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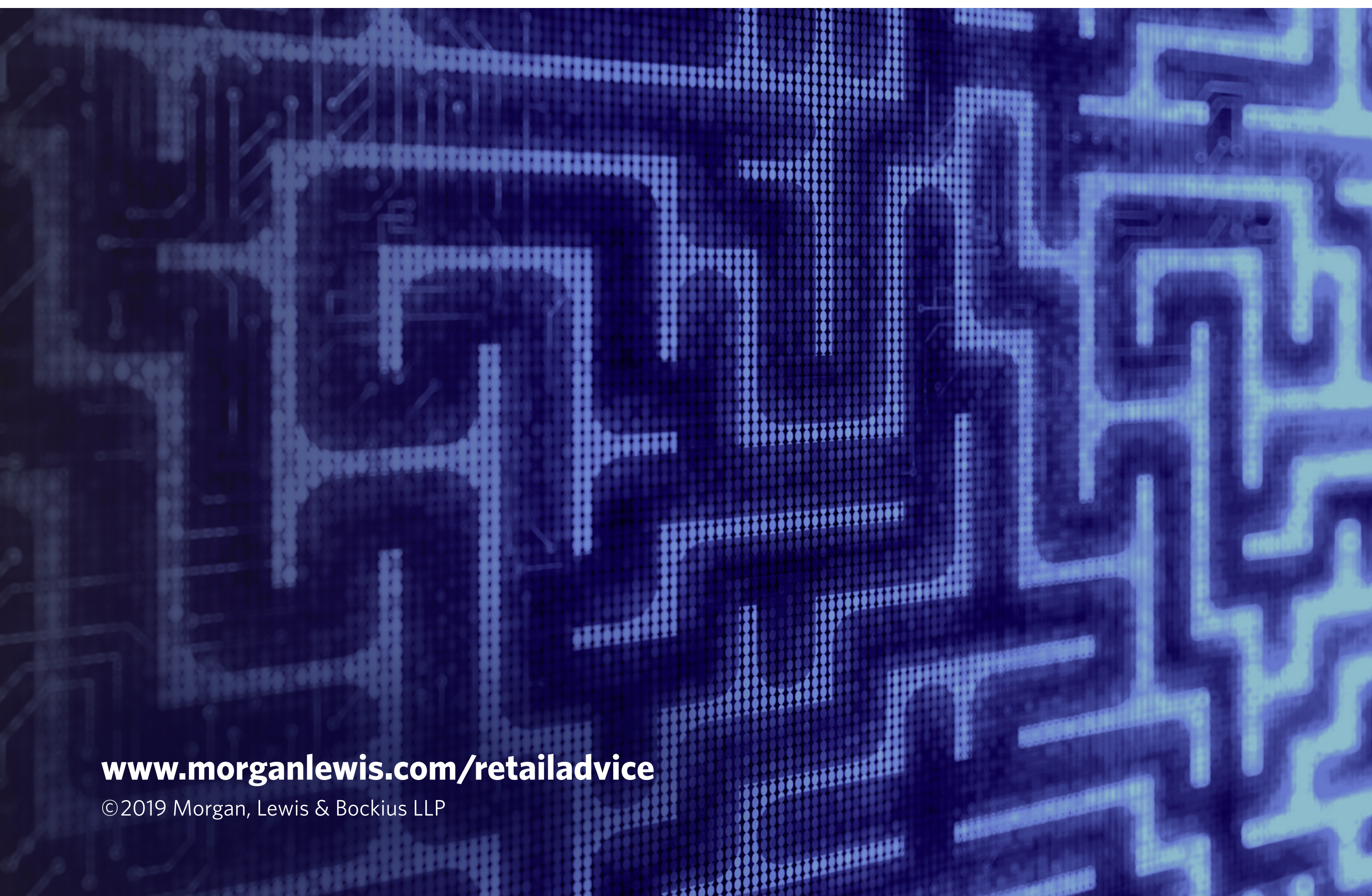
July 12, 2019

RULES & INTERPRETATIONS



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Regulation Best Interest:
The Broker-Dealer Standard of Conduct

REGULATION BEST INTEREST: RULE TEXT

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

§ 240.15l-1 Regulation Best Interest.

(a) Best interest obligation.

(1) A broker, dealer, or a natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.

(2) The best interest obligation in paragraph (a)(1) of this section shall be satisfied if:

(i) Disclosure obligation. The broker, dealer, or natural person who is an associated person of a broker or dealer, prior to or at the time of the recommendation, provides the retail customer, in writing, full and fair disclosure of:

(A) All material facts relating to the scope and terms of the relationship with the retail customer, including:

(1) That the broker, dealer, or such natural person is acting as a broker, dealer, or an associated person of a broker or dealer with respect to the recommendation;

(2) The material fees and costs that apply to the retail customer's transactions, holdings, and accounts; and

(3) The type and scope of services provided to the retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer; and

(B) All material facts relating to conflicts of interest that are associated with the recommendation.

(ii) Care obligation. The broker, dealer, or natural person who is an associated person of a broker or dealer, in making the recommendation, exercises reasonable diligence, care, and skill to:

(A) Understand the potential risks, rewards, and costs associated with the recommendation, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers;

(B) Have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation and does not place the financial or other interest of the broker, dealer, or such natural person ahead of the interest of the retail customer;

(C) Have a reasonable basis to believe that a series of recommended transactions, even if in the retail customer's best interest when viewed in isolation, is not excessive and is in the retail customer's best interest when taken together in light of the retail customer's investment profile and does not place the financial or other interest of the broker, dealer, or such natural person making the series of recommendations ahead of the interest of the retail customer.

(iii) Conflict of interest obligation. The broker or dealer establishes, maintains, and enforces written policies and procedures reasonably designed to:

(A) Identify and at a minimum disclose, in accordance with paragraph (a)(2)(i) of this section, or eliminate, all conflicts of interest associated with such recommendations;

(B) Identify and mitigate any conflicts of interest associated with such recommendations that create an incentive for a natural person who is an associated person of a broker or dealer to place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer;

(C)(1) Identify and disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended to a retail customer and any conflicts of interest associated with such limitations, in accordance with subparagraph (a)(2)(i), and

(2) Prevent such limitations and associated conflicts of interest from causing the broker, dealer, or a natural person who is an associated person of the broker or dealer to make recommendations that place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; and

(D) Identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.

(iv) Compliance obligation. In addition to the policies and procedures required by paragraph (a)(2)(iii) of this section, the broker or dealer establishes, maintains, and enforces written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest.

(b) Definitions. Unless otherwise provided, all terms used in this rule shall have the same meaning as in the Securities Exchange Act of 1934. In addition, the following definitions shall apply for purposes of this section:

(1) Retail customer means a natural person, or the legal representative of such natural person, who:

(i) 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

(ii) Uses the recommendation primarily for personal, family, or household purposes.

(2) Retail customer investment profile includes, but is not limited to, the retail customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the retail customer may disclose to the broker, dealer, or a natural person who is an associated person of a broker or dealer in connection with a recommendation.

(3) Conflict of interest means an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer —consciously or unconsciously—to make a recommendation that is not disinterested.

§ 240.17a-3 Records to be made by certain exchange members, brokers and dealers.

(a)***

(24) – (34) [Reserved].

(35) For each retail customer to whom a recommendation of any securities transaction or investment strategy involving securities is or will be provided:

(i) A record of all information collected from and provided to the retail customer pursuant to § 240.15l-1, as well as the identity of each natural person who is an associated person, if any, responsible for the account.

(ii) For purposes of this paragraph (a)(35), the neglect, refusal, or inability of the retail customer to provide or update any information described in paragraph (a)(35)(i) of this section shall excuse the broker, dealer, or associated person from obtaining that required information.

§ 240.17a-4 Records to be preserved by certain exchange members, brokers and dealers.

* * * * *

(e)(5) All account record information required pursuant to § 240.17a-3(a)(17) and all records required pursuant to § 240.17a-3(a)(35), in each case until at least six years after the earlier of the date the account was closed or the date on which the information was collected, provided, replaced, or updated.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–86031; File No. S7–07–18]

RIN 3235–AM35

Regulation Best Interest: The Broker-Dealer Standard of Conduct

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the "Commission") is adopting a new rule under the Securities Exchange Act of 1934 ("Exchange Act"), establishing a standard of conduct for broker-dealers and natural persons who are associated persons of a broker-dealer (unless otherwise indicated, together referred to as "broker-dealer") when they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities ("Regulation Best Interest"). Regulation Best Interest enhances the broker-dealer standard of conduct beyond existing suitability obligations, and aligns the standard of conduct with retail customers' reasonable expectations by requiring broker-dealers, among other things, to: Act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the interests of the retail customer; and address conflicts of interest by establishing, maintaining, and enforcing policies and procedures reasonably designed to identify and fully and fairly disclose material facts about conflicts of interest, and in instances where we have determined that disclosure is insufficient to reasonably address the conflict, to mitigate or, in certain instances, eliminate the conflict. The standard of conduct established by Regulation Best Interest cannot be satisfied through disclosure alone. The standard of conduct draws from key principles underlying fiduciary obligations, including those that apply to investment advisers under the Investment Advisers Act of 1940 ("Advisers Act"). Importantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial professional ahead of the interests of the retail investor.

DATES:

Effective date: This rule is effective September 10, 2019.

Compliance date: The compliance date is discussed in Section II.E of this final release.

FOR FURTHER INFORMATION CONTACT: Lourdes Gonzalez, Assistant Chief Counsel—Office of Sales Practices; Emily Westerberg Russell, Senior Special Counsel; Alicia Goldin, Senior Special Counsel; John J. Fahey, Branch Chief; Daniel Fisher, Branch Chief; Bradford Bartels, Special Counsel; and Geeta Dhingra, Special Counsel, Office of Chief Counsel, Division of Trading and Markets, at (202) 551–5550, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is adopting new rule 17 CFR 240.15*l*–1 under the Exchange Act to establish a standard of conduct for broker-dealers and natural persons who are associated persons of a broker-dealer when they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities. The Commission is also adopting amendments to rules 17 CFR 240.17a–3 and 17 CFR 240.17a–4 to establish new record-making and recordkeeping requirements for broker-dealers with respect to certain information collected from or provided to retail customers.

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I. Introduction

We are adopting a new rule 15*l*–1 under the Exchange Act ("Regulation Best Interest") that will improve investor protection by: (1) Enhancing the obligations that apply when a broker-dealer makes a recommendation to a retail customer and natural persons who are associated persons of a broker-dealer ("associated persons") (unless otherwise indicated, together referred to as "broker-dealer") and (2) reducing the potential harm to retail customers from conflicts of interest that may affect the recommendation. Regulation Best Interest enhances the broker-dealer standard of conduct beyond existing suitability obligations, and aligns the standard of conduct with retail customers' reasonable expectations by requiring broker-dealers, among other things, to: (1) Act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the interests of the retail customer; and (2) address conflicts of interest by establishing, maintaining, and enforcing policies and procedures reasonably designed to identify and fully and fairly disclose material facts about conflicts of interest, and in instances where we have determined that disclosure is insufficient to reasonably address the conflict, to mitigate or, in certain instances, eliminate the conflict. Regulation Best Interest establishes a standard of conduct under the Exchange Act that cannot be satisfied through disclosure alone.

A. Background

Broker-dealers play an important role in helping Americans organize their finances, accumulate and manage retirement savings, and invest toward other important long-term goals, such as buying a house or funding a child's college education. Broker-dealers offer a wide variety of brokerage (*i.e.*, agency) services and dealer (*i.e.*, principal) services and products to both retail and institutional customers.[1] Specifically, the brokerage services provided to retail customers range from execution-only services to providing personalized investment advice in the form of recommendations of securities transactions or investment strategies involving securities to customers.[2]

Investment advisers play a similarly important, though distinct, role. As described in the Fiduciary Interpretation, investment advisers provide a wide range of services to a large variety of clients, from retail clients with limited assets and investment knowledge and experience to institutional clients with very large portfolios and substantial knowledge, experience, and analytical resources.[3]

As a general matter, broker-dealers and investment advisers have different types of relationships with investors, offer different services, and have different compensation models when providing investment recommendations or investment advisory services to customers. Broker-dealers typically provide transaction-specific recommendations and receive compensation on a transaction-by-transaction basis (such as commissions) ("transaction-based" compensation or model). A broker-dealer's recommendations may include recommending transactions where the broker-dealer is buying securities from or selling securities to retail customers on a principal basis or recommending proprietary products.[4] Investment advisers, on the other hand, typically provide ongoing, regular advice and services in the context of broad investment portfolio management, and are compensated based on the value of assets under management ("AUM"), a fixed fee or other arrangement ("fee-based" compensation or model).[5] This variety is important because it presents investors with choices regarding the types of relationships they can have, the services they can receive, and how they can pay for those services. It is also common for a firm to provide both broker-dealer and investment adviser services.

Like many principal-agent relationships—including the investment adviser-client relationship—the relationship between a broker-dealer and a customer has inherent conflicts of interest, including those resulting from a transaction-based (*e.g.*, commission) compensation structure and other broker-dealer compensation.[6] These and other conflicts of interest may provide an incentive to a broker-dealer to seek to increase its own compensation or other financial interests at the expense of the customer to whom it is making investment recommendations.

Notwithstanding these inherent conflicts of interest in the broker-dealer-customer relationship, there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations.[7] For example, retail customers that intend to buy and hold a long-term investment may find that paying a one-time commission to a broker-dealer recommending such an investment is more cost effective than paying an ongoing advisory fee to an investment adviser merely to hold the same investment. Retail customers with limited investment assets may benefit from broker-dealer recommendations when they do not qualify for advisory accounts because they do not meet the account minimums often imposed by investment advisers. Other retail customers who hold a variety of investments, or prefer differing levels of services (*e.g.*, both episodic recommendations from a broker-dealer and continuous advisory services including discretionary asset management from an investment adviser), may benefit from having access to both brokerage and advisory accounts. Nevertheless, concerns exist regarding (1) the potential harm to retail customers resulting from broker-dealer recommendations provided where conflicts of interest exist and (2) the insufficiency of existing broker-dealer regulatory requirements to address these conflicts when broker-dealers make recommendations to retail customers.[8] More specifically, there are concerns that existing requirements do not require a broker-dealer's recommendations to be in the retail customer's best interest.[9]

B. Overview of Regulation Best Interest

On April 18, 2018, we proposed enhancements to the standard of conduct that applies when broker-dealers make recommendations to retail customers.[10] Specifically, the proposal would have established an express best interest obligation that would require all broker-dealers and associated persons,

[1] *See* Regulation Best Interest, Release No. 34-83062 (Apr. 18, 2018) [83 FR 21574] (May 9, 2018) ("Proposing Release") at 21574–75; *see also* Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011) ("913 Study") at 8–12, *available at www.sec.gov/news/studies/2011/913studyfinal.pdf* (discussing the range of brokerage and dealer services provided by broker-dealers).

[2] *See* Proposing Release at 21574–21575; *see also* 913 Study.

[3] *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019) ("Fiduciary Interpretation").

[4] *See* Proposing Release at 21574–21575; *see also* 913 Study.

[5] *See* 913 Study.

[6] The investment adviser-client relationship also has inherent conflicts of interest, including those resulting from an asset-based compensation structure that may provide an incentive for an investment adviser to encourage its client to invest more money through an adviser in order increase its AUM at the expense of the client. *See* Fiduciary Interpretation at footnotes 53–72 and accompanying text for a discussion of how investment advisers satisfy their fiduciary duty when conflicts of interest are present.

[7] *See* Proposing Release at 21579.

[8] *Id.* at 21577–21579.

[9] *Id. See also* Section I.C, Overview of Modifications to the Proposed Rule Text and Guidance Provided.

[10] Proposing Release at 21575.

when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer, to act in the best interest of the retail customer at the time the recommendation is made without placing the financial or other interest of the broker-dealer or associated person making the recommendation ahead of the interest of the retail customer.

The Commission received substantial comment on proposed Regulation Best Interest. We received over 6,000 comment letters in connection with the Proposing Release, of which approximately 3,000 are unique comment letters, from a variety of commenters including individual investors, consumer advocacy groups, financial services firms (including broker-dealers, investment advisers, and insurance companies), investment professionals, industry and trade associations, state securities regulators, bar associations, and others.[11]

The Commission also solicited individual investors' input through a number of forums in addition to the traditional requests for comment in the Proposing Release. Among other things, seven investor roundtables were held in different locations across the country to solicit further comment on the proposed relationship summary,[12] and the Commission and its staff received in-person feedback from almost 200 attendees in total.[13] The Commission also received input and recommendations from a majority of its Investor Advisory Committee ("IAC") on proposed Regulation Best Interest.[14]

After careful review and consideration of comments received and upon further consideration, the Commission is adopting Regulation Best Interest, with certain modifications as compared to the Proposing Release. As discussed below, while the Commission is generally retaining the overall structure and scope set forth in the Proposing Release, we are making modifications to the text of the rule and also providing interpretations and guidance to address points raised during the comment process.

The Commission has crafted Regulation Best Interest to draw on key principles underlying fiduciary obligations, including those that apply to investment advisers under the Advisers Act, while providing specific requirements to address certain aspects of the relationships between broker-dealers and their retail customers. Regulation Best Interest enhances the existing standard of conduct applicable to broker-dealers and their associated persons at the time they recommend to a retail customer a securities transaction or investment strategy involving securities. This includes recommendations of account types and rollovers or transfers of assets and also covers implicit hold recommendations resulting from agreed-upon account monitoring. When making a recommendation, a broker-dealer must act in the retail customer's best interest and cannot place its own interests ahead of the customer's interests (hereinafter, "General Obligation").[15] The General Obligation is satisfied only if the broker-dealer complies with four specified component obligations. The obligations are: (1) Providing certain prescribed disclosure before or at the time of the recommendation, about the recommendation and the relationship between the retail customer and the broker-dealer ("Disclosure Obligation"); (2) exercising reasonable diligence, care, and skill in making the recommendation ("Care Obligation"); (3) establishing, maintaining, and enforcing policies and procedures reasonably designed to address conflicts of interest ("Conflict of Interest Obligation"), and (4) establishing, maintaining, and enforcing policies and procedures reasonably designed to achieve compliance with Regulation Best Interest ("Compliance Obligation").[16]

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[11] Comments received in response to the Proposing Release are available at: *https://www.sec.gov/comments/s7-07-18/s70718.htm.*

[12] In a separate, concurrent rulemaking, the Commission proposed to, among other things, require broker-dealers and investment advisers to deliver to retail investors a short relationship summary ("Relationship Summary"). *See Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles,* Release No. 34–83063, IA–4888, File No. S7–08–18 (Apr. 18, 2018), 83 FR 23848 (May 23, 2018) ("Relationship Summary Proposal").

Along with adopting Regulation Best Interest, the Commission is adopting Exchange Act Rule 17a–14 (CFR 240.17a–14) and Form CRS (17 CFR 249.640) under the Exchange Act ("Form CRS"). *See Form CRS Relationship Summary; Amendments to Form ADV* Exchange Act Release No. 86032, Advisers Act Release No. 5247, File No. S7–08–18 (June 5, 2019) ("Relationship Summary Adopting Release"). The Commission is also providing interpretations: (1) Clarifying standards of conduct for investment advisers, and (2) regarding when a broker-dealer's advisory services are solely incidental to the conduct of the business of a broker or dealer. *See* Fiduciary Interpretation; Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion to the Definition of Investment Adviser, Advisers Act Release No. 5249 (June 5, 2019) ("Solely Incidental Interpretation").

[13] The transcripts from the seven investor roundtables, which took place in Atlanta, Baltimore, Denver, Houston, Miami, Philadelphia, and Washington DC, are available in the comment file at *https://www.sec.gov/comments/s7-08-18/s70818.htm#transcripts.*

The Commission also used a "feedback form" designed specifically to solicit input from retail investors with a set of questions requesting both structured and narrative responses, and received more than 90 responses from individuals who reviewed and commented on the sample proposed relationship summaries published in the proposal. The feedback forms are available in the comment file at *https://www.sec.gov/comments/s7-08-18/s70818.htm.*

Finally, the Commission's Office of the Investor Advocate engaged the RAND Corporation to conduct investor testing of the proposed relationship summary. Angela A. Hung, *et al.,* RAND Corporation, *Investor Testing of Form CRS Relationship Summary* (2018), *available at https://www.sec.gov/about/offices/investorad/investor-testing-form-crs-relationship-summary.pdf* ("RAND 2018"). *See also Investor Testing of the Proposed Relationship Summary for Investment Advisers and Broker-Dealers,* Commission Press Release 2018–257 (Nov. 7, 2018), *available at https://www.sec.gov/news/press-release/2018-257.* As noted in the Relationship Summary Adopting Release, the amount of information available from the various investor surveys and investor testing described in this release is extensive. We considered all of this information thoroughly, using our decades of experience with investor disclosures, when evaluating changes to the disclosure required by Regulation Best Interest, as well as to the Relationship Summary. *See* Relationship Summary Adopting Release.

[14] Recommendation of the Investor as Purchaser Subcommittee Regarding Proposed Regulation Best Interest, Form CRS, and Investment Advisers Act Fiduciary Guidance, Nov. 7, 2018, *available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac110718-investor-as-purchaser-subcommittee-recommendation.pdf* ("IAC 2018 Recommendation"). Generally, a majority of the IAC made the following recommendations related to Regulation Best Interest: (1) That the meaning of the best interest obligation should be clarified to require both broker-dealers, investment advisers, and their associated persons to recommend the investments, investment strategies, accounts, or services, from among those they have reasonably available to recommend, that they reasonably believe represent the best available options for the investor; (2) that the best interest obligation be expanded to apply to the implicit "no recommendation" recommendation that a broker makes when reviewing an account and recommending no change, to rollover recommendations and recommendations by dual registrant firms regarding account types; and (3) that the best interest obligation should be explicitly characterized as the fiduciary duty that it is, while making clear that the specific obligations that flow from that duty will vary based on differences in business models. The Commission is statutorily obligated to respond to the recommendations of the IAC, which we are doing in this section and throughout the adopting release in the relevant sections, for example, in the discussion of the General Obligation in Section II.A.1, the discussion of recommendations in Section II.B.1, Recommendation of Any Securities Transaction or Investment Strategy Involving Securities, and the Care Obligation in Section II.C.2.

[15] *See generally* Section II.A, General Obligation.

[16] As discussed in further detail below, although Regulation Best Interest identifies specified obligations with which a broker-dealer must comply in order to meet its General Obligation, compliance with each of the component obligations of Regulation Best Interest will be principles-based. In other words, whether a broker-dealer has acted in the retail customer's best interest will turn on an objective assessment of the facts and circumstances of whether the specific components of Regulation Best Interest are satisfied at the time that the recommendation is made.

First, under the Disclosure Obligation,[17] before or at the time of the recommendation, a broker-dealer must disclose, in writing, all material facts about the scope and terms of its relationship with the customer. This includes a disclosure that the firm or representative is acting in a broker-dealer capacity; the material fees and costs the customer will incur; and the type and scope of the services to be provided, including any material limitations on the recommendations that could be made to the retail customer. Moreover, the broker-dealer must disclose all material facts relating to conflicts of interest associated with the recommendation that might incline a broker-dealer to make a recommendation that is not disinterested, including, for example, conflicts associated with proprietary products, payments from third parties, and compensation arrangements.

Second, under the Care Obligation,[18] a broker-dealer must exercise reasonable diligence, care, and skill when making a recommendation to a retail customer. The broker-dealer must understand potential risks, rewards, and costs associated with the recommendation. The broker-dealer must then consider those risks, rewards, and costs in light of the customer's investment profile and have a reasonable basis to believe that the recommendation is in the customer's best interest and does not place the broker-dealer's interest ahead of the retail customer's interest. A broker-dealer should consider reasonable alternatives, if any, offered by the broker-dealer in determining whether it has a reasonable basis for making the recommendation. Whether a broker-dealer has complied with the Care Obligation will be evaluated as of the time of the recommendation (and not in hindsight). When recommending a series of transactions, the broker-dealer must have a reasonable basis to believe that the transactions taken together are not excessive, even if each is in the customer's best interest when viewed in isolation.

Third, under the Conflict of Interest Obligation,[19] a broker-dealer must establish, maintain, and enforce reasonably designed written policies and procedures addressing conflicts of interest associated with its recommendations to retail customers. These policies and procedures must be reasonably designed to identify all such conflicts and at a minimum disclose or eliminate them. Importantly, the policies and procedures must be reasonably designed to mitigate conflicts of interests that create an incentive for an associated person of the broker-dealer to place its interests or the interest of the firm ahead of the retail customer's interest. Moreover, when a broker-dealer places material limitations on recommendations that may be made to a retail customer (*e.g.,* offering only proprietary or other limited range of products), the policies and procedures must be reasonably designed to disclose the limitations and associated conflicts and to prevent the limitations from causing the associated person or broker-dealer from placing the associated person's or broker-dealer's interests ahead of the customer's interest. Finally, the policies and procedures must be reasonably designed to identify and eliminate sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sale of specific securities or specific types of securities within a limited period of time.

Fourth, under the Compliance Obligation,[20] a broker-dealer must also establish, maintain, and enforce written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest as a whole. Thus, a broker-dealer's policies and procedures must address not only conflicts of interest but also compliance with its Disclosure and Care Obligations under Regulation Best Interest.

The enhancements contained in Regulation Best Interest are designed to improve investor protection by enhancing the quality of broker-dealer recommendations to retail customers and reducing the potential harm to retail customers that may be caused by conflicts of interest. Regulation Best Interest will complement the related rules, interpretations, and guidance that the Commission is concurrently issuing.[21] Individually and collectively, these actions are designed to help retail customers better understand and compare the services offered by broker-dealers and investment advisers and make an informed choice of the relationship best suited to their needs and circumstances, provide clarity with respect to the standards of conduct applicable to investment advisers and broker-dealers, and foster greater consistency in the level of protections provided by each regime, particularly at the point in time that a recommendation is made.[22]

At the time a recommendation is made, key elements of the Regulation Best Interest standard of conduct that applies to broker-dealers will be similar to key elements of the fiduciary standard for investment advisers.[23] Importantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial professional ahead of the interests of the retail investor.

There are also key differences between Regulation Best Interest and the Advisers Act fiduciary standard that reflect the distinction between the services and relationships typically offered under the two business models. For example, an investment adviser's fiduciary duty generally includes a duty to provide ongoing advice and monitoring,[24] while Regulation Best Interest imposes no such duty and instead requires that a broker-dealer act in the retail customer's best interest *at the time* a recommendation is made. In addition, the new obligations applicable to broker-dealers under Regulation Best Interest are more prescriptive than the obligations applicable to investment advisers under the Advisers Act fiduciary duty and reflect the characteristics of the generally applicable broker-dealer business model.[25]

The Commission has been studying and carefully considering the issues related to the standard of conduct for broker-dealers for many years, which led to the development of Regulation Best Interest.[26] In designing Regulation Best Interest, we considered a number of options to enhance investor protection, while preserving, to the extent possible, retail investor access (in terms of choice and cost) to differing types of investment services and products. There

[17] *See generally* Section II.C.1, Disclosure Obligation.

[18] *See generally* Section II.C.2, Care Obligation.

[19] *See generally* Section II.C.3, Conflict of Interest Obligation.

[20] *See generally* Section II.C.4, Compliance Obligation.

[21] *See* Relationship Summary Adopting Release; Fiduciary Interpretation; Solely Incidental Interpretation.

[22] We believe each rule and interpretation stands on its own and enhances the effectiveness of existing rules, and is reinforced by the other rules and interpretations being adopted contemporaneously.

[23] Specifically, an investment adviser's fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the "best interest" of its client at all times. *See* Fiduciary Interpretation.

[24] *See* Fiduciary Interpretation, Section II.B.3 (Duty to Provide Advice and Monitoring over the Course of the Relationship).

[25] *See, e.g.,* Sections II.A and III.E.

[26] Proposing Release at 21579–21583.

were several options, including, among others: (1) Applying the fiduciary standard under the Advisers Act to broker-dealers; (2) adopting a "new" uniform fiduciary standard of conduct that would apply equally to both broker-dealers and investment advisers, such as that recommended by the staff in the 913 Study; [27] and (3) the path we ultimately chose, adopting a new standard of conduct specifically for broker-dealers, which draws from key principles underlying fiduciary obligations, including those that apply to investment advisers under the Advisers Act.[28] The standard also provides specific requirements to address certain aspects of the relationships between broker-dealers and their retail customers, including certain conflicts related to compensation of associated persons.[29]

We have declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model (*i.e.*, transaction-specific recommendations and compensation), and would not properly take into account, and build upon, existing obligations that apply to broker-dealers, including under FINRA rules.[30] Moreover, we believe (and our experience indicates), that this approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations.[31]

We have also declined to craft a new uniform standard that would apply equally and without differentiation to both broker-dealers and investment advisers. Adopting a "one size fits all" approach would risk reducing investor choice and access to existing products, services, service providers, and payment options, and would increase costs for firms and for retail investors in both broker-dealer and investment adviser relationships. Moreover, applying a new uniform standard to advisers would mean jettisoning to some extent the fiduciary standard under the Advisers Act that has worked well for retail clients and our markets and is backed by decades of regulatory and judicial precedent.

Our concerns about the ramifications for investor access, choice, and cost from adopting either of these approaches are not theoretical. With the adoption of the now vacated Department of Labor ("DOL") Fiduciary Rule,[32] there was a significant reduction in retail investor access to brokerage services,[33] and we believe that the available alternative services were higher priced in many circumstances.[34] Moreover, because key elements of the standard of conduct that Regulation Best Interest applies to broker-dealers at the time that a recommendation is made to a retail customer will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act, we do not believe that applying the existing fiduciary standard under the Advisers Act to broker-dealers or adopting a new uniform fiduciary standard of conduct applicable to both broker-dealers and investment advisers would provide any greater investor protection (or, in any case, that any benefits would justify the costs imposed on retail investors in terms of reduced access to services, products, and payment options, and increased costs for such services and products).

We acknowledge certain commenters urged the Commission to take additional

[27] One of the staff's primary recommendations was that the Commission engage in rulemaking to adopt and implement a uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers. The staff's recommended standard would require firms "to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer or investment adviser providing the advice." The staff made a number of specific recommendations for implementing the uniform fiduciary standard of conduct, including that the Commission should: (1) Require firms to eliminate or disclose conflicts of interest; (2) consider whether rulemaking would be appropriate to prohibit certain conflicts, to require firms to mitigate conflicts through specific action, or to impose specific disclosure and consent requirements; and (3) consider specifying uniform standards for the duty of care owed to retail customers, such as specifying what basis a broker-dealer or investment adviser should have in making a recommendation to a retail customer by referring to and expanding upon broker-dealers' existing suitability requirements. *See generally* 913 Study.

[28] *See supra* footnote 23.

[29] In addition to these alternatives, we also considered several other reasonable alternatives. *See* Section III.E.

[30] *See also* 913 Study at 139–143.

[31] *See, e.g.*, Section 913 Study. at 143–159 for the study's consideration of the potential costs, expenses, and impacts of various regulatory changes related to the provision of personalized investment advice to retail investors. *See also* Section II.A.1, Commission's Approach.

[32] As discussed in more detail in the Proposing Release, on April 8, 2016, the DOL adopted a new, expanded definition of "fiduciary" that treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA") (an "ERISA plan") or individual retirement account ("IRA") as fiduciaries in a wider array of advice relationships than under the previous regulation and issued certain related prohibited transaction exemptions ("PTEs") (together, the "DOL Fiduciary Rule"). The rule was subsequently vacated in toto by the United States Court of Appeals for the Fifth Circuit. *See Chamber of Commerce* v. *U.S. Dep't of Labor, 885 F.3d 360* (5th Cir. 2018).

We understand that in the absence of a PTE, broker-dealers that would be considered to be a "fiduciary" for purposes of ERISA and the Internal Revenue Code (the "Code") would be prohibited from engaging in purchases and sales of certain investments for their own account (*i.e.*, engaging in principal transactions) and would be prohibited from receiving common forms of broker-dealer compensation (notably, transaction-based compensation). *See* DOL, Best Interest Contract Exemption, 81 FR 21002 (Apr. 8, 2016) ("BIC Exemption Release"). To avoid this result, the DOL published, among other PTEs, the Best Interest Contract Exemption ("BIC Exemption"), which would have provided conditional relief for an "adviser," as that term is used in the context of the BIC Exemption, and the adviser's firm, to receive common forms of "conflicted" compensation, such as commissions and third-party payments (such as revenue sharing), provided that the adviser's firm met certain conditions. *See id.* Generally, the BIC Exemption and other PTEs required that, among other things, the advice be provided pursuant to a written contract that commits the firm and the adviser to adhere to standards of impartial conduct, including providing advice in the investor's best interest; charging only reasonable compensation; and avoiding misleading statements about fees and conflicts of interest) ("Impartial Conduct Standards"). *See generally id. See also* Proposing Release at 21580–21582.

[33] While the full effects of the DOL Fiduciary Rule were not realized as it was vacated during the transition period, a number of industry studies indicated that, as a result of the DOL Fiduciary Rule, industry participants had already or were planning to alter services and products available to retail customers. For example, of the 21 members of the Securities Industry and Financial Markets Association ("SIFMA") that participated in the SIFMA Study, 53% eliminated or reduced access to brokerage advice services and 67% migrated away from open choice to fee-based or limited brokerage services. *See* SIFMA & Deloitte, *The DOL Fiduciary Rule: A Study on How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors* (Aug. 9, 2017), *available at https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf* ("SIFMA Study"). Other studies also saw shifts from commission-based accounts to fee-based accounts. *See infra* footnote 1009. In addition, an industry study found that some customers were shifted from commission-based brokerage accounts to self-directed accounts, while the same study observed that 29% of their survey participants expected to move clients, particularly those with low account balances, to robo-advisors. *See infra* footnote 1010.

[34] It was widely reported that a number of firms responded to the DOL Fiduciary Rule by either requiring customers to enter into more expensive advice relationships or by passing through higher compliance costs to customers, which altered many retail customer relationships with their financial professionals. *See infra* footnote 1007. From the SIFMA Study, for those firms whose retail customers faced eliminated or reduced brokerage advice services, 63% of firms had customers that chose to move to self-directed accounts rather than fee-based accounts and cited the customers' reasons as "not wanting to move to a fee-based model, not in the best interest to move to a fee-based model, did not meet account minimums, or wanted to maintain positions in certain asset classes prohibited by the fee-based models."

or different regulatory actions than the approach we have adopted, including the alternatives discussed above. We do not believe that any rulemaking governing retail investor-advice relationships can solve for every issue presented. After careful consideration of the comments and additional information we have received,[35] we believe that Regulation Best Interest, as modified, appropriately balances the concerns of the various commenters in a way that will best achieve the Commission's important goals of enhancing retail investor protection and decision making, while preserving, to the extent possible, retail investor access (in terms of choice and cost) to differing types of investment services and products.[36]

The Commission's staff will offer firms significant assistance and support during the transition period and thereafter with the aim of helping to ensure that the investor protections and other benefits of the final rule are implemented in an efficient and effective manner. Further, we will continue to monitor the effectiveness of Regulation Best Interest in achieving the Commission's goals.

C. Overview of Modifications to the Proposed Rule Text and Guidance Provided

The vast majority of commenters supported the Commission's rulemaking efforts to address the standards of conduct that apply to broker-dealers when making recommendations, but nearly all commenters suggested modifications to proposed Regulation Best Interest.[37] These suggestions touch on almost every aspect of the proposal, as discussed in more detail below. A variety of commenters offered suggestions on the overall structure and scope of the proposed rule, including: whether the standard should be a fiduciary standard;[38] whether the standard should apply to both investment advisers and broker-dealers;[39] whether the standard should be principles-based or more prescriptive;[40] whether the standard should define "best interest;"[41] whether the standard is or should be a safe harbor;[42] what should be considered a recommendation, including whether Regulation Best Interest should apply to recommendations to roll over or transfer assets or take plan distributions, and to recommendations of particular account types (*i.e.*, brokerage or advisory);[43] whether Regulation Best Interest should apply to account monitoring services provided by a broker-dealer, or impose a continuing duty;[44] and whether Regulation Best Interest's protections should apply to a broader or narrower set of "retail customers."[45]

[35] *See supra* footnotes 11–13 and accompanying text.

[36] If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

[37] *See, e.g.*, Letter from David Certner, Legislative Counsel and Legislative Policy Director, AARP (Aug. 7, 2018) ("AARP August 2018 Letter"); Letter from Christopher Gilkerson, Senior Vice President and General Counsel, and Tara Tune, Director and Corporate Counsel, Charles Schwab & Co., Inc. (Aug. 6, 2018) ("Schwab Letter"); Letter from Barbara Roper, Director of Investor Protection, and Micah Hauptman, Financial Services Counsel, Consumer Federation of America ("CFA") (Aug. 7, 2018) ("CFA August 2018 Letter"); Letter from Joseph Borg, President, North American Securities Administrators Association, Inc. ("NASAA") (Aug. 23, 2018) ("NASAA August 2018 Letter"); Letter from Kenneth E. Bentsen, Jr., President and Chief Executive Officer, SIFMA (Aug. 7, 2018) ("SIFMA August 2018 Letter").

[38] *See, e.g.*, Letter from Jon Stein, Founder and CEO, Benjamin T. Alden, General Counsel, and Seth Rosenbloom, Associate General Counsel, Betterment (Aug. 7, 2018) ("Betterment Letter"); Letter from Kurt N. Schacht, Managing Director, James Allen, Head, Capital Markets Policy, and Linda L. Rittenhouse, Director, Capital Markets, CFA Institute (Aug. 7, 2018) ("CFA Institute Letter"); Letter from Jill I. Gross, Associate Dean for Academic Affairs, Professor of Law, Elisabeth Haub School of Law, Pace University (Mar. 11, 2019) ("Pace March 2019 Letter"); Letter from Sharon Cheever, Senior Vice President and General Counsel, Pacific Life Insurance Company (Aug. 3, 2018) ("Pacific Life August 2018 Letter"); Letter from Melanie Fein, Fein Law Offices (Jun. 6, 2018) ("Fein Letter"); Letter from Elizabeth Warren, U.S. Senator (Aug. 3, 2018) ("Warren Letter"); Letter from Dean P. McDermott, McDermott Investment Advisors (Jul. 7, 2018) ("McDermott Letter"); Letter from Brian Hamburger, President and CEO, MarketCounsel (Aug. 7, 2018) ("MarketCounsel Letter").

[39] *See, e.g.*, AARP August 2018 Letter; Letter from Americans for Financial Reform et al. (Aug. 7, 2018) ("Americans for Financial Reform Letter"); Letter from Robert J. Moore, Chief Executive Officer, Cetera Financial Group ("Cetera") (Aug. 7, 2018) ("Cetera August 2018 Letter"); Letter from L.A. Schnase, Individual Investor and Attorney at Law (Jul. 30, 2018) ("Schnase Letter"); Pacific Life August 2018 Letter; Pace March 2019 Letter; MarketCounsel Letter; Letter from Dennis M. Kelleher, President and CEO, Stephen Hall, Legal Director and Securities Specialist, Lev Bagramian, Senior Securities Policy Advisor, Better Markets (Aug. 7, 2018) ("Better Markets August 2018 Letter"); Letter from Attorneys General of New York, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia (Aug. 7, 2018) ("State Attorneys General Letter").

[40] *See, e.g.*, SIFMA August 2018 Letter; Letter from Mortimer J. Buckley, President and Chief Executive Officer, Vanguard (Aug. 7, 2018) ("Vanguard Letter"); Letter from Chris Lewis, General Counsel, Edward Jones (Aug. 7, 2018) ("Edward Jones Letter"); Letter from Joseph E. Sweeney, President, Advice & Wealth Management Products and Service Delivery, Ameriprise Financial (Aug. 6, 2018) ("Ameriprise Letter"); Letter from Sheila Kearney Davidson, Executive Vice President, Chief Legal Officer & General Counsel, New York Life Insurance Company ("NY Life") (Aug. 7, 2018) ("NY Life Letter"); Letter from Keith Gillies, NAIFA President, National Association of Insurance and Financial Advisors ("NAIFA") (Aug. 2, 2018) ("NAIFA Letter"); Letters from Tom Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce ("CCMC") (Aug. 7, 2018) (supplemented by letter dated Sep. 5, 2018) ("CCMC Letters"); Letter from Dave Paulsen, Executive Vice President, Chief Distribution Officer, Transamerica (Aug. 7, 2018) ("Transamerica August 2018 Letter").

[41] *See, e.g.*, Letter from Seth A. Miller, General Counsel, Senior Vice President, Chief Risk Officer, Cambridge (Aug. 7, 2018) ("Cambridge Letter"); SIFMA August 2018 Letter; Vanguard Letter; Edward Jones Letter; Ameriprise Letter; NY Life Letter; NAIFA Letter; CCMC Letters; Letter from Aron Szapiro, Director of Policy Research, Morningstar (Aug. 7, 2018) ("Morningstar Letter"); Letter from David Kowach, Head of Wells Fargo Advisors, Wells Fargo (Aug. 7, 2018) ("Wells Fargo Letter").

[42] *See, e.g.*, CFA August 2018 Letter; Letter from Anthony Chereso, President & CEO, Institute for Portfolio Alternatives ("IPA") (Aug. 7, 2018) ("IPA Letter"); Letter from Heather Slavkin Corzo, AFL–CIO et al. (Apr. 26, 2019) ("AFL–CIO April 2019 Letter").

[43] *See, e.g.*, Letter from Jason Bortz, Senior Counsel, Capital Research and Management Company (Aug. 7, 2018) ("Capital Group Letter"); Letter from Andrew Stoltmann, President, Public Investors Arbitration Bar Association ("PIABA") (Aug. 7, 2018) ("PIABA Letter"); SIFMA August 2018 Letter; NASAA Letter; Letter from Robert K. Shaw, President, Individual Markets, Great-West Financial (Aug. 7, 2018) ("Great-West Letter"); NAIFA Letter; Transamerica August 2018 Letter; Letter from Tim Rouse, Executive Director, The SPARK Institute (Aug. 7, 2018) ("SPARK Letter"); Letter from Robin C. Swope, Director, Global Product Governance & Support, Invesco (Aug. 7, 2018) ("Invesco Letter"); Letter from R. Keith Overly, President, National Association of Government Defined Contribution Administrators ("NAGDCA") (Aug. 7, 2018) ("NAGDCA Letter"); Letter from Kevin R. Keller, Chief Executive Officer, CFP Board, et al., Financial Planning Coalition ("FPC") (Aug. 7, 2018) ("FPC Letter"); Letter from Dennis Simmons, Executive Director, Committee on Investment of Employee Benefit Assets, Committee on Investment of Employee Benefit Assets ("CIEBA") (Aug. 6, 2018) ("CIEBA Letter").

[44] *See, e.g.*, SIFMA August 2018 Letter; Letter from Lisa D. Crossley, Executive Director, National Society of Compliance Professionals ("NSCP") (Aug. 7, 2018) ("NSCP Letter"); PIABA Letter; FPC Letter; Better Markets August 2018 Letter; Letter from Karen L. Barr, President and CEO, Investment Adviser Association ("IAA") (Aug. 6, 2018) ("IAA August 2018 Letter").

We also received comments addressing when a broker-dealer's advisory services are "solely incidental to the conduct of his business as a broker or dealer" under the "broker-dealer exclusion" from the definition of investment adviser—and thus from the application of the Advisers Act—provided in Section 202(a)(11)(C) of the Advisers Act. We have addressed these comments in the context of the Solely Incidental Interpretation.

[45] *See, e.g.*, Letter from Carl B. Wilkerson, Vice President and Chief Counsel, American Council of Life Insurers ("ACLI") (Aug. 3, 2018) ("ACLI Letter"); Letter from Brian H. Graff, Executive Director and CEO, Craig P. Hoffman, General Counsel, Dough Fisher, Director of Retirement Policy, and Joseph A. Caruso, Government Affairs Counsel, American Retirement Association ("ARA") (Aug. 3, 2018) ("ARA August 2018 Letter"); Letter from Anne Tennant, Managing

Continued

In addition, most commenters from both industry and consumer advocate groups requested modifications to each of the Disclosure, Care, and Conflict of Interest Obligations, and also called for more specific examples of conduct that would—or would not—satisfy these obligations. With respect to the Disclosure Obligation, most commenters generally sought greater clarity or made suggestions regarding what material facts and material conflicts would need to be disclosed, the form and manner (*e.g.*, written versus oral, individualized versus standardized, and the use of electronic and/or layered) and the timing and frequency of the disclosure (*e.g.*, whether the disclosure should be prior to, at the time of, or could be after a recommendation), as well as whether the Disclosure Obligation could be satisfied by complying with other existing disclosure requirements.[46] In particular, several commenters recommended that the Commission require broker-dealers provide "full and fair" disclosure.[47]

Regarding the Care Obligation, commenters from certain investor groups supported incorporating a "prudence" standard,[48] while a number of industry commenters expressed concern about including this standard.[49] Numerous commenters requested further clarity on what would be required to meet the Care Obligation, including what factors a broker-dealer should consider in developing a retail customer's investment profile and when making a recommendation, and in particular the role of cost and other relevant factors when making a recommendation, and also asked for more specific examples of how to weigh costs against other factors when making a recommendation.[50] A majority of the IAC and other commenters requested clarification on how to consider "reasonably available alternatives" when making a recommendation and suggested clarifying the scope of the inquiry into potential reasonably available alternatives when a broker-dealer offers a limited product menu versus when the broker-dealer has an "open architecture" model.[51] Several industry commenters made recommendations regarding the application of proposed Regulation Best Interest to recommendations of specific categories of securities, such as variable annuities or leveraged exchange-traded products.[52]

With respect to the Conflict of Interest Obligation, many commenters questioned the distinction between financial incentives that would have to be mitigated and other conflicts that would only need to be disclosed, and recommended generally that the distinction be eliminated.[53] In addition, some commenters suggested that the obligation to establish policies and procedures to mitigate conflicts should apply to material conflicts at the level of the natural person who is an associated person (as opposed to the firm).[54] Commenters also asked for more clarity and examples of what conflicts must be mitigated versus eliminated and more guidance on appropriate mitigation methods.[55] Some commenters also expressed the view that by requiring mitigation of financial incentives, proposed Regulation Best Interest would require more of broker-dealers than what is required of investment advisers under their fiduciary duty, which could create a competitive disadvantage for broker-dealers that could further encourage migration from the broker-dealer to investment adviser business model and result in a loss of retail investor access (in terms of choice and cost) to differing types of investment services and products.[56]

In addition, a number of commenters agreed with the Commission's statement that it was not intended to create a private right of action, but many requested that the Commission explicitly state in the final rule that Regulation Best Interest does not confer a private right of action.[57] One

Director and General Counsel, Morgan Stanley (Aug. 7, 2018) ("Morgan Stanley Letter"); CCMC Letters; Letter from Thomas Roberts, Groom Law Group (Aug. 7, 2018) ("Groom Letter"); Letter from Catherine J. Weatherford, President and CEO, Insured Retirement Institute ("IRI") (Aug. 7, 2018) ("IRI Letter"); NSCP Letter; Letter from Raymond J. Manista, Executive Vice President, Chief Legal Officer and Secretary, Northwestern Mutual (Aug. 7, 2018) ("Northwestern Mutual Letter"); State Attorneys General Letter; Letter from Mari-Anne Pisarri, Pickard Djinis and Pisarri LLP (Aug. 14, 2018) ("Pickard Letter"); SIFMA August 2018 Letter; Invesco Letter; Letter from Tom Clark, Managing Director, Sean Murphy, Vice President, Blackrock (Aug. 7, 2018) ("Blackrock Letter").

46 *See, e.g.*, Ameriprise Letter; Great-West Letter; Letter from Ram Subramaniam, Head of Brokerage and Investment Solutions, David Forman, Chief Legal Officer, Fidelity Investments (Aug. 7, 2018) ("Fidelity Letter"); Morgan Stanley Letter; CCMC Letters; Letter from Bret C. Hester, Senior Managing Director, Head of Regulatory Affairs, Teachers Insurance and Annuity Association of America ("TIAA") (Aug. 7, 2018) ("TIAA Letter"); Letter from James Sonne, Assistant Vice President, Federal Government Relations, Mass Mutual (Feb. 19, 2019) ("Mass Mutual Letter"); Letter from Edmund F. Murphy III, President, Empower Retirement (Aug. 2, 2018) ("Empower Retirement Letter"); IRI Letter; Letter from Paul Schott Stevens, President and CEO, Investment Company Institute ("ICI") (Aug. 7, 2018) ("ICI Letter"); SIFMA August 2018 Letter; Edward Jones Letter; Letter from Michelle Bryan Oroschakoff, Chief Legal Officer, LPL Financial (Aug. 7, 2018) ("LPL August 2018 Letter"); NASAA August 2018 Letter; AARP August 2018 Letter; PIABA Letter; Letter from Ann M. Kappler, Senior Vice President, Deputy General Counsel, Prudential Financial (Aug. 7, 2018) ("Prudential Letter"), CFA Institute Letter; State Attorneys General Letter; CFA August 2018 Letter; Letter from Jason Chandler, Group Managing Director, Co-Head Investment Platforms and Solutions, and Michael Crowl, Group Managing Director, General Counsel, UBS (Aug. 7, 2018) ("UBS Letter"), Letter from William F. Galvin, Secretary of the Commonwealth of Massachusetts (Aug. 7, 2018) ("Galvin Letter"); Letter from David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute ("FSI") (Aug. 7, 2018) ("FSI August 2018 Letter"); Mass Mutual Letter; Schwab Letter; Letter from Michael F. Anderson, Senior Vice President and Chief Legal Officer, CUNA Mutual (Aug. 7, 2018) ("CUNA Letter"); Transamerica August 2018 Letter.

47 *See, e.g.*, CFA August 2018 Letter; Better Markets August 2018 Letter; Pace Letter.

48 *See, e.g.*, AARP August 2018 Letter; CFA August 2018 Letter; FPC Letter.

49 *See, e.g.*, Letter from Karen L. Sukin, Executive Vice President, Deputy General Counsel, Primerica (Aug. 7, 2018) ("Primerica Letter"); Transamerica August 2018 Letter; IPA Letter; Cetera August 2018 Letter.

50 *See, e.g.*, Letter from Felice R. Foundos, Partner, Chapman and Cutler (Aug. 6, 2018) ("Chapman Letter"); Vanguard Letter; ICI Letter; Morgan Stanley Letter; Wells Fargo Letter; Primerica Letter; Great-West Letter; NASAA August 2018 Letter; Cambridge Letter; Blackrock Letter.

51 *See, e.g.*, IAC 2018 Recommendation; Fidelity Letter; ICI Letter; SIFMA August 2018 Letter; Prudential Letter; LPL August 2018 Letter; Morningstar Letter. *See also* AFL–CIO April 2019 Letter (stating that the rule "must make clear that brokers are required to recommend the investments they reasonably believe are the best match for the investor from among the reasonably available investment options").

52 *See, e.g.*, Letter from Brian Winikoff, Senior Executive Director and Head of U.S. Life, Retirement and Wealth Management, AXA (Aug. 7, 2018) ("AXA Letter"); Letter from Clifford Kirsch, Susan Krawczyk, Eversheds Sutherland, Committee of Annuity Insurers (Aug. 7, 2018) ("Committee of Annuity Insurers Letter"); Pacific Life August 2018 Letter; Letter from Angela Brickl, General Counsel, Rafferty Asset Management ("Direxion") (Aug. 7, 2018) ("Direxion Letter"); Letter from Mark F. Halloran, VP Managing Director, Business Development, Transamerica (Nov. 9, 2018) ("Transamerica November 2018 Letter").

53 *See, e.g.*, CFA August 2018 Letter; SIFMA August 2018 Letter; Primerica Letter; Letter from Jeff Hartney, Executive Director, Bank Insurance and Securities Association ("BISA") (Aug. 7, 2018) ("BISA Letter"); Committee of Annuity Insurers Letter; IPA Letter; CFA Institute Letter; Morgan Stanley Letter; CCMC Letters.

54 *See, e.g.*, Primerica Letter; TIAA Letter; ICI Letter; Letter from Craig D. Pfeiffer, President and CEO, Money Management Institute (Aug. 7, 2018) ("Money Management Institute Letter").

55 *See, e.g.*, AALU Letter; CFA August 2018 Letter; Letter from Quinn Curtis, Professor of Law, University of Virginia School of Law ("UVA"), (Aug. 3, 2018) ("UVA Letter"); Primerica Letter; Committee of Annuity Insurers Letter; Cetera August 2018 Letter; Wells Fargo Letter; NASAA August 2018 Letter; Morningstar Letter.

56 *See, e.g.*, Letter from Craig S. Tyle, Executive Vice President and General Counsel, Franklin Templeton Investments, (Aug. 6, 2018) ("Franklin Templeton Letter"); Primerica Letter; LPL August 2018 Letter; CCMC Letters; UBS Letter; ICI Letter; Letter from Christopher A. Iacovella, Chief Executive Officer, American Securities Association ("ASA") (Aug. 7, 2018) ("ASA Letter"); Schwab Letter.

57 *See, e.g.*, Letter from Paul C. Reilly, Chairman and CEO, Raymond James Financial (Aug. 7, 2018)

commenter requested that the Commission elaborate and make clear the remedies available to investors when broker-dealers violate Regulation Best Interest and emphasize that scienter is not required to establish a violation of Regulation Best Interest.[58]

Finally, numerous commenters urged the Commission to coordinate with other regulators, in particular the DOL[59] and state securities and insurance regulators,[60] and several commenters opined that the Commission should preempt (or avoid preempting) state law.[61]

After carefully reviewing the comments on the proposed rule, we have determined to retain its overall structure and scope. However, we have modified the proposed rule in a number of respects and are also providing additional interpretations and guidance to address and clarify issues raised by commenters. Summarized below are the key modifications from the proposal, as well as the interpretations and guidance provided.

- *Retail Customer Definition:* We are modifying the definition of "retail customer" to include *any natural person* who receives a recommendation from the broker-dealer for the natural person's own account (but not an account for a business that he or she works for), including individual plan participants.[62] We are interpreting "legal representative of such natural person" to include the nonprofessional legal representatives of such a natural person (*e.g.,* nonprofessional trustee who represents the assets of a natural person).
- *Implicit Hold Recommendations:* While broker-dealers will not be required to monitor accounts, in instances where a broker-dealer agrees to provide the retail customer with specified account monitoring services, it is our view that such an agreement will result in buy, sell or hold recommendations subject to Regulation Best Interest, even when the recommendation to hold is implicit.[63]
- *Recommendations of account types, including recommendations to roll over or transfer assets from one type of account to another:* We are modifying Regulation Best Interest to expressly apply to account recommendations including, among others, recommendations to roll over or transfer assets in a workplace retirement plan account to an IRA, recommendations to open a particular securities account (such as brokerage or advisory), and recommendations to take a plan distribution for the purpose of opening a securities account.[64] We are also providing guidance under the Care Obligation on what factors a broker-dealer generally should consider when making such recommendations.
- *Dual-Registrants:* We are providing additional guidance on how dual-registrants can comply with Regulation Best Interest, and confirming that Regulation Best Interest does not apply to advice provided by a broker-dealer that is dually registered as an investment adviser ("dual-registrant") when acting in the capacity of an investment adviser, and that a dual-registrant is an investment adviser solely with respect to accounts for which a dual-registrant provides advice and receives compensation that subjects it to the Advisers Act.[65]

We are also clarifying the relationship between the General Obligation and the specific component obligations, and in particular, what it means to "act in the best interest" of the retail customer. As is the case with the fiduciary duty applicable to investment advisers under the Advisers Act, we are not expressly defining in the rule text the term "best interest," and instead are providing in Regulation Best Interest and through interpretations, what "acting in the best interest" means.[66] Whether a broker-dealer has acted in the retail customer's best interest in compliance with Regulation Best Interest will turn on an objective assessment of the facts and circumstances of how the specific components of Regulation Best Interest—including its Disclosure, Care, Conflict of Interest, and Compliance Obligations—are satisfied at the time that the recommendation is made (and not in hindsight). In response to commenters, we are addressing, among other things, what the General Obligation does and does not require (for example, that it does not impose a continuing duty beyond a particular recommendation), providing specific examples of what would violate Regulation Best Interest, and its application to certain scenarios, particularly in the context of satisfying the Care Obligation.

We are also modifying and clarifying the component obligations that a broker-dealer would be required to satisfy in order to meet the General Obligation:

Disclosure Obligation. We are refining the treatment of conflicts of interest by: (1) Defining in the rule text a "conflict of interest" for purposes of Regulation Best Interest (as opposed to interpreting the phrase "material conflict of interest" as in the Proposing Release) as an interest that might incline a broker-dealer—consciously or unconsciously—to make a recommendation that is not disinterested; and (2) revising the Disclosure Obligation to require disclosure of "material facts" regarding conflicts of interest associated with the recommendation.[67] Similar to the proposal, all such conflicts of interest will be covered by Regulation Best

("Raymond James Letter"); NAIFA Letter; ASA Letter; CCMC Letters; UBS Letter; LPL August 2018 Letter; Cambridge Letter. *Contra* Letter from Elise Sanguinetti, President, American Association for Justice (Aug. 6, 2018) ("American Association for Justice Letter").

[58] NASAA August 2018 Letter.

[59] *See, e.g.,* ICI Letter; Franklin Templeton Letter; Morningstar Letter; Wells Fargo Letter; Edward Jones Letter; IRI Letter; Letter from Cynthia Lo Bessette, Executive Vice President and General Counsel, Letter from Oppenheimer Funds (Aug. 7, 2018) ("Oppenheimer Letter"); Vanguard Letter.

[60] *See, e.g.,* CCMC Letters; Letter from Robert Reynolds, President and CEO, Putnam Investments (Aug. 7, 2018) ("Putnam Letter"); Letter from Will H. Fuller, Executive Vice President, President, Annuity Solutions, Lincoln Financial Group (Nov. 13, 2018) ("Lincoln Financial Letter"); Cetera August 2018 Letter; Great-West Letter; Letter from Marc Cadin, Chief Operating Officer, Association of Advanced Life Underwriting ("AALU") (Aug. 7, 2018) ("AALU Letter"); IRI Letter; Pacific Life August 2018 Letter; Vanguard Letter; Fidelity Letter; Letter from Andrew J. Bowden, Senior Vice President and General Counsel, Jackson National Life Insurance Company (Aug. 7, 2018) ("Jackson National Letter"); Invesco Letter; Lincoln Letter; CUNA Mutual Letter; Great-West Letter.

[61] *See, e.g.,* Cetera August 2018 Letter; ICI Letter; Franklin Templeton Letter; Putnam Investments Letter; *but see* NASAA August 2018 Letter; PIABA Letter; Letter from Teresa J. Verges, Director, Investor Rights Clinic, University of Miami School of Law (Aug. 2, 2018) ("U. of Miami Letter"); Letter from Kayla Martin, Legal Intern, Christine Lazaro, Director and Professor Clinical Legal Education, Securities Arbitration Clinic, St. John's University School of Law (Aug. 7, 2018) ("St. John's U. Letter"); Letter from Kevin M. Carroll, Managing Director & Associate General Counsel, SIFMA (Mar. 29, 2019) ("SIFMA March 2019 Letter"); Letter from Michael Pieciak, NASAA President and Commissioner, Vermont Department of Regulation, NASAA (Apr. 25, 2019); Letter from Tom Quaadman, Executive Vice President, CCMC (May 16, 2019) ("CCMC May 2019 Letter"); AFL–CIO April 2019 Letter.

[62] As discussed in Section II.B.3.a, Retail Customer, Focus on Natural Persons and Legal Representatives of Natural Persons, to the extent a plan representative who decides service arrangements for a workplace retirement plan is a sole proprietor or other self-employed individual who will participate in the plan, the plan representative will be a retail customer to the extent that the sole proprietor or self-employed individual receives recommendations directly from a broker-dealer primarily for personal, family or household purposes.

[63] *See* Section II.B.2.b, Interpretation of Any Securities Transaction or Investment Strategy Involving Securities.

[64] *See id.*

[65] *See* Section II.B.3.d, Retail Customers, Treatment of Dual-Registrants.

[66] In the investment adviser context, an investment adviser's fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the "best interest" of its client at all times. *See* Fiduciary Interpretation.

[67] *See* Section II.C.1.b, Disclosure Obligation, Material Facts Regarding Conflicts of Interest.

Interest (*e.g.,* subject to the Conflict of Interest Obligation), however, only "material facts" regarding these conflicts would be required to be disclosed under the Disclosure Obligation.

Furthermore, we are modifying the Disclosure Obligation to explicitly require broker-dealers to provide "full and fair" disclosure of material facts, rather than requiring broker-dealers to "reasonably disclose" such information. We are providing the Commission's view regarding what it means to provide "full and fair" disclosure to retail customers, including the level of specificity of disclosure required, and the form and manner and timing and frequency of such disclosure.[68] We are explicitly requiring the disclosure of material facts relating to the scope and terms of the relationship that were specifically identified in the proposal (*i.e.,* capacity, material fees and charges, and type and scope of services).[69] In connection with disclosure requirements regarding the type and scope of services, we are also clarifying that at a minimum, a broker-dealer needs to disclose whether or not account monitoring services will be provided (and if so, the scope and frequency of those services), account minimums, and any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer.[70] Also we conclude that the basis for a broker-dealer's recommendations as a general matter (*i.e.,* what might commonly be described as the firm's investment approach, philosophy, or strategy) and the risks associated with a broker-dealer's recommendations in standardized (as opposed to individualized) terms are material facts relating to the scope and terms of the relationship that should be disclosed.[71] Below, we outline a method to address oral disclosure and written disclosure provided after the fact.[72]

Care Obligation. We are adopting the Care Obligation largely as proposed; however, we are expressly requiring that a broker-dealer understand and consider the potential *costs* associated with its recommendation, and have a reasonable basis to believe that the recommendation does not place the financial or other interest of the broker-dealer ahead of the interest of the retail customer.[73] Nevertheless, we emphasize that while cost must be considered, it should never be the only consideration. Cost is only one of many important factors to be considered regarding the recommendation and that the standard does not necessarily require the "lowest cost option." Relatedly, we are emphasizing the need to consider costs in light of other factors and the retail customer's investment profile.

We are also providing additional guidance on what it means to make a recommendation in a retail customer's "best interest." As in the Proposing Release, determining whether a broker-dealer's recommendation satisfies the Care Obligation will be an objective evaluation turning on the facts and circumstances of the particular recommendation and the particular retail customer. We recognize that a facts and circumstances evaluation of a recommendation makes it difficult to draw bright lines around whether a particular recommendation will meet the Care Obligation. Accordingly, we focus on how a broker-dealer could establish a reasonable basis to believe that a recommendation is in the best interest of its retail customer and does not place the broker-dealer's interest ahead of the retail customer's interest, and the circumstances under which a broker-dealer could not establish such a reasonable belief.

We are clarifying that an evaluation of reasonably available alternatives does not require an evaluation of every possible alternative (including those offered outside the firm) nor require broker-dealers to recommend one "best" product, and what this evaluation will require in certain contexts (such as a firm with open architecture). Furthermore, we clarify that, when a broker-dealer materially limits its product offerings to certain proprietary or other limited menus of products, it must still comply with the Care Obligation—even if it has disclosed and taken steps to prevent the limitation from placing the interests of the broker-dealer ahead of the retail customer, as required by the Disclosure and Conflict of Interest Obligation—and thus could not use its limited menu to justify recommending a product that does not satisfy the obligation to act in a retail customer's best interest.

Conflict of Interest Obligation. We are revising the Conflict of Interest Obligation by: (1) Similar to the proposal, establishing an overarching obligation to establish written policies and procedures to identify and at a minimum disclose (pursuant to the Disclosure Obligation), or eliminate, all conflicts of interest associated with the recommendation;[74] and (2) setting forth explicit requirements to establish written policies and procedures reasonably designed to mitigate or eliminate certain identified conflicts of interest, specifically:

- *Mitigation of Associated Person Conflicts of Interest.* We are revising the proposal's mitigation requirement to: (1) Eliminate the distinction between financial incentives and all other conflicts of interest; and (2) focus on mitigating conflicts of interest associated with recommendations that create an incentive for the associated person of the broker-dealer to place the interest of the firm or the associated person ahead of the interest of the retail customer.[75] We are providing further guidance regarding the types of incentives covered by this revised obligation, in particular focusing on compensation or employment related incentives and other incentives provided to the associated person (whether by the broker-dealer or third-parties). We are also confirming, clarifying and expanding on the proposal's guidance on potential mitigation methods to further promote compliance with this obligation.
- *Address Any Material Limitations on Recommendations to Retail Customers.* To address the conflicts of interest presented when broker-dealers place any material limitations on the securities or investment strategies involving securities that may be recommended to a retail customer (*i.e.,* only make recommendations of proprietary or other limited range of products), we are requiring broker-dealers to establish, maintain and enforce written policies and procedures reasonably designed to: (1) Identify and disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended and any associated conflicts of interest; and (2) prevent the limitations and associated conflicts of

[68] *See* Section II.C.1.c, Disclosure Obligation, Full and Fair Disclosure.

[69] *See* Section II.C.1.a, Disclosure Obligation, Material Facts Regarding Scope and Terms of the Relationship.

[70] *Id.*

[71] *Id.*

[72] *See* Section II.C.1, Disclosure Obligation, Oral Disclosure or Disclosure After a Recommendation.

[73] *See generally* Section II.C.2, Care Obligation.

[74] This obligation achieves greater consistency with the treatment of conflicts under the Advisers Act. As discussed in the Fiduciary Interpretation, in seeking to meet its duty of loyalty, an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship. An adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested. *See* Fiduciary Interpretation.

[75] *See generally* Section II.C.3.e, Conflict of Interest Obligation, Mitigation of Certain Incentives to Associated Persons.

interest from causing the broker-dealer or their associated persons to make recommendations that place the interest of the broker-dealer or associated person ahead of the interest of the retail customer (for example, a broker-dealer could establish product review processes or establish procedures addressing which retail customers would qualify for the product menu).[76]

• *Elimination of Certain Conflicts.* We are requiring broker-dealers to establish written policies and procedures reasonably designed to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sale of specific securities or the sale of specific types of securities within a limited period of time.[77] By explicitly focusing on policies and procedures to eliminate these incentives, it does not mean that all other incentives are presumptively compliant with Regulation Best Interest. Rather, such other incentives and practices that are not explicitly prohibited are permitted provided that the broker-dealer establishes reasonably designed policies and procedures to disclose and mitigate the incentive created to the representative, and the broker-dealer and its associated persons comply with the Care Obligation and the Disclosure Obligation.

General Compliance Obligation. We are establishing a new, general "Compliance Obligation" to require broker-dealers to establish policies and procedures to achieve compliance with Regulation Best Interest in its entirety.[78]

Books and Records. In addition to adopting Regulation Best Interest, we are also adopting the record-making and recordkeeping requirements largely as proposed, with certain explanations and clarifications regarding the scope of these requirements and the extent to which new obligations have been created.[79]

Interaction with Other Standards, Waivers and Private Right of Action. Compliance with Regulation Best Interest will not alter a broker-dealer's obligations under the general antifraud provisions of the federal securities laws. Regulation Best Interest applies in addition to any obligations under the Exchange Act, along with any rules the Commission may adopt thereunder, and any other applicable provisions of the federal securities laws and related rules and regulations.[80]

Scienter will not be required to establish a violation of Regulation Best Interest. We note that the preemptive effect of Regulation Best Interest on any state law governing the relationship between regulated entities and their customers would be determined in future judicial proceedings based on the specific language and effect of that state law. We believe that Regulation Best Interest, Form CRS, and the related rules, interpretations and guidance that the Commission is concurrently issuing will serve as focal points for promoting clarity, establishing greater consistency in the level of retail customer protections provided, and easing compliance across the regulatory landscape and the spectrum of investment professionals and products. In addition, under Section 29(a) of the Exchange Act, a broker-dealer will not be able to waive compliance with Regulation Best Interest, nor can a retail customer agree to waive her protections under Regulation Best Interest.

Furthermore, we do not believe Regulation Best Interest creates any new private right of action or right of rescission, nor do we intend such a result.

D. Overview of Key Enhancements

With these modifications and clarifications, Regulation Best Interest is designed to improve investor protection by:

• Requiring broker-dealers to have a reasonable basis to believe that recommendations are in the retail customer's best interest, which enhances existing suitability obligations by: Requiring compliance not only with the explicit Care Obligation, but also with Disclosure, Conflict of Interest, and Compliance Obligations; expressly requiring consideration of cost in evaluating a recommendation as part of the Care Obligation; expressing our views regarding the consideration of reasonably available alternatives when making a recommendation as part of the Care Obligation; applying Regulation Best Interest to recommendations of account types and rollovers and to any recommendations resulting from agreed-upon account monitoring services (including implicit hold recommendations); and, applying the Care Obligation to a series of recommended transactions (currently referred to as "quantitative suitability") irrespective of whether a broker-dealer exercises actual or *de facto* control over a customer's account;

• requiring broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to mitigate (and in some cases, eliminate) certain identified conflicts of interest that create incentives to make recommendations that are not in the retail customer's best interest; these new requirements are a significant and critical enhancement as existing requirements under the federal securities laws largely center upon conflict disclosure rather than conflict mitigation;

• requiring disclosure under the Disclosure Obligation of the material facts relating to the scope of terms of a broker-dealer's relationship with the retail customer and the conflicts of interest associated with a broker-dealer's recommendations, which will foster retail customers' understanding of their relationship with the broker-dealer and help them to evaluate the recommendations received; and

• requiring broker-dealers to establish, maintain and enforce written policies and procedures reasonably designed to achieve compliance with Regulation as a whole, which will further promote broker-dealer compliance with Regulation Best Interest.

Through these new requirements, we believe that Regulation Best Interest will improve investor protection by enhancing the quality of broker-dealer recommendations to retail customers and reducing the potential harm to retail customers that may be caused by conflicted brokerage recommendations. We also believe Regulation Best Interest achieves these enhancements in a manner that is workable for the transaction-based relationship offered by broker-dealers, thus preserving, to the extent possible, retail investor access (in terms of choice and cost) to different types of quality investment services and products. As discussed above, Regulation Best Interest will complement Form CRS and related rules, interpretations, and guidance that the Commission is concurrently issuing.

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[76] *See generally* Section II.C.3.f, Conflict of Interest Obligation, Mitigation of Material Limitations on Recommendations to Retail Customers.

[77] *See generally* Section II.C.3.g, Conflict of Interest Obligation, Elimination of Certain Conflicts of Interest.

[78] *See generally* Section II.C.4, Compliance Obligation.

[79] *See generally* Section II.D, Record-Making and Recordkeeping.

[80] For example, any transaction or series of transactions, whether or not subject to the provisions of Regulation Best Interest, remain subject to the antifraud and anti-manipulation provisions of the securities laws, including, without limitation, Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. 77q(a)] and Sections 9, 10(b), and 15(c) of the Exchange Act [15 U.S.C. 78i, 78j(b), and 78o(c)] and the rules thereunder.

II. Discussion of Regulation Best Interest

A. General Obligation

As in the Proposing Release, Regulation Best Interest is set forth in two subparagraphs: (1) An overarching provision setting forth a general best interest obligation ("General Obligation"); and (2) a second provision requiring compliance with specific obligations in order to satisfy the overarching standard (discussed below in Section II.C).[81] Specifically, as in the Proposing Release, the General Obligation requires that a broker-dealer "shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of [the broker-dealer] . . . ahead of the interest of the retail customer." [82]

Most commenters, including a majority of the IAC, expressed opinions on this approach, and in particular on the General Obligation, including whether the obligation should be a "fiduciary" standard, whether it should be a uniform standard for broker-dealers and investment advisers,[83] and whether the standard should be more principles-based or more prescriptive (in particular, whether to define "best interest").[84]

The views of commenters on the approach to an enhanced standard of conduct for broker-dealers varied widely. A number of commenters supported a broker-dealer specific standard of conduct.[85] Several of these commenters supported the Commission's approach as proposed, with certain modifications to the specific component obligations discussed below.[86] Some commenters urged the Commission to change the standard from what the commenters called "suitability-plus" to what the commenters called a "true best interest standard," including the avoidance of certain conflicts,[87] and urged the Commission to change the name of Regulation Best Interest unless it required firms to always be responsible for acting in the retail customer's best interest (as opposed to at the time of the recommendation).[88] Other commenters advocated for the adoption of a broker-dealer standard modeled after FINRA suitability rules,[89] and some suggested that the Commission create a safe harbor from liability for compliance with Regulation Best Interest.[90]

By contrast, other commenters recommended that the Commission adopt a uniform standard of conduct for investment advisers and broker-dealers, in varying forms.[91] Commenters expressed differing views on the form of such a uniform standard of conduct, including that the Commission should adopt: a fiduciary standard for broker-dealers similar to, or no less stringent than, the fiduciary duty under the Advisers Act; [92] a uniform fiduciary standard as articulated in Section 913(g) of the Dodd-Frank Act [93] and/or consistent with the recommendations of the staff's Section 913 Study; [94] or a uniform standard similar to the DOL standard as reflected in the BIC Exemption; [95] harmonized requirements and guidance for broker-dealers and investment advisers offering services to retail customers; [96] or a new uniform best interest standard, with common core elements.[97]

In this vein, a number of commenters suggested specific revisions to the text of the General Obligation to clarify what the standard requires with respect to broker-dealer conflicts of interest, including that the Commission change the proposed "without placing the financial or other interest [of the broker-dealer] ahead" language to a standard that requires a recommendation be made "without regard to" a broker-dealer's interest [98] and/or requires the broker-dealer to "place the customer's interest first" or ahead of its own.[99] These commenters stated that changing the proposed language to a "without regard to" and/or "place the customer's interest first" phrasing would result in a stronger standard, whereas the proposed phrasing would allow a broker-dealer to act in its own interests as long as the broker-dealer does not put its interests ahead of its customers' interest.[100] These commenters stated that broker-dealers must put aside their own interest when determining what is best for the retail customer, that broker-dealers must ensure that conflicts do not taint recommendations.[101]

Some commenters challenged the Commission's concern that the "without regard to" language "could be inappropriately construed to require a broker-dealer to eliminate all of its conflicts," arguing that their position is supported by the plain meaning of the language and the context of 913(g) (which explicitly recognizes conflicts in certain areas), and the interpretations by others (such as the DOL) who have used it.[102] Highlighting what commenters viewed as inconsistencies in the Proposing Release's interpretation of the proposed "without placing . . . ahead" phrasing, such as statements that the obligation would require broker-dealers to "put aside their interests" when

[81] *See* Proposing Release at 21585 *et seq.*

[82] *See* Paragraph (a)(1) of Regulation Best Interest.

[83] *See* IAC 2018 Recommendation; Letter from Rob Foregger, Co-Founder, NextCapital (Aug. 7, 2018) ("NextCapital Letter") (recommending that the Commission adopt a uniform fiduciary standard of conduct applicable to both broker-dealers and investment advisers); Letter from Sharon Cheever, Senior Vice President and General Counsel, Pacific Life Insurance Company (May 28, 2019) ("Pacific Life May 2019 Letter") (recommending that the Commission adopt a single 'best interest' standard of care for all financial professionals).

See also Letter from R. Scott Henderson, Bank of America (Aug. 7, 2018) ("Bank of America Letter"); Letter from Christopher Jones, Chief Investment Officer, Financial Engines (Aug. 6, 2018) ("Financial Engines Letter"); State Attorneys General Letter; Letter from Jill I. Gross, Associate Dean, Academic Affairs, Elisabeth Haub School of Law, Pace University (Mar. 11, 2019) ("Gross Letter"). Relatedly, one commenter expressed concern that a court or arbitration panel would determine that Regulation Best Interest would control, rather than existing case law, which would apply a fiduciary duty in certain circumstances. *See* Gross Letter. *See also* AFL–CIO April 2019 Letter.

[84] *See, e.g.,* Ameriprise Letter; Cambridge Letter; CCMC Letters; Edward Jones Letter; NAIFA Letter; Morningstar Letter; NY Life Letter; Letter from Kevin T. Reynolds, Senior Vice President, Penn Mutual Life Insurance Company (Aug. 1, 2018) ("Penn Mutual Letter"); SIFMA August 2018 Letter; Vanguard Letter; Letter from Kent. A Mason, Davis & Harman LLP (Jul. 20, 2018) ("Davis Harman Letter").

[85] *See, e.g.,* SIFMA August 2018 Letter; Cetera August 2018 Letter; Vanguard Letter; Edward Jones Letter; Ameriprise Letter; NY Life Letter; NAIFA Letter; CCMC Letters; Penn Mutual Letter; Cambridge Letter; PIABA Letter; Letter from Ronald J. Kruszewski, Chairman and Chief Executive Officer, Stifel Financial (Aug. 7, 2018) ("Stifel Letter"); Financial Engines Letter.

[86] *See, e.g.,* SIFMA August 2018 Letter; Vanguard Letter; Edward Jones Letter; Ameriprise Letter; NY Life Letter; NAIFA Letter; CCMC Letters; Penn Mutual Letter; Cambridge Letter; PIABA Letter.

[87] *See, e.g.,* CFA Institute Letter.

[88] *See, e.g.,* Letter from Jean-Luc Bourdon, CPA/PFS, Chair, Personal Financial Planning Legislative and Regulatory Task Force, and Charles R. Kowal, Chair, Personal Financial Planning Executive Committee, AICPA (Aug. 7, 2018) ("AICPA Letter"); Betterment August 2018 Letter; NASAA August 2018 Letter.

[89] *See, e.g.,* National Society of Compliance Professionals Letter; Cetera August 2018 Letter.

[90] *See* Cambridge Letter; BISA Letter; IPA Letter.

[91] *See, e.g.,* Betterment Letter; AARP August 2018 Letter; AFR Letter; Galvin Letter; State Attorneys General Letter.

[92] *See, e.g.,* Betterment Letter; Warren Letter; Fein Letter; Letter from Joseph M. Torsella, Pennsylvania State Treasurer, et al. (Aug. 7, 2018) ("State Treasurers Letter"); AARP August 2018 Letter.

[93] *See, e.g.,* FPC Letter; Letter from Maxine Waters, Ranking Member, Committee on Financial Services, U.S. House of Representatives, et al. (Sep. 12, 2018) ("Waters Letter"); Fein Letter.

[94] *See, e.g.,* ACLI Letter; Schwab Letter.

[95] *See, e.g.,* Galvin Letter. *See supra* footnote 32.

[96] *See, e.g.,* AARP August 2018 Letter.

[97] *See, e.g.,* Pacific Life August 2018 Letter.

[98] *See, e.g.,* CFA August 2018 Letter; FPC Letter; PACE Letter; Better Markets August 2018 Letter.

[99] *See, e.g.,* Invesco Letter; Schwab Letter; Better Markets August 2018 Letter; CFA Institute Letter.

[100] *See, e.g.,* CFA August 2018 Letter; FPC Letter; Pace Letter.

[101] *See, e.g.,* CFA August 2018 Letter.

[102] *See, e.g.,* CFA August 2018 Letter; Waters Letter.

making a recommendation versus others suggesting that a broker-dealer's interests cannot "predominantly motivate" or be the "sole basis" for the recommendation, some commenters suggested we either adopt the "without regard to" phrasing or state that the proposed phrasing requires a broker-dealer to put aside its interests.[103] Some commenters further stated that the "without regard to" phrasing, which is used in Section 913(g) of the Dodd-Frank Act, is the stronger standard of conduct that Congress intended, and challenged the Commission's reliance on the authority provided in Section 913(f).[104] In this vein, some commenters suggested that the Commission should adopt a uniform standard of conduct for broker-dealers and investment advisers that was authorized under Section 913(g), and recommended by the staff in the Section 913 Study.[105]

Other commenters, however, supported the proposal's "without placing . . . ahead" formulation.[106] These commenters expressed concern that a "without regard to" standard would require "conflict free" recommendations, which would limit compensation structures and the offering of certain products.[107] Instead, commenters stated that the appropriate role of a best interest standard is to require disclosure and management of conflicts of interest.[108] Others generally supported, or did not object to, the Commission's decision not to proceed under its 913(g) authority in its current proposal.[109]

A common theme across many comments was the need for additional guidance on what "best interest" means, with some commenters recommending that the Commission codify its interpretation of "best interest" or provide a more specific definition of what it means to act in the "best interest."[110] Several commenters suggested that the "best interest" standard should require the "best" or most beneficial product available,[111] while others (including a majority of the IAC) requested that the Commission clarify that there is no single "best" recommendation and that the obligation is to adhere to a professional standard of conduct when making a recommendation.[112] Some commenters suggested defining "best interest" as including a duty of loyalty and care.[113] Several also suggested that the Commission incorporate best execution and fair pricing and compensation as factors for determining compliance with the standard.[114]

Several commenters recommended that the Commission adopt a definition of best interest that is consistent with the best interest obligation described by the DOL in the BIC Exemption's Impartial Conduct Standards,[115] and supported a standard which would require a broker-dealer to act "solely" in the interest of the retail customer when making a recommendation.[116] Conversely, other commenters recommended that the "best interest" standard could be satisfied even if the recommendations are in part influenced by "self-promotion."[117]

Finally, in lieu of a prescribed definition of "best interest," a number of commenters advocated for a facts-and-circumstances or "totality of the circumstances approach" for determining compliance with the "best interest" standard.[118] A majority of the IAC recommended that the meaning of the best interest obligation should be clarified to require "broker-dealers, investment advisers, and their associated persons to recommend the investments, investment strategies, accounts or services, from among those they have reasonably available to recommend, that they reasonably believe represent the best available options for the investor."[119]

After careful consideration of these comments, we continue to believe that our proposed approach for enhancing the standards of conduct that apply to broker-dealers' recommendations to retail customers is the appropriate approach, and therefore we are adopting as proposed the structure and scope of Regulation Best Interest, including the phrasing of the General Obligation, and are not expressly defining "best interest" in the rule text.[120] However, in consideration of these comments, we are providing our views on what the standard generally requires, what it is intended to achieve, and its alignment in many respects with fiduciary principles.

1. Commission's Approach

After extensive consideration, and for the reasons discussed in the Proposing Release and further below, we are adopting a rule to enhance the existing broker-dealer conduct obligations when they make recommendations to a retail customer.[121] At the same time, we seek to preserve retail investor access (in terms of choice and cost) to differing types of investment services and products.

The Commission is adopting Regulation Best Interest pursuant to the

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[103] *See, e.g.*, CFA August 2018 Letter. *See also* Waters Letter (stating that the proposal fails to adequately explain just what it would require of brokers that is different from the status quo, that the standard should clearly differ from the current "suitability" standard, and that any final rule must clearly explain the standard, what it requires and prohibits, and how it differs from the status quo).

[104] *See, e.g.*, CFA August 2018 Letter; State Attorneys General Letter; Waters Letter; FPC Letter; Better Markets August 2018 Letter.

[105] *See, e.g.*, Waters Letter; FPC Letter.

[106] *See, e.g.*, AALU Letter; Cetera August 2018 Letter; NAIFA Letter; Pickard Letter.

[107] *See, e.g.*, AALU Letter; Cetera August 2018 Letter; NAIFA Letter; Pickard Letter.

[108] *See, e.g.*, AALU Letter; Cetera August 2018 Letter.

[109] *See, e.g.*, Invesco Letter; IAC 2018 Recommendation (stating "we recognize that the Commission has chosen not to proceed under its 913(g) authority in its current proposal, and it is not our intent to derail that proposal by advocating that the Commission change the legal basis for its rulemaking. Moreover, we believe the clarifications we have outlined above to the meaning of best interest, if implemented, have the potential to deliver immediate benefits to customers of broker-dealers and investment advisers alike. Should the Commission determine, however, that it cannot enforce the clarified best interest standard under the Advisers Act, a majority of the Committee believes the Commission should reconsider rulemaking under its 913(g) authority to close that regulatory gap."). As noted above, Regulation Best Interest draws from key principles underlying fiduciary obligations, including those that apply to investment advisers under Advisers Act. Accordingly, as discussed below, the Commission has chosen to enhance existing obligations for broker-dealers when they make recommendations to a retail customer, while, in a separate interpretation, reaffirming and in some cases clarifying an investment adviser's fiduciary duty. *See* Fiduciary Interpretation.

[110] *See, e.g.*, NASAA August 2018 Letter.

[111] *See, e.g.*, Financial Engines Letter; CFA August 2018 Letter.

[112] *See, e.g.*, Wells Fargo Letter; *see also* IAC 2018 Recommendation ("[T]he Commission should recognize there will often not be a single best option and that more than one of the available options may satisfy this standard.").

[113] *See, e.g.*, TIAA Letter; Morningstar Letter.

[114] *See, e.g.*, CFA Institute Letter; Letter from Mark Heckert, Vice President, Pricing and Analytics, ICE Data Services, (Aug. 7, 2018) ("ICE Letter"); FPC Letter.

[115] *See, e.g.*, AARP August 2018 Letter; Wells Fargo Letter; Schwab Letter; NASAA August 2018 Letter.

[116] *See, e.g.*, Galvin Letter.

[117] See, *e.g.*, LPL August 2018 Letter.

[118] *See, e.g.*, AAJ Letter; CFA August 2018 Letter.

[119] IAC 2018 Recommendation.

[120] Another commenter stated that any modification to the proposed rules and guidance that would make them "more restrictive" should be reproposed for additional public comment. *See* ACLI Letter. Because we have provided notice and the changes we are making are based on comments we received, reproposal is not necessary.

[121] *See* Proposing Release at 21575. In particular, we considered the recommendations made by our staff in 2011 and the recommendations of the IAC. *See* Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011) ("913 Study"), at 9–10, *available at www.sec.gov/news/studies/2011/913studyfinal.pdf*; Recommendation of the Investor Advisory Committee: Broker-Dealer Fiduciary Duty (Nov. 2013) ("IAC 2013 Recommendation"), *available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation-2013.pdf*; IAC 2018 Recommendation.

express and broad grant of rulemaking authority in Section 913(f) of the Dodd-Frank Act.[122] As some commenters noted, Section 913(g) expressly authorizes the Commission to adopt rules that would hold broker-dealers to the same standard of conduct as investment advisers. However, the availability of overlapping, yet distinct, rulemaking power under Section 913(g) does not negate the grant of authority under Section 913(f). The plain text of Section 913(f) authorizes the Commission to promulgate this rule addressing the legal and regulatory standards of care for broker-dealers, and their associated persons.

The Commission is utilizing its authority under 913(f) in order to adopt an enhanced investor-protection standard for broker-dealers that maintains the availability of both the broker-dealer model and the investment adviser model. The Commission has chosen not to apply the existing fiduciary standard under the Advisers Act to broker-dealers in part because of concerns that such a shift would result in fewer broker-dealers offering transaction-based services to retail customers, which would in turn reduce choice and may raise costs for certain retail customers.

Moreover, the Commission has chosen not to create a new uniform standard applicable to both broker-dealers and investment advisers which, among other things, would discard decades of regulatory and judicial precedent and experience with the fiduciary duty for investment advisers that has generally worked well for retail clients and our markets. We believe that adopting a "one size fits all" approach would not appropriately reflect the fact that broker-dealers and investment advisers play distinct roles in providing recommendations or advice and services to investors, and may ultimately harm retail investors. Instead, the Commission has chosen to enhance existing obligations for broker-dealers when they make recommendations to a retail customer, while, in a separate interpretation, reaffirming and in some cases clarifying an investment adviser's fiduciary duty.[123]

Regulation Best Interest considers and incorporates (to the extent appropriate) obligations that apply to investment advice in other contexts, with the goal of fostering greater consistency and clarity in the level of protection provided to retail customers at the time that a recommendation is made. We are tailoring these principles to the structure and characteristics of the broker-dealer relationship with retail customers and building upon existing regulatory obligations. As a result, Regulation Best Interest protects investors who seek access to the services, products, and payment options offered by broker-dealers.

Although we are not applying the existing fiduciary standard under the Advisers Act to broker-dealers, key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act[124] at the time that a recommendation is made. Regulation Best Interest's regulatory structure is unique to broker-dealers—and is tailored to the broker-dealer business model—but regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial professional ahead of the interests of the retail investor.

As discussed in the proposal, and in the discussion below, Regulation Best Interest, as adopted, incorporates Care and Conflict of Interest Obligations substantially similar to the fiduciary duties of care and loyalty under Section 206(1) and (2) of the Advisers Act, even if not in the same manner as the 913 Study recommendations or identical to the duties under the Advisers Act.[125] We extensively considered the 913 Study as part of developing Regulation Best Interest, as discussed in the Proposing Release, and believe that the enhancements to the broker-dealer standard of conduct incorporate, and in many aspects (such as the concept of mitigation, and the detailed Care Obligation), build upon and go beyond the recommendations in the 913 Study.

Although key elements are substantially similar, the Commission notes that the obligations of a broker-dealer under Regulation Best Interest and the obligations of an investment adviser pursuant to its fiduciary duty under the Advisers Act differ in certain respects, taking into account the scope of the services and relationships typically offered by broker-dealers and

[122] Section 913(f) of the Dodd-Frank Act provides the Commission discretionary authority to "commence a rulemaking, as necessary or appropriate to the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide), to address the legal or regulatory standards of care for brokers, dealers . . . [and] persons associated with brokers or dealers . . . for providing personalized investment advice about securities to such retail customers." In addition to Section 913(f), the Commission is promulgating Regulation Best Interest pursuant to other provisions of the Exchange Act, including Section 15(c)(6) and Section 17.

[123] Although we are not adopting a uniform fiduciary standard of conduct, we note that our rules are designed to achieve many of the key goals advocated for by supporters of a uniform standard of conduct. For example, in advocating for a uniform standard of conduct former Commission Chair Elisse B. Walter (then a Commissioner) stated that (1) "[t]o appreciate fully what a fiduciary standard means, and what it really means to act in the best interest of an investor, it is absolutely necessary to drill down and determine what duties and obligations flow from a fiduciary standard," (2) "a fiduciary standard is not a substitute for business practice rules . . . [r]ather, the two are complementary . . . and can be used by the Commission] to prohibit certain conflicted behavior or to require mitigation or management of the conflict," (3) "what a fiduciary duty requires depends on the scope of the engagement," and (4) "[m]ost important, whatever gloss and guidance the Commission provides, it should not deviate from the basic principle that financial professionals should always act in the best interests of investors, both large and small." Commissioner Elisse B. Walter, Regulating Broker-Dealers and Investment Advisers: Demarcation or Harmonization? (May 5, 2009), *available at https://www.sec.gov/news/speech/2009/spch050509ebw.htm.*

In our Fiduciary Interpretation and in this release, we are providing our views on the duties and obligations that flow from the fiduciary duty and Regulation Best Interest. In this release, we discuss the specific obligations of broker-dealers under the Disclosure, Care and Conflicts of Interest Obligations, which include requirements to establish policies and procedures that comply with the Conflict of Interest Obligation, specifically to disclose and mitigate (*i.e.*, reasonably reduce), or eliminate, certain conflicts. As discussed below, these specific obligations are tailored to address particular concerns that arise as a result of the broker-dealer model. For that reason, as well as the other reasons set forth above, the Commission does not believe that it is necessary to adopt a uniform standard in order to ensure that these specific obligations also apply to investment advisers, as the IAC suggests. *See* IAC 2018 Recommendation. In our Fiduciary Interpretation, we state that "the application of the investment adviser's fiduciary duty will vary with the scope of the relationship," and here we have noted that we are not expressly defining in the rule text the term "best interest," and instead are providing in the rule and through interpretations what "best interest" means. Compliance with each of the specific component obligations will turn on an objective assessment of the facts and circumstances of how the specific components of Regulation Best Interest are satisfied at the time that the recommendation is made. Finally, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial professional ahead of the interests of the retail investor.

[124] Specifically, an investment adviser's fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the "best interest" of its client at all times. *See* Fiduciary Interpretation.

[125] *See* Proposing Release at 21590.

investment advisers. For example, an investment adviser's duty of care encompasses the duty to provide advice and monitoring at a frequency that is in the best interest of the client, taking into account the scope of the agreed relationship. This difference reflects the generally ongoing nature of the advisory relationship, and the Commission's view that, within the scope of the agreed adviser-client relationship, investment advisers' fiduciary duty generally applies to the entire relationship. In contrast, the provision of recommendations in a broker-dealer relationship is generally transactional and episodic, and therefore the final rule requires that broker-dealers act in the best interest of their retail customers at the time a recommendation is made and imposes no duty to monitor a customer's account following a recommendation.

As noted above, Regulation Best Interest also generally imposes more specific obligations on broker-dealers under the Disclosure, Care and Conflict of Interest Obligations (each of which is discussed in detail below) than the principles-based requirements of investment advisers' fiduciary duty under the Advisers Act. This approach is intended to tailor the application of principles that have developed in the context of a different business model over the course of almost 80 years. Moreover, this more specific and tailored approach drawing on key fiduciary principles (1) is consistent with the generally rules-based regulatory regime that applies to broker-dealers, (2) acknowledges that certain relevant obligations may already be addressed by existing broker-dealer requirements (*e.g.*, broker-dealers are already subject to a duty of best execution), (3) allows us to impose requirements that we are believe are more appropriately tailored to address the specific conflicts raised by the transaction-based nature of the broker-dealer model, and (4) recognizes that it would be inappropriate to apply to certain generally applicable obligations of investment advisers (*e.g.*, duty to monitor) in the context of a transaction-based relationship.

These specific obligations include express requirements relating to the Care Obligation, requiring that a broker-dealer exercise reasonable diligence, care, and skill to: (1) Understand the risks, rewards and costs of a recommendation; (2) have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer, based on the retail customer's investment profile, and that the recommendation does not place the broker-dealer's interest ahead of the retail customer's interest; and (3) have a reasonable basis to believe that a series of transactions is in the best interest of the retail customer and does not place the interest of the broker-dealer ahead of the retail customer's interests. Regulation Best Interest imposes a duty of care that enhances existing suitability obligations (as discussed further below). It also includes a requirement under the Care Obligation to specifically address the risk that a broker-dealer's transaction-based recommendations and compensation could result in a series of recommendations that are not in the best interest or a retail customer—a "churning" risk unique to the broker-dealer model of providing recommendations and resulting transaction-based compensation.

Regulation Best Interest also includes a requirement under the Conflict of Interest Obligation for broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to (1) mitigate conflicts of interest at the associated person level, (2) specifically address the conflicts of interest presented when broker-dealers place material limitations on the securities or products that may be recommended (*i.e.*, only make recommendations of proprietary or other limited range of products), and (3) eliminate sales contests, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time. The conflicts of interest associated with incentives at the associated person level and limitations on the securities or products that may be recommended to retail customers have raised particular concerns in the context of the broker-dealer, transaction-based relationship. Accordingly, the Commission believes specific disclosure and additional mitigation requirements are appropriate to address those conflicts. Sales contests, sales quotas, bonuses and non-cash compensation that are based on the sales of specific securities within a limited period of time create high-pressure situations for associated persons to increase the sales of specific securities or specific types of securities within a limited period of time and thus compromise the best interests of their retail customers. The Commission does not believe such conflicts of interest can be reasonably mitigated and, accordingly, they must be eliminated.

Phrasing of Standard

We are adopting the phrasing "act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the [broker-dealer] ahead of the interest of the retail customer" as it was proposed.[126] In response to comments, we are clarifying our views on what this standard entails and how it compares to the "without regard to" language of Section 913.

By replacing the "without regard to" language of Section 913(g) and the 913 Study with the "without placing the financial or other interest of the [broker-dealer] . . . ahead of the interest of the retail customer" phrasing, we did not intend to create a "lower" or "weaker" standard compared to the language of Section 913(g) and the 913 Study. Rather, we are adopting a standard that reflects that a broker-dealer should not put its interests ahead of the retail customer's interest, and thereby aligns with (and in certain areas imposes more specific obligations than) the investment adviser fiduciary duty, at the time a broker-dealer makes a recommendation to a retail customer.

As discussed in the Proposing Release, we do not intend for our standard to require a broker-dealer to provide conflict-free recommendations. For example, under Regulation Best Interest, a broker-dealer could recommend a more expensive or more remunerative security or investment strategy if the broker-dealer has a reasonable basis to believe there are other factors about the security or investment strategy that make it in the best interest of the retail customer, based on that retail customer's investment profile.[127]

We also agree with commenters that we do not believe that is the intent behind the "without regard to" phrase, as included in Section 913 of the Dodd-Frank Act or recommended in the 913 Study, as is evident both from other provisions of Section 913 that acknowledge and permit the existence of financial interests under that standard, and how our staff articulated the recommended uniform fiduciary standard in the 913 Study.[128]

[126] *See* paragraph (a)(1) of Regulation Best Interest. As discussed in Section II.C.2, we are also adding the phrasing "does not place the financial or other interest of the broker, dealer, or such natural person . . . ahead of the retail customer" to certain provisions of the Care Obligation.

[127] See Section II.C.2, Care Obligation.

[128] *See* Proposing Release at 21590. As noted in the proposal, among other things, Dodd-Frank Act Section 913(g) expressly provides that the receipt of commission-based compensation, or other standard compensation, for the sale of securities shall not, in and of itself, violate any uniform fiduciary standard promulgated under that subsection's authority as applied to a broker-dealer. Moreover, Section 913(g) does not itself require the imposition of the

Continued

Nevertheless, we are concerned that there is a risk that the "without regard to" language would be inappropriately construed to require a broker-dealer to eliminate all of its conflicts when making a recommendation (*i.e.*, require recommendations that are conflict free), which we believe could ultimately harm retail investors by reducing their access to differing types of investment services and products and by increasing their costs.

The potential for a range of different meanings to be given to the phrase "without regard to" was heightened by the DOL's use of this same language for purposes of the Impartial Conduct Standards set forth in the BIC Exemption. We recognize, as noted by some commenters, that the DOL interpretation of this phrase does not require "conflict-free" recommendations. Nevertheless, because of the differences in the approach to the treatment of conflicts under ERISA and under the federal securities laws—ERISA starts by prohibiting conflicts and then through exemptions permits certain conflicts, whereas the federal securities laws generally start with disclosure and become more restrictive—we share commenters' concerns that DOL's use of the "without regard to" language could alter the way in which conflicts are viewed and cause a substantial portion of conduct that is currently permitted, and reasonably accepted and desired by retail customers, to be limited or eliminated. Based on market participant experience with the implementation of—and reaction to the subsequent overturning of—the DOL Fiduciary Rule, in particular the BIC Exemption,[129] we continue to believe that it is better to use language that provides similar investor protections, but does not raise these legal ambiguities.

The "without placing the financial or other interest . . . ahead of the interest of the retail customer" phrasing recognizes that while a broker-dealer will inevitably have some financial interest in a recommendation—the nature and magnitude of which will vary—the broker-dealer's interests cannot be placed ahead of the retail customer's interest.[130] Accordingly, we believe this phrasing establishes a standard that enhances investor protection by prohibiting a broker-dealer from placing its interests ahead of the retail customer's interests, and preserves investor access (in terms of both choice and cost) to differing types of investment services and products.

The phrasing also aligns with an investment adviser's fiduciary obligation. As discussed in the Fiduciary Interpretation, an investment adviser's fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty.[131] The fiduciary duty requires that an adviser "adopt the principal's goals, objectives, or ends."[132] This means the adviser must, at all times, serve the best interest of its clients and not subordinate its client's interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client.[133] This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the "best interest" of its client at all times.[134]

Language that would require a broker-dealer to put the retail customer's interest "first" arguably raises many of the same concerns as the "without regard to" language. Accordingly, we are adopting a formulation in Regulation Best Interest that is consistent with how we describe the duty of loyalty for investment advisers in the Fiduciary Interpretation—that is, a requirement not to place the adviser's interests ahead of the interests of its client.[135]

While we are not revising this phrasing of the standard, we appreciate concerns raised by commenters about clarifying whether this standard permits broker-dealers to allow their conflicts to taint their recommendations or to allow broker-dealers to make recommendations that are motivated by their own interests or to put their interests first. We discuss below what it means to "act in the best interests," particularly in the context of satisfying the Care and Conflict of Interest Obligations. Specifically, we clarify that the obligations set forth in Regulation Best Interest are intended to require broker-dealers to take steps to reduce the effect of (and in some cases eliminate) conflicts that create an incentive to place a broker-dealer's or an associated person's interest ahead of the retail customer's interest when making a recommendation, and to make recommendations in the best interest of the retail customer even where conflicts continue to exist. We believe that this approach will result in a standard of conduct that is consistent with what a reasonable retail customer would expect.[136]

principal trade provisions of Advisers Act Section 206(3) on broker-dealers. In addition, Dodd-Frank Act Section 913 provides that offering only proprietary products by a broker-dealer shall not, in and of itself, violate such a uniform fiduciary standard, but may be subject to disclosure and consent requirements. *See* Exchange Act Section 15(k)(1) and Advisers Act Section 211(g)(1). *See also* 913 Study at 113; Proposing Release at 21590.

[129] *See supra* footnotes 33 and 34 (citing reduction in services and increase in costs following DOL).

[130] In this vein, we believe that a broker-dealer's "financial interest" is broad, and that a broker-dealer is unlikely to have an "other interest" that is not a "financial interest." *See, e.g.*, Proposing Release at 21618 (noting ". . . our interpretation of the types of material conflicts of interest arising from financial incentives is broad. . .").

[131] *See, e.g.*, Proxy Voting by Investment Advisers, Advisers Act Release No. 2106 (Jan. 31, 2003) ("Investment Advisers Release No. 2106"). *See also* Fiduciary Interpretation.

[132] Arthur B. Laby, *The Fiduciary Obligations as the Adoption of Ends*, 56 Buffalo Law Review 99 (2008); *see also* Restatement (Third) of Agency, § 2.02 Scope of Actual Authority (2006) (describing a fiduciary's authority in terms of the fiduciary's reasonable understanding of the principal's manifestations and objectives). *See* Fiduciary Interpretation.

[133] *See* Fiduciary Interpretation.

[134] *Id. See also* Amendments to Form ADV, Advisers Act Release No. 3060 (Jul. 28, 2010) (adopting amendments to Form ADV and stating that "under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Investment Advisers Act Release 2106). *See SEC* v. *Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) ("Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund. . ."); *SEC* v. *Moran*, 944 F. Supp. 286, 297 (S.D.N.Y 1996) ("Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.").

[135] *See* Fiduciary Interpretation at footnote 54 (stating that, in practice, referring to putting a client's interest first is a plain English formulation commonly used by investment advisers to explain their duty of loyalty in a way that may be more understandable to retail clients).

[136] *See, e.g.*, Brian Scholl, *et al.*, SEC Office of the Investor Advocate and RAND Corporation, *The Retail Market for Investment Advice* (2018), *available at https://www.sec.gov/comments/s7-07-18/s70718-4513005-176009.pdf* ("OIAD/RAND"). OIAD/RAND summarized the results of focus groups, indicating that in the context of discussing expectations for standards of conduct, "the groups typically expected that a financial professional who is acting in a client's best interest" to, among other things, "disclose payments they receive that might influence their advice [and] avoid taking higher compensation for selling one product over a similar but less costly product." Further, OIAD/RAND summarized focus group comments on professionals' form of compensation, noting that "although many participants prefer that a professional be compensated by the client alone, some might not rule out using a professional who is receiving other compensation, for example if the compensation is openly disclosed and they are comfortable with the professional." The SEC's Office of Investor Advocate and the RAND Corporation prepared this research report regarding the retail market of investment advice prior to, and separate from, our rulemaking proposals. This report was included in the comment file at *https://www.sec.gov/comments/s7-07-18/s70718-4513005-176009.pdf. See also, e.g.*, Washington, DC Roundtable at 49 ("So it seems to me that there is a tight connection between the obligation that you have, and our obligations down below here to the conflicts of interest, that it's really important that advisers or brokers spell out what conflicts of interest they have, and what that means in real terms to the person before they make a choice, for example").

Finally, although our standard draws from key fiduciary principles, for various reasons, including to emphasize that Regulation Best Interest is tailored to the broker-dealer relationship and distinct from the investment adviser fiduciary duty, we are not referring to Regulation Best Interest as a "fiduciary" standard, and we emphasize that Regulation Best Interest is separate from any common law analysis of whether a broker-dealer has fiduciary duties.[137] As noted in the proposal, fiduciary standards vary, for example, for investment advisers, banks acting as trustees or fiduciaries, and fiduciaries to ERISA plans. As we have learned through our consideration of the Relationship Summary Proposal, and from various investor studies, using the term "fiduciary" to describe the standard may not sufficiently convey meaning regarding the specific substance of the standard.[138] In addition, we appreciate commenters' concerns that using the term in the context of a different relationship may introduce further legal or compliance ambiguity.[139]

As articulated in the Proposing Release, we appreciate the desire for clarity about the requirements imposed by Regulation Best Interest, and we have sought to provide such clarity by specifying by rule the specific components with which a broker-dealer is required to comply to satisfy its best interest obligation. The changes we are making from the Proposing Release to this final Regulation Best Interest and the additional interpretations and guidance we are providing are intended to further clarify how a broker-dealer could comply with these requirements.

As noted above and discussed in the Fiduciary Interpretation, an investment adviser's fiduciary duty under the Advisers Act requires the adviser to act in the best interests of its clients. We have chosen to describe the standard by referring directly to what the standard requires at the time a recommendation is made.[140] Furthermore, while key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act at the time that a recommendation is made, we are concerned that using the term "fiduciary" to describe a broker-dealer's obligations under Regulation Best Interest may create confusion by suggesting that the standards of conduct are identical in all respects, when there are key differences as noted above, including the scope of the of the duty (*e.g.*, the application of the adviser's fiduciary duty to the entire relationship versus Regulation Best Interest's recommendation-specific application, and the application of an adviser's fiduciary duty to all clients as opposed to Regulation Best Interest's application to retail customers).[141]

Similarly, while we are not harmonizing the phrasing of the best interest standard with the DOL's definition of "best interest" as reflected in the BIC Exemption's Impartial Conduct Standards, as suggested by some commenters,[142] or otherwise adopting some or all conditions of the BIC Exemption, we gave careful consideration to the DOL Fiduciary Rule in developing Regulation Best Interest.[143] Regulation Best Interest takes into account both market participant experience with the implementation of—and reaction to the subsequent overturning of the DOL Fiduciary Rule, in particular the BIC Exemption. As discussed in the Proposing Release, we believe Regulation Best Interest is consistent with many of the key components of the DOL's Impartial Conduct Standards. Regulation Best Interest incorporates principles underlying the DOL Fiduciary Rule—such as the concept of conflict mitigation—that, based on our expertise in regulating the broker-dealer industry, we believe would further our goal of reducing the effect of conflicts on recommendations and would promote recommendations in the best interest of the retail customer even where conflicts continue to exist.

2. General Obligation To "Act in Best Interest"

We agree with commenters that further clarity should be provided on what it means to "act in the best interest" of a retail customer and particularly what it means to make a recommendation in a retail customer's "best interest" under the Care Obligation. In the guidance that follows and in the detailed discussion of each of the Disclosure, Care, Conflict of Interest, and Compliance Obligations in Section II.C below, we provide further clarity on how a broker-dealer acts in a retail customer's best interest when making a recommendation.

First, in response to comments, we are clarifying the relationship between the General Obligation and the specific component obligations described in Section II.C. These specific component obligations expressly set forth what it means to "act in the best interest" of the retail customer in accordance with the General Obligation. As articulated in the proposal, and discussed in more detail in the relevant sections specifically addressing these obligations, these specific component obligations draw on principles underlying the fiduciary duties of care and loyalty interpreted under the Advisers Act and as recommended in the 913 Study. However, we believe that adopting specific regulatory obligations for broker-dealers appropriately reflects the structure and characteristics of broker-dealer relationships with retail customers and the extensive existing regulatory regime applicable to broker-dealers. Regulation Best Interest does not establish a "safe harbor." The specific component obligations of Regulation Best Interest are mandatory, and failure to comply with any of the components would violate the General Obligation. By contrast, compliance with a safe harbor is optional, and failure to comply with the terms of the safe harbor does not necessarily violate the relevant legal requirement.

Second, while we are declining to expressly define "best interest" in the

[137] In addition to the antifraud provisions of the federal securities laws, courts interpreting state common law have imposed fiduciary obligations on broker-dealers in certain circumstances. *See* Proposing Release at 21584. Generally, courts have found that broker-dealers that exercise discretion or control over customer assets, or have a relationship of trust and confidence with their customers, owe customers a fiduciary duty. *Id.* In developing proposed Regulation Best Interest, the Commission has drawn from principles that apply to investment advice under other regulatory regimes, including state common law fiduciary principles, among others. By doing so, we hope to establish greater consistency in the level of retail customer protections and to make it easier to comply with Regulation Best Interest where other legal regimes, such as state common law drawing upon comparable fiduciary principles, might also apply.

[138] *See, e.g.,* RAND 2018 ("Some participants had never heard of the word, whereas others had heard it but did not know what it meant in this context. Others thought the word "fiduciary implies acting in best interest . . ."). We have modified the standard of conduct disclosure required by Form CRS to eliminate technical words, such as "fiduciary," and describe the standards of conduct of broker-dealers, investment advisers, or dual-registrants using similar terminology in a plain-English manner. In particular, Form CRS uses the term "best interest" to describe how broker-dealers, investment advisers, and dual-registrants must act regarding their retail customers or clients when providing recommendations as a broker-dealer or acting as an investment adviser. *See* Relationship Summary Adopting Release.

[139] *See, e.g.,* Stifel Letter.

[140] As discussed in the Relationship Summary Adopting Release, we are adopting a requirement in Form CRS for a description of a firm's applicable standard of conduct using prescribed wording.

[141] *See* Fiduciary Interpretation.

[142] *See* AARP August 2018 Letter; Wells Fargo Letter; Schwab Letter; NASAA August 2018 Letter.

[143] On March 15, 2018, the DOL Fiduciary Rule was vacated by the United States Court of Appeals for the Fifth Circuit. *Chamber of Commerce* v. *U.S. Dep't of Labor,* 885 F.3d 360 (5th Cir. 2018).

rule text as suggested by some commenters, we are providing interpretations and guidance regarding the application of the specific component obligations and in particular what it means to make a recommendation in the retail customer's "best interest." Consistent with the proposal, compliance with each of the specific component obligations of Regulation Best Interest, including the "best interest" requirement in the Care Obligation, will be applied in a principles-based manner. This principles-based approach to determining what is in the "best interest" is similar to an investment adviser's fiduciary duty, which has worked well for advisers' retail clients and our markets. As proposed, whether a broker-dealer has acted in the retail customer's best interest will turn on an objective assessment of the facts and circumstances of how the specific components of Regulation Best Interest are satisfied at the time that the recommendation is made (and not in hindsight). In particular, whether a broker-dealer's recommendation satisfies the requirements of the Care Obligation is an objective evaluation that is not susceptible to a bright line test; rather it turns on the facts and circumstances of the particular recommendation and the particular retail customer, at the time the recommendation is made. This facts-and-circumstances approach recognizes that one size *does not* fit all, and what is in the best interest of one retail customer may not be in the best interest of another.

We understand that markets evolve and we encourage broker-dealers to have an open dialogue with the Commission and Commission's staff as questions arise.

As a general matter, however, in response to comments, we are changing guidance in the Proposing Release stating that under Regulation Best Interest, a broker-dealer's financial interests cannot be the "predominant motivating factor behind" a recommendation, and that a "broker-dealer would violate proposed Regulation Best Interest's Care Obligation and Conflict of Interest Obligations, if any recommendation was *predominantly motivated* by the broker-dealer's self-interest." [144] Many commenters expressed concerns regarding and requested removal of the "predominantly motivated" language, stating that it contradicted statements that there was no scienter requirement under Regulation Best Interest by requiring a consideration of intent, creating ambiguity as to what extent a broker-dealer's interests could influence its recommendations or requiring a weighing of the broker-dealer's interests against the retail customer's interests.[145] Some commenters, however, indicated support for the "predominantly motivated language" in the context of agreeing with the Commission's proposed "without placing the financial or other interest . . . ahead" phrasing of the best interest standard.[146]

In consideration of these comments, we are modifying these statements to remove this language and to clarify our intent. Specifically, Regulation Best Interest recognizes that while a broker-dealer will inevitably have some financial interest in a recommendation—the nature and magnitude of which will vary—the broker-dealer's interests cannot be placed ahead of the retail customer's interest.[147] Accordingly, Regulation Best Interest will not per se prohibit a broker-dealer from making recommendations where conflicts of interest are present.[148] Instead, Regulation Best Interest includes specific requirements for broker-dealers to address their conflicts of interest.[149] These specific requirements are designed to promote recommendations that are in the best interest of the retail customer despite the existence of these conflicts of interest. In other words, recommendations involving conflicts of interest between the broker-dealer and the retail customer will be permissible under Regulation Best Interest only to the extent that the broker-dealer satisfies the specific requirements of Regulation Best Interest.

Further, for the reasons discussed in the proposal, we confirm that Regulation Best Interest is not intended to limit or eliminate recommendations that encourage diversity in a retail customer's portfolio through investment in a wide range of products, including, when appropriate, products that may involve higher risks or cost to the retail customer, as these products may be in the best interest of certain retail customers at certain times or in certain circumstances.[150] Regulation Best Interest will not necessarily obligate a broker-dealer to recommend the "least expensive" or the "least remunerative" security or investment strategy, provided the broker-dealer complies with the specific component obligations.[151] In other words, Regulation Best Interest will allow a broker-dealer to recommend products that entail higher costs or risks for the retail customer, or that result in greater compensation to the broker-dealer, or that are more expensive, than other products, provided that the broker-dealer complies with the specific component obligations detailed below,[152] including the requirement to make these recommendations exercising reasonable diligence, care, and skill to have a reasonable basis to believe that the recommendation is in the retail customer's best interest and does not place the broker-dealer's interest ahead of the retail customer's interest.

Finally, some commenters sought additional clarity whether Regulation Best Interest would extend beyond a particular recommendation, impose a duty to monitor the retail customer's account, or apply to unsolicited orders.[153] We confirm that, consistent with the Proposing Release and as discussed further below, Regulation Best Interest *would not:* (1) Extend beyond a particular recommendation [154] or generally require a broker-dealer to have a continuous duty to a retail customer or impose a duty to monitor; [155] (2) require the broker-dealer

[144] *See* Proposing Release at 21588.

[145] *See* CFA August 2018 Letter; Better Markets August 2018 Letter; Wells Fargo Letter.

[146] *See* AXA Letter; FSI August 2018 Letter.

[147] *See id. See infra* Section II.C.2.

[148] Such conflicts of interest may include: Charging commissions or other transaction-based fees; receiving or providing differential compensation based on the product sold; receiving third-party compensation; recommending proprietary products, products of affiliates or a limited range of products; recommending a security underwritten by the broker-dealer or a broker-dealer affiliate, including initial public offerings ("IPOs"); recommending a transaction to be executed in a principal capacity; allocating trades and research, including allocating investment opportunities (*e.g.*, IPO allocations or proprietary research or advice) among different types of customers and between retail customers and the broker-dealer's own account; considering cost to the broker-dealer of effecting the transaction or strategy on behalf of the customer (for example, the effort or cost of buying or selling a complex or an illiquid security); or accepting a retail customer's order that is contrary to the broker-dealer's recommendations. While these practices will not be *per se* prohibited by Regulation Best Interest, we are also not saying that these practices are *per se* consistent with Regulation Best Interest or other obligations under the federal securities laws. *See also* Proposing Release at 21587.

[149] *Id* at 21588.

[150] *Id.*

[151] *See id.*

[152] *See id.*

[153] *See, e.g.*, SIFMA August 2018 Letter; Transamerica August 2018 Letter; *see also generally* CFA August 2018 Letter; Better Markets August 2018 Letter.

[154] However, paragraph (a)(2)(iii)(C) of Regulation Best Interest addresses a series of recommended transactions. *See* Section II.C.2.d.

[155] However, as discussed below, it is our position that when a broker-dealer agrees with a retail customer to provide account monitoring services: (1) The broker-dealer would be required to disclose the material facts (including scope and frequency) of those services pursuant to the

to refuse to accept a customer's order that is contrary to the broker-dealer's recommendation; or (3) apply to self-directed or otherwise unsolicited transactions by a retail customer, whether or not she also receives separate recommendations from the broker-dealer.

B. Key Terms and Scope of Best Interest Obligation

1. Natural Person Who Is an Associated Person

In the Proposing Release, we stated that a "natural person who is an associated person" is a natural person who is an associated person as defined in Section 3(a)(18) of the Exchange Act: "any partner, officer, or director or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions); any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer; or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of Section 15(b) of this title (other than paragraph 6 thereof)." [156] In limiting the term to only a "natural person who is an associated person," we sought to exclude affiliated entities of the broker-dealer that are not themselves broker-dealers, as they are not the intended focus of Regulation Best Interest.[157]

We solicited comment on whether the application of the definition was appropriate, alternative definitions should be considered, or the scope should be broadened or narrowed. We received no comments and, for the reasons discussed in the Proposing Release, are using the term "natural person who is an associated person," consistent with the definition in Section 3(a)(18) of the Exchange Act.[158]

2. Recommendation of Any Securities Transaction or Investment Strategy Involving Securities

We proposed to apply Regulation Best Interest to broker-dealer recommendations of any securities transaction or investment strategy involving securities to a retail customer. We believed that by applying Regulation Best Interest to a "recommendation," as that term is currently interpreted under broker-dealer regulation, we would make clear when the obligation applied and would maintain efficiencies for broker-dealers that have already established infrastructures to comply with suitability obligations, which are recommendation-based.[159] Moreover, we believed that focusing on each recommendation would appropriately capture and reflect the various types of recommendations that broker-dealers make to retail customers, whether on an episodic, periodic, or more frequent basis and would help ensure that retail customers receive the protections that Regulation Best Interest is intended to provide. We received numerous comments supporting our general proposed approach to what is a "recommendation," while several commenters suggested modifications regarding the scope of a recommendation or sought additional clarity regarding particular scenarios.[160]

As we indicated in the Proposing Release, in our view, the determination of whether a broker-dealer has made a recommendation that triggers application of Regulation Best Interest should turn on the facts and circumstances of the particular situation and therefore, whether a recommendation has taken place is not susceptible to a bright line definition. Factors considered in determining whether a recommendation has taken place include whether the communication "reasonably could be viewed as a 'call to action'" and "reasonably would influence an investor to trade a particular security or group of securities." [161] The more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a "recommendation." We continue to believe this general framework regarding what is a recommendation is appropriate, and for the reasons discussed in the Proposing Release, are taking this approach.[162]

While certain commenters recommended formally defining the term "recommendation," including what does not come within that term,[163] other commenters maintained there is no need to define "recommendation" and expressed support for harmonizing the term in accordance with existing broker-dealer guidance and case law.[164] We agree with commenters that clarity is important, and we continue to believe that the current principles-based approach underlying existing Commission precedent and guidance will provide effective clarity. Being more prescriptive could result in a definition that is over inclusive, under inclusive, or both.[165] We believe that what constitutes a recommendation is highly fact-specific and not conducive to an express definition in the rule text. Furthermore, we believe that the existing framework has worked well, that broker-dealers generally are familiar with the existing framework, and therefore, that this approach should continue. Accordingly, we are taking the approach as set forth in the Proposing Release, which we believe provides a workable framework and clarity for broker-dealers regarding the contours of a recommendation. To provide further clarity, in response to comments, we describe below the types of communications that we generally view

Disclosure Obligation, and (2) such agreed-upon account monitoring services involve an *implicit* recommendation to hold (*i.e.*, an implicit recommendation not to buy, sell, or exchange assets pursuant to that securities account review) at the time agreed-upon monitoring occurs, which is a recommendation "of any securities transaction or investment strategy involving securities" covered by Regulation Best Interest.

[156] Proposing Release at 21592–21593.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *See generally* SIFMA August 2018 Letter; Financial Engines Letter; IPA Letter; Putnam Letter; Cambridge Letter (recommending the Commission adopt FINRA's approach to determining whether a communication is a "recommendation"). *But see* NASAA August 2018 Letter; BlackRock Letter; FSI August 2018 Letter (recommending modifications or clarifications to "recommendation").

[161] *See* Proposing Release at 21592–21593; *see also* NASD Notice to Members 01–23, Online Suitability—Suitability Rules and Online Communications (Apr. 2001); Notice of Filing Proposed Rule Change to Adopt FINRA Rule 2090 (Know Your Customer) and FINRA Rule 2111 (Suitability) in the Consolidated FINRA Rulebook, Exchange Act Release No. 62718 (Aug. 13, 2010), 75 FR 51310 (Aug. 19, 2010), as amended, Exchange Act Release No. 67218A (Aug. 20, 2010), 75 FR 52562 (Aug. 26, 2010) (discussing what it means to make a "recommendation").

[162] *See* Proposing Release at 21592–21593.

[163] *See, e.g.*, Prudential Letter (recommending an express definition of "recommendation" that would codify guidance).

[164] *See, e.g.*, SIFMA August 2018 Letter ("Similarly, the SEC refers to the FINRA concept of 'recommendation' rather than prescribing a specific definition. We believe this is appropriate, and we believe that a carve-out for educational materials would be consistent with that approach."); Edward Jones Letter ("We do not believe it is necessary for the SEC to define the phrase 'at the time the recommendation is made,' because its meaning is plain."); Cambridge Letter ("FINRA Rule 2111 sets forth an explicit standard for what constitutes a recommendation and recognizes 'call to action' as the hallmark. Cambridge believes this definition is fully understood and in use by the industry." Cambridge also states that harmonizing the final rule with existing FINRA rules and guidance will provide clarity to firms, financial professionals, and investors).

[165] *See id.;* Proposing Release at 21592–21593. Similarly, FINRA has stated that "defining the term 'recommendation' is unnecessary and would raise many complex issues in the absence of specific facts of a particular case." Exchange Act Release No. 37588, 1996 SEC LEXIS 2285, at *29 (Aug. 20, 1996), 61 FR 44100, 44107 (Aug. 27, 1996).

as falling outside of the scope of a recommendation.

We are also generally confirming our interpretation in the Proposing Release of the phrase "any securities transaction or investment strategy involving securities." However, in response to comments regarding the coverage of certain securities or investment strategies, we are providing further clarity regarding our interpretation of this phrase, and in certain instances, refining our interpretation. For example, as discussed more fully below, we are confirming our interpretation that recommendations of "any securities transaction" (purchase, sale, or exchange) and any "investment strategy" involving securities (including an explicit hold recommendation) *are* recommendations "of any securities transaction or investment strategy involving securities."

In addition, we are generally confirming our interpretation that a broker-dealer may agree with a retail customer to take on additional obligations beyond those imposed by Regulation Best Interest, for example, by agreeing with a retail customer to provide monitoring of the retail customer's investments on a periodic basis for purposes of recommending changes in investments.[166] In response to comments, it is our position that when a broker-dealer agrees[167] with a retail customer to monitor that customer's account: (1) The broker-dealer is required to disclose the terms of such account monitoring services (including the scope and frequency of those services) pursuant to the Disclosure Obligation[168] and (2) such agreed-upon monitoring involves an *implicit* recommendation to hold (*i.e.*, recommendation not to buy, sell, or exchange assets pursuant to that securities account review) at the time the agreed-upon monitoring occurs, which is a recommendation "of any securities transaction or investment strategy involving securities" covered by Regulation Best Interest.[169] As discussed further below, in our view, a recommendation of "an investment strategy" includes implicit hold recommendations in this context, where the broker-dealer has agreed to monitor a retail customer's account.[170] We are interpreting the phrase "any security transaction or investment strategy" to include instances where there is an agreement to monitor because in this context there is an implicit recommendation to hold at the time the agreed-upon monitoring occurs when the broker-dealer does not provide an express recommendation to buy, sell, or hold.[171]

We recognize that a broker-dealer may voluntarily, and without any agreement with the customer, review the holdings in a retail customer's account for the purposes of determining whether to provide a recommendation to the customer. We do not consider this voluntary review to be "account monitoring," nor would it in itself create an implied agreement with the retail customer to monitor the customer's account. Any explicit recommendation made to the retail customer as a result of any such voluntary review would be subject to Regulation Best Interest.

Finally, in response to comments received, we have modified the rule text to provide that an "investment strategy involving securities" includes "account recommendations." We interpret "account recommendations" to include recommendations of securities account types generally, as well as recommendations to roll over or transfer assets from one type of account to another (*e.g.*, workplace retirement plan to an IRA). As discussed in more detail below, we believe that recommendations of securities account types are consistent with the types of recommendations that have been treated as investment strategies,[172] because the

[166] Proposing Release at 21594–21595. The Proposing Release referred to "ongoing" monitoring of the retail customer's investments for purposes of recommending changes in investments. *Id.* In the discussion that follows and the Solely Incidental Interpretation, we are clarifying our views regarding broker-dealer account monitoring services, and the application of Regulation Best Interest to such services. As discussed in the Solely Incidental Interpretation, a broker-dealer that agrees to monitor a retail customer's account on a periodic basis for purposes of providing buy, sell, or hold recommendations may still be considered to provide advice in connection with and reasonably related to effecting securities transactions. Broker-dealers may choose to adopt policies and procedures that, if followed, would help demonstrate that any agreed-upon monitoring is in connection with and reasonably related to the broker-dealer's primary business of effecting securities transactions. *See* Solely Incidental Interpretation.

[167] An agreement to provide account monitoring services to a retail customer is not required to be in writing (although whether or not the broker-dealer is providing account monitoring services, and, if so, the scope and frequency of such monitoring services, must be disclosed in writing pursuant to the Disclosure Obligation). For example, a broker-dealer's oral undertaking that the broker-dealer will monitor the retail customer's account on a periodic basis would create an agreement to monitor the account on the terms specified orally. Whether an agreement with the retail customer has been established in the absence of a written agreement or express oral undertaking will depend on an objective inquiry of the particular facts and circumstances, including reasonable retail customer expectations arising from the broker-dealer's course of conduct. In cases where a broker-dealer does not intend to create an implied agreement to monitor the retail customer's account through course of conduct or otherwise, and to avoid ambiguity over whether an implied agreement has been formed, broker-dealers should take steps to ensure that all communications with the retail customer are consistent with its disclosures required under the Disclosure Obligation, which in this case would require the broker-dealer to clearly disclose that the broker-dealer does not monitor the retail customer's account.

[168] To avoid ambiguity over whether or when an implicit hold recommendation has been made, this disclosure should identify with specificity when the agreed upon monitoring will occur. *See also* FINRA Regulatory Notice 12–25 at Q14.

[169] *See* IAC 2018 Recommendation; NAIFA Letter; AFL–CIO April 2019 Letter; *see also* FINRA Regulatory Notice 12–25, Suitability—Additional Guidance on FINRA's New Suitability Rule (May 2012) at Q3 and accompanying footnotes.

[170] *See* FINRA Rule 2111.03; FINRA Regulatory Notice 12–25. The Commission recognizes that its position with respect to Regulation Best Interest differs from that provided in FINRA guidance regarding whether implicit hold recommendations are subject to the suitability rule. This interpretation applies in the context of the protections of Regulation Best Interest, and does not change the scope of the application of the FINRA suitability rule. Further, while for purposes of Regulation Best Interest implicit hold recommendations are generally recommendations of "any securities transaction or investment strategy regarding securities" where a broker-dealer agrees to provide account monitoring services, we are not otherwise addressing the treatment of implicit hold recommendations in other contexts. In other words, except where a broker-dealer agrees to provide account monitoring services as described, consistent with existing FINRA guidance, Regulation Best Interest will only apply to explicit hold recommendations. *See* FINRA Regulatory Notice 12–25 at Q3 and accompanying footnotes.

[171] Our interpretation is generally consistent with commenters' views regarding the application of Regulation Best Interest to implicit hold recommendations in the context of agreed-upon account monitoring services. *See* IAC 2018 Recommendation ("we believe the best interest standard should be applied to the broker-dealer's monitoring of the customer account, where brokers provide ongoing services to the account. In essence, this would apply the best interest standard to the implicit "no recommendation" recommendation that a broker makes when reviewing the account and recommending no change."); NAIFA Letter (asserting broker-dealers should be free to agree to, and define the nature of, any ongoing relationship via contract, such as including monitoring services). *See also* AFL–CIO April 2019 Letter ("adopt a principles-based obligation to monitor the account, where the nature and extent of the monitoring follows the contours of the relationship"). *See also supra* footnote 166 (encouraging broker-dealers to adopt policies and procedures that, if followed, would help demonstrate that any agreed-upon monitoring is in connection with and reasonably related to the broker-dealer's primary business of effecting securities transactions in accordance with the Solely Incidental Interpretation).

[172] Although FINRA has stated that a recommendation concerning the type of workplace retirement plan account in which a customer should hold his retirement investments typically involves a recommended securities transaction, and thus is subject to suitability requirements, FINRA did not address whether such a recommendation would be an investment strategy in the absence of such a recommended securities transaction. FINRA Regulatory Notice 13–45, Rollovers to Individual Retirement Accounts—FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers

type of securities account recommended is an investment strategy that has the potential to greatly affect retail customers' costs and investment returns.[173] For example, different types of securities accounts can offer different features, products, or services, some of which may—or may not—be in the best interest of certain retail customers.[174] Our interpretation is consistent with a majority of the IAC and other commenters that stated that such important recommendations relating to securities are "investment strategies involving securities" and thus within the scope of Regulation Best Interest.[175] We note that, although we are specifically identifying "account recommendations" as an investment strategy involving securities in the rule text, an account recommendation is just one example of an investment strategy.

a. Recommendation

We interpret whether a "recommendation" has been made to a retail customer that triggers the best interest obligation consistent with precedent under the anti-fraud provisions of the federal securities laws as applied to broker-dealers, and with how the term has been applied under the rules of self-regulatory organizations ("SROs").[176] Several commenters supported this approach, and specifically agreed with following the existing facts and circumstances approach as understood under federal securities laws and SRO rules.[177]

Commenters sought additional clarity regarding the scope of a recommendation and in particular whether certain activities or communications would constitute recommendations, and requested that the Commission incorporate or specifically identify exceptions or exclusions such as the exceptions recognized in FINRA Rule 2111.03 (Suitability) or acknowledged by the DOL.[178] Some commenters also sought an explicit carve out or confirmation that certain communications, such as general education materials, general retirement planning materials, or general retirement communications, including "pure distribution recommendations," are not "recommendations" subject to Regulation Best Interest.[179]

The treatment of certain communications as "education" rather than "recommendations" is well understood by broker-dealers. We generally view the following types of communications as not being recommendations of any securities transaction or investment strategy involving securities as long as they do not include, standing alone or in combination with other communications, a recommendation of a particular security or securities or particular investment strategy involving securities:[180]

• General financial and investment information, including:
  ○ Basic investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment,
  ○ historic differences in the return of asset classes (*e.g.*, equities, bonds, or cash) based on standard market indices,
  ○ effects of inflation,
  ○ estimates of future retirement income needs, and
  ○ assessment of a customer's investment profile;

• Descriptive information about an employer-sponsored retirement or benefit plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan;[181]

(Dec. 2013). Taking this approach is consistent with Commission precedent finding a recommendation of a margin strategy to be unsuitable under the NASD suitability rule, in light of the associated transactions costs and the impact the strategy could have on customer returns. *See F.J. Kaufman & Co.*, 50 SEC. 164 (1989) (Commission Opinion) (stating that a broker-dealer recommending the purchase of securities using a margin strategy "at a minimum . . . had an obligation to understand that, in light of the applicable transaction costs, the two components of his recommended strategy, when combined, always would have produced returns inferior to those that could have been obtained from one of those components alone.").

[173] *See* SEC Office of Investor Education and Advocacy, Updated Investor Bulletin: How Fees and Expenses Affect Your Investment Portfolio (Sep. 2016).

[174] In addition to brokerage versus investment advisory accounts, there are also many options or account types within brokerage accounts. For example, brokerage accounts can include: Education accounts (*e.g.*, 529 Plans and tax-free Coverdell accounts); retirement accounts (*e.g.*, IRA, Roth IRA, or SEP–IRA accounts); and specialty accounts (*e.g.*, cash or margin accounts, and accounts with access to Forex or options trading). Different brokerage accounts can also offer different levels of services, such as access to online trading, or can offer different products, for example, in higher dollar amount accounts (*e.g.*, access to products with break-points).

[175] *See, e.g.*, IAC 2018 Recommendation ("Decisions about which type of account to open have the potential to greatly affect their costs. Moreover, both rollover and account type recommendations are recommendations of an 'investment strategy involving securities' that can have substantial potential long-term impacts on investors. Both types of recommendations inherently involve potential conflicts of interest, making it critical that advisers and brokers put their clients' interests ahead of their own in making such recommendations."); Capital Group Letter ("Choosing between a brokerage and an advisory account is an incredibly impactful decision for investors. It is very important that these recommendations be made in the best interest of the retail [customer].").

[176] *See* Proposing Release at 21592–21595. In this regard, Regulation Best Interest does not extend beyond a particular recommendation, for example, by imposing a general broker-dealer duty to monitor a customer's account or by applying the duty to unsolicited orders.

[177] *See, e.g.*, AXA Letter; SIFMA August 2018 Letter; IPA Letter; Putnam Letter; FSI August 2018 Letter; Cetera August 2018 Letter.

[178] *See, e.g.*, Prudential Letter; Transamerica August 2018 Letter; SPARK Letter; *see also* FINRA Rule 2111.03 (excluding the following communications from the coverage of Rule 2111 as long as they do not include (standing alone or in combination with other communications) a recommendation of a particular security or securities: (a) General financial and investment information, including: (i) Basic investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment, (ii) historic differences in the return of asset classes (*e.g.*, equities, bonds, or cash) based on standard market indices, (iii) effects of inflation, (iv) estimates of future retirement income needs, and (v) assessment of a customer's investment profile; (b) Descriptive information about an employer-sponsored retirement or benefit plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan; (c) Asset allocation models that are: (i) Based on generally accepted investment theory, (ii) accompanied by disclosures of all material facts and assumptions that may affect a reasonable investor's assessment of the asset allocation model or any report generated by such model, and (iii) in compliance with Rule 2214 (Requirements for the Use of Investment Analysis Tools) if the asset allocation model is an "investment analysis tool" covered by Rule 2214; and (d) Interactive investment materials that incorporate the above).

The DOL took a similar approach, excluding from the term "recommendation," among other things, general communications and investment education (including plan information, general financial, investment and retirement information, asset allocation models and interactive investment materials). *See* DOL Interpretative Bulletin 96–1; Participant Investment Education, 29 CFR 2509.96–1, 61 FR 29588 (Jun. 11, 1996) (IB 96–1). *See also* DOL, Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 FR 20945, 20975 (Apr. 8, 2016) (noting that the now vacated DOL Fiduciary Rule would have carved out investment education from the definition of investment advice, incorporating much of IB 96–1).

[179] *See* SPARK Letter; NAGDCA Letter. Similarly, communications regarding participation in a plan and communications to make or increase plan contributions, without more, would generally not come within "recommendation."

[180] This concept also applies to investment strategies. *See* FINRA Regulatory Notice 11–25, Know Your Customer and Suitability—New Implementation Date for and Additional Guidance on the Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations (May 2011) at FAQ 9 ("It is important to note, however, that the suitability rule would not apply to a firm's explanation of a strategy falling outside the safe-harbor provision if a reasonable person would not view the communication as a recommendation. Accordingly, the suitability rule would cover a firm's recommendation that a customer purchase securities using margin, whereas the rule generally would not cover a firm's brochure that simply explains the risks and benefits of margin without suggesting that the customer take action.").

[181] While this descriptive information would be treated as "education" rather than a "recommendation," we caution broker-dealers to ensure that communications by their associated persons intended as "education" do not cross the line into "recommendations." *See* FINRA Regulatory Notice 13–45.

• Asset allocation models that are:
  ○ Based on generally accepted investment theory,
  ○ accompanied by disclosures of all material facts and assumptions that may affect a reasonable investor's assessment of the asset allocation model or any report generated by such model, and
  ○ in compliance with FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) if the asset allocation model is an "investment analysis tool" covered by FINRA Rule 2214;[182] and
• Interactive investment materials that incorporate the above.

Thus, for example, a general conversation about retirement planning, such as providing a company's retirement plan options to a retail customer, would not, by itself, rise to the level of a recommendation. Similarly, where a broker-dealer informs a retail customer that he or she needs to take a required minimum distribution under the Internal Revenue Code, we would not interpret such communication, by itself, to rise to the level of a recommendation. Such a communication would be considered investment education or descriptive information, provided it does not involve, for example, a recommendation regarding specific securities to be sold or a recommendation regarding specific securities to be purchased with the proceeds of any sale.[183] We agree with commenters that Regulation Best Interest should not stifle investment education as a means to encourage financial wellness, or otherwise restrict broker-dealers from disseminating information about, for example, retirement plans, and the approach we are taking to what is or is not considered a "recommendation" achieves this goal.[184]

b. Interpretation of Any Securities Transaction or Investment Strategy Involving Securities

As proposed, Regulation Best Interest would apply to recommendations of "any securities transaction" (purchase, sale, and exchange) and any "investment strategy" involving securities (including explicit recommendations to hold a security or regarding the manner in which it is to be purchased or sold). In addition, the Proposing Release stated that securities transactions or investment strategies involving securities might also include recommendations to roll over or transfer assets from one type of account to another, such as recommendations to roll over or transfer assets from a retirement plan.[185] Finally, although we did not propose to cover account type recommendations generally, we noted that evaluating the appropriateness of the type of account is an issue that relates to both broker-dealers and investment advisers, and requested comment on whether and how we should address this type of recommendation.

In response to the Proposing Release, several commenters supported the Commission's approach; however, several commenters also requested modifications or clarifications regarding products or strategies covered under Regulation Best Interest. For example, a majority of the IAC and numerous commenters highlighted the conflicts of interest associated with account type recommendations, and urged the Commission to apply Regulation Best Interest to account type recommendations generally, and to IRA rollovers.[186] Relatedly, several commenters sought clarity regarding whether and when a rollover or account type recommendation would be a "recommendation" under Regulation Best Interest.[187]

After careful consideration of comments and feedback, the Commission has modified the rule text to state that an "investment strategy involving securities" includes "account recommendations." We interpret "account recommendations" to include recommendations by broker-dealers of securities account types generally,[188] as well as recommendations to roll over or transfer assets from one type of account to another (*e.g.,* workplace retirement plan account to an IRA).[189] In addition, the Commission is stating its view that "any securities transaction or investment strategy involving securities" not only includes explicit hold recommendations, but also includes implicit hold recommendations that are the result of agreed-upon account monitoring between the broker-dealer and retail customer.[190]

Account Recommendations

The Proposing Release indicated that securities transactions or investment strategies involving securities could include recommendations to roll over or transfer assets from one type of account to another, such as recommendations to roll over or transfer assets in a workplace retirement plan account to an IRA, and requested comment on whether and how to address account type recommendations.

Several commenters suggested expanding Regulation Best Interest to explicitly cover rollover recommendations and recommendations by firms regarding account types. For example, a majority of the IAC explained that rollover recommendations "are frequently provided at a critical juncture in an investor's life—retirement—and are often irrevocable decisions," and further noted that "[d]ecisions about which type of account to open have the

[182] In this regard, as an allocation recommendation becomes narrower or more specific, the recommendation gets closer to becoming a recommendation of particular securities and, thus, subject to the suitability rule. *See* FINRA Regulatory Notice 12–25 at FAQ 8.

[183] *See, e.g.,* SPARK Letter (asking for confirmation that "pure 'distribution recommendations' involving retirement accounts, such as those required under Internal Revenue Code section 401(a)(9), are not a 'recommendation of any securities transaction or investment strategy involving securities.' "). However, informing a retail customer about a required minimum distribution may become a recommendation where a broker-dealer includes (standing alone or in combination with other communications) a recommendation of, or regarding, a particular security or securities or an investment strategy involving securities. *See* FINRA Rule 2111 (Suitability) FAQ.

[184] *See* SPARK Letter (suggesting expressly excluding beneficial conversations about retirement savings and "ensuring that Regulation Best Interest does not discourage broker-dealers in any way from having these important conversations with retirement investors"); *see also* Transamerica August 2018 Letter (suggesting the exclusion of various conversations designed to facilitate retirement savings).

[185] *See* Proposing Release at 21595.

[186] *See, e.g.,* IAC 2018 Recommendation (supporting the "expan[sion] of the best interest obligation to cover rollover recommendations and recommendations by dual registrant firms regarding account types"); *see also* NASAA August 2018 Letter; SPARK Letter; Financial Engines Letter; Cetera August 2018 Letter; AFL–CIO April 2019 Letter. *But see* SIFMA August 2018 Letter (viewing recommendations of an account type as not involving a recommendation of a securities transaction or investment strategy involving securities).

[187] *See, e.g.,* NAGDCA Letter; FPC Letter.

[188] In the discussion of the Care Obligation in Section II.C.2, we are also setting forth additional positions regarding the application of the Care Obligation to account type recommendations, as well as recommendations to roll over or transfer assets from one account to another. *See also* Fiduciary Interpretation (explaining that "[a]dvice about account type includes advice about whether to open or invest through a certain type of account (*e.g.,* a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.,* a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages").

[189] A majority of the IAC and numerous commenters expressed the importance of account rollovers and the need for rollovers to be covered under Regulation Best Interest. *See, e.g.,* IAC 2018 Recommendation; Financial Engines Letter.

[190] Several commenters stated that broker-dealers should be able to contract with retail customers to provide additional services, such as account monitoring, and that such agreed upon services should be subject to Regulation Best Interest. *See, e.g.,* NAIFA Letter; IAA August 2018 Letter; AFL–CIO April 2019 Letter.

potential to greatly affect [retail customers'] costs" and that both rollovers and account type recommendations can "have substantial potential long-term impacts on investors." [191] Another commenter noted that "[r]etirees have no practical ability to recoup lost spending power by returning to work and setting aside additional retirement savings, so they are particularly vulnerable to the adverse consequences of poor advice and high expenses." [192] Finally, a majority of the IAC and several commenters noted that broker-dealers and investment advisers alike have a strong economic incentive to recommend investors roll over plan assets into an IRA or otherwise transfer assets to open an account with the broker-dealer or investment adviser.[193]

After consideration of comments received, including concerns expressed about the conflicts associated with recommendations of account types, IRA rollovers and retirement advice more broadly, it is our view that Regulation Best Interest should apply broadly to recommendations of securities transactions and investment strategies involving securities. Accordingly, the Commission is including in the rule text account recommendations as recommendations that will be covered by Regulation Best. "Account recommendations" include recommendations of securities account types generally (*e.g.*, to open an IRA or other brokerage account), as well as recommendations to roll over or transfer assets from one type of account to another (*e.g.*, a workplace retirement plan account to an IRA).

Although account recommendations, including recommendations of a securities account type generally, as well as recommendations to roll over assets from a workplace retirement plan account to an IRA or to open an IRA held at the broker-dealer, will almost always involve a "securities transaction" (such as a securities purchase, sale, or exchange), and thus would generally be subject to Regulation Best Interest, we are modifying the rule text to provide that such recommendations are "investment strategies involving securities" for purposes of Regulation Best Interest, regardless of whether they are tied to a specific securities transaction.[194] Existing broker-dealer regulation and guidance stresses that the term "investment strategy" is to be interpreted broadly, and would include, among others, recommendations generally to use a bond ladder, day trading, "liquefied home equity," or margin strategy involving securities, irrespective of whether the recommendations mention particular securities.[195] This approach appropriately recognizes that customers may rely on firms' and associated persons' investment expertise and knowledge, and therefore the broker-dealer should be responsible for such recommendations, regardless of whether those recommendations result in transactions or generate transaction-based compensation.[196]

Account recommendations, including recommendations of securities account types generally (*e.g.*, to open an IRA or other brokerage account), and recommendations to roll over or transfer assets into an IRA or another securities account, are consistent with the types of recommendations that have been treated as investment strategies under existing suitability rules.[197] Specifically, like other investment strategies, account recommendations are recommendations of an approach or method (*i.e.*, a "strategy") for how a retail customer should engage in transactions in securities, involve conflicts of interest, and can have long-term effects on investors' costs and returns from their investments.[198] In addition, we believe retail customers rely on broker-dealers' and associated persons' investment expertise and knowledge with respect to such recommendations. As a result, such recommendations must be made consistent with the retail customer's objectives and needs (*i.e.*, investment profile), irrespective of whether those recommendations are tied to a specific securities transaction. Consistent with a majority of the IAC's and other commenters' suggestions, we are modifying the rule text to state that the term "investment strategy involving securities" includes "account recommendations," which we interpret to include recommendations of securities account types generally, as well as recommendations to roll over or transfer assets.[199]

Thus, such account recommendations will be subject to Regulation Best Interest even if there is not a recommendation of a securities transaction. Although we proposed only covering account type recommendations that are tied to securities transactions, and not account type recommendations generally, we agree with commenters and a majority of the IAC that consistent with other investment strategies involving securities, securities account type recommendations should be covered under Regulation Best Interest regardless of whether those recommendations result in transactions or generate transaction-based compensation.[200] In addition, as discussed in the Fiduciary Interpretation, investment advisers' fiduciary duty applies to advice to clients about account types, which satisfies the concerns about parity set forth in the Proposing Release and protects retail customers of broker-dealers and retail clients of investment advisers alike.[201]

Where a financial professional who is dually registered (*i.e.*, an associated person of a broker-dealer and a supervised person of an investment adviser (regardless of whether the professional works for a dual-registrant, affiliated firm, or unaffiliated firm)) is making an account recommendation to a retail customer,[202] whether Regulation Best Interest or the Advisers Act will apply will depend on the capacity in which the financial professional making

[191] IAC 2018 Recommendation. *See also* Letter from Brian H. Graff, Executive Director and CEO, Craig P. Hoffman, General Counsel, Doug Fisher, Director of Retirement Policy, American Retirement Association ("ARA") (Dec. 13, 2018) ("ARA December 2018 Letter"); Transamerica August 2018 Letter.

[192] Fiduciary Benchmarks Letter.

[193] *See, e.g.*, IAC 2018 Recommendation; NASAA August 2018 Letter; Fiduciary Benchmarks Letter.

[194] A recommendation that a retail customer roll over or transfer assets to an IRA held at the broker-dealer, or open an IRA or another securities account with a broker-dealer, presumes that the recommendation would involve transactions in securities, even if the rollover or account recommendation does not result in transactions or transaction-based compensation.

[195] *See* FINRA Rule 2111.03; FINRA Regulatory Notice 12–25 at Q7.

[196] *See* FINRA Regulatory Notice 11–02, Know Your Customer and Suitability—SEC Approves Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations (Jan. 2011).

[197] *See supra* footnotes 172 and 173.

[198] *See* Capital Group Letter; *see also* IAC 2018 Recommendation; NASAA August 2018 Letter.

[199] *See, e.g.*, IAC 2018 Recommendation; Capital Group Letter ("Choosing between a brokerage and an advisory account is an incredibly impactful decision for investors. It is very important that these recommendations be made in the best interest of the retail [customer].").

[200] *See, e.g.*, IAC 2018 Recommendation; NASAA August 2018 Letter.

[201] *See* Fiduciary Interpretation.

[202] As discussed in more detail below in Section II.B.3.b, Regulation Best Interest applies to a retail customer who receives a recommendation and *uses* the recommendation. Among other things, we interpret a retail customer to *use* a recommendation when: (1) The retail customer opens a brokerage account with the broker-dealer, regardless of whether the broker-dealer receives compensation; (2) the retail customer has an existing account with the broker-dealer and receives a recommendation from the broker-dealer, regardless of whether the broker-dealer receives or will receive compensation, directly or indirectly, as a result of that recommendation; or (3) the broker-dealer receives or will receive compensation, directly or indirectly as a result of that recommendation, even if that retail customer does not have an account at the firm.

the recommendation is acting.[203] As discussed further in the Care Obligation, if the individual is acting as a broker-dealer or associated person thereof, he or she must comply with Regulation Best Interest and will need to take into consideration all types of accounts offered by the financial professional (*i.e.,* both brokerage and advisory accounts) when making the recommendation of an account that is in the retail customer's best interest.

In the case of an account recommendation by a financial professional who is only registered as an associated person of broker-dealer (regardless of whether that broker-dealer entity is a dual-registrant or affiliated with an investment adviser), Regulation Best Interest will apply to the recommendation. Further, the associated person can only recommend a brokerage account that the broker-dealer offers when the associated person has a reasonable basis to believe that the recommended brokerage account is in the best interest of the retail customer and the broker-dealer otherwise complies with Regulation Best Interest.

Regulation Best Interest would apply to account recommendations by the dual-registrant firm, and consistent with the Conflict of Interest Obligation, the firm would need to, among other things, establish, maintain and enforce policies and procedures to identify, disclose, and mitigate, any incentives for an associated person of the broker-dealer to place the interest of the firm or the associated person ahead of the interests of the retail customer.

In the discussion of the Care Obligation below, we discuss how a broker-dealer and associated persons of a broker-dealer can make recommendations of securities account types, including recommendations to open an IRA or to roll over assets into an IRA, in the best interest of the retail customer.

Hold Recommendations

The Proposing Release stated that Regulation Best Interest would apply to any securities transaction or investment strategy involving securities, including explicit recommendations to hold a security or regarding the manner in which it is to be purchased or sold to retail customers.[204] The Proposing Release also recognized that broker-dealers may agree with a retail customer by contract to take on additional obligations beyond those imposed by Regulation Best Interest, for example, by agreeing with a retail customer to provide periodic or ongoing services, such as ongoing monitoring of the retail customer's investments for purposes of recommending changes in investments.[205] To the extent that a broker-dealer takes on such additional obligations, the Proposing Release indicated that Regulation Best Interest would apply to any recommendations about securities or investment strategies involving securities made to retail customers resulting from such services.

Several commenters agreed that broker-dealers should be able to contract with retail customers for additional services and be able to expand the relationship on their own terms, while other commenters recommended that a duty to monitor apply to broker-dealers depending on the facts and circumstances.[206] Other commenters suggested that the Commission not impose a duty to monitor brokerage accounts.[207]

We are confirming that, consistent with existing broker-dealer regulation, Regulation Best Interest will apply to explicit recommendations to hold a security or securities.[208] We are also confirming that Regulation Best Interest does not impose a duty to monitor a retail customer's account. We agree, however, with commenters that Regulation Best Interest should apply to any recommendations that result from the account monitoring services that a broker-dealer agrees to provide.[209] We believe that any monitoring service agreed to by the broker-dealer, the scope and frequency of which would be required to be disclosed pursuant to the Disclosure Obligation, would be covered by Regulation Best Interest, as these activities will result in a recommendation to purchase, sell, or hold a security, or the manner in which to purchase, sell, or hold a security, at each time the agreed-upon monitoring occurs.[210] Thus, by agreeing to perform account monitoring services, the broker-dealer is taking on an obligation to review and make recommendations with respect to that account (*e.g.,* to buy, sell or hold) on that specified, periodic basis.[211] For example, if a broker-dealer agrees to monitor the retail customer's account on a quarterly basis, the quarterly review and each resulting recommendation to purchase, sell, or hold, will be a recommendation subject to Regulation Best Interest. This is the case even in instances where the broker-dealer does not communicate any recommendation to the retail customer. We believe that such an "implicit" recommendation to hold in this context should be covered under Regulation Best Interest in addition to "explicit" recommendations to hold.[212]

This position differs from FINRA guidance, which generally states that the FINRA suitability rule does not cover an implicit recommendation to hold.[213] We believe that "implicit" hold

[203] *See* Section II.B.3.d, below for discussion of factors the Commission will consider in determining capacity. *See also* Fiduciary Interpretation at footnotes 42–44 and accompanying text. As discussed in the Fiduciary Interpretation, while advice to prospective clients about these matters is subject to the antifraud provisions under section 206 of the Advisers Act, the adviser must also satisfy its fiduciary duty with respect to any such advice (*e.g.,* regarding account type) once a prospective client becomes a client. Thus, at the point in time at which the prospective client becomes a client of the investment adviser (*e.g.,* at account opening), the fiduciary duty applies. *Id.*

[204] Proposing Release at 21593–21595.

[205] *Id.* We also asked whether broker-dealers who provide ongoing monitoring should be considered investment advisers. *Id.* at 21592.

[206] *See, e.g.,* NAIFA Letter ("Additionally, while the best interest standard applies to each recommendation and may not be waived or modified by contract as it applies to those recommendations, it should not be interpreted to create obligations with respect to other, expanded services (*e.g.,* ongoing research and monitoring services, regular in-person meetings, etc.). Again, however, advisors and consumers may agree to expand the relationship in these ways on their own terms."); *see also* CFA August 2018 Letter; Better Markets August 2018 Letter (recommending the Commission establish a duty to monitor depending on the facts and circumstances); AFL–CIO April 2019 Letter.

We note that additional commenters maintained that if broker-dealers agree with retail customers to provide ongoing monitoring for purposes of recommending changes in investments, they should be considered investment advisers. *See* NASAA August 2018 Letter; FPC Letter. We have addressed these comments in the context of the Solely Incidental Interpretation. *See* Solely Incidental Interpretation.

[207] *See* IAA August 2018 Letter.

[208] *See* FINRA Regulatory Notice 12–25.

[209] *See* NAIFA Letter; IAA August 2018 Letter.

[210] In agreeing to provide any account monitoring services, broker-dealers need to consider whether the monitoring services fit within the broker-dealer exclusion from the Advisers Act. *See* Solely Incidental Interpretation.

[211] The broker-dealer would also be required to disclose the existence, scope, and frequency of such account monitoring services pursuant to the Disclosure Obligation. To avoid ambiguity over whether or when an implicit hold recommendation has been made, this disclosure should identify with specificity when the agreed upon monitoring will occur.

[212] *See* FINRA Rule 2111.03 (noting "[t]he phrase 'investment strategy involving a security or securities' used in this Rule is to be interpreted broadly and would include, among other things, an explicit recommendation to hold a security or securities."); *see also* NASAA August 2018 Letter.

[213] FINRA Regulatory Notice 11–25 at Q7 ("The rule, for instance, would not apply where an associated person remains silent regarding, or refrains from recommending the sale of, securities held in an account. That is true regardless of whether the associated person previously recommended the purchase of the securities, the customer purchased them without a recommendation, or the customer transferred them into the account from another firm where the same or a different associated person had handled the account."). *See also id.* at footnote 21 ("To the extent that a customer account at a broker-dealer

recommendations in this context, where the broker-dealer agrees to provide specified account monitoring services, are similar to explicit hold recommendations that are considered "investment strategies" because they would constitute the type of recommendations that retail customers would be expected to rely upon and would be a "call to action" in the sense of a recommendation that the customer stay the course.[214] We believe that, in this context, silence is tantamount to an explicit recommendation to hold, and should be viewed as a recommendation to hold the securities for purposes of Regulation Best Interest.[215] Our interpretation that the term "investment strategy involving securities" includes implicit recommendations to hold that result from an agreement to monitor, at the time the agreed-upon monitoring occurs, is generally consistent with the treatment of similar broker-dealer communications as "investment strategies," and applies the Regulation Best Interest protections to retail customers relying on a broker-dealer's agreement to monitor the customer's account.[216]

Although for purposes of Regulation Best Interest, implicit hold recommendations will be considered a recommendation of "any securities transaction or investment strategy regarding securities" where a broker-dealer has agreed to provide account monitoring services, we are not otherwise changing the treatment of implicit hold recommendations in other contexts. In other words, unless the broker-dealer has agreed to provide account monitoring services as described, Regulation Best Interest would only apply to explicit—*and not to implicit*—hold recommendations regarding security positions in an account.[217] This is consistent with the fact that Regulation Best Interest would not impose a duty to monitor customer accounts.[218]

Finally, although certain commenters stated that account monitoring services should only be performed by investment advisers,[219] we reiterate that Regulation Best Interest does not change the scope of account monitoring that broker-dealers may agree to provide, nor does it change the scope of activities that would come within the "solely incidental" prong of the broker-dealer exclusion to the definition of "investment adviser" in the Advisers Act. We recognize that a broker-dealer may voluntarily, and without any agreement with the customer, review the holdings in a retail customer's account for the purpose of determining whether to provide a recommendation to the customer. We view this voluntary review—and any subsequent recommendation to the customer—as in connection with and reasonably related to the broker-dealer's primary business of effecting securities transactions.[220]

Recommendations Involving Retirement Accounts

Furthermore, based on comments, our position is that recommendations to retail customers regarding retirement accounts would also be subject to Regulation Best Interest where they involve securities transactions or investment strategies involving securities. We agree with commenters that recommendations to retail customers to take distributions from proceeds of specific securities or to take in-service loans from an employer-sponsored plan are recommendations of a securities transaction, as they would involve a recommendation to sell a security.[221] However, while such recommendations to take plan distributions are "recommendations" and thereby subject to Regulation Best Interest, we reiterate that general communications by broker-dealers relating to distributions in the context of a required minimum distribution or education regarding a plan's options would not, by themselves, constitute recommendations that would be subject to Regulation Best Interest.[222]

3. Retail Customer

We proposed to define retail customer as: "a person, or the legal representative of such person, who: (1) 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 (2) uses the recommendation primarily for personal, family or household purposes." [223] The definition was generally intended to track the definition of "retail customer" under Section 913(a) of the Dodd-Frank Act with some differences, as described in the Proposing Release.[224]

In proposing the definition, we intended to exclude recommendations

can be discretionary under applicable federal securities laws, the suitability rule generally would not apply where a firm refrains from selling a security. The rule states that it applies to explicit recommendations to hold. Unless the facts indicate that an associated person's failure to sell securities in a discretionary account was intended as or tantamount to an explicit recommendation to hold, FINRA would not view the associated person's inaction or silence in such circumstances as a recommendation to hold the securities for purposes of the suitability rule.").

[214] *See* FINRA Regulatory Notice 11–25 at Q7 ("The rule would apply, for example, when an associated person meets with a customer during a quarterly or annual investment review and explicitly advises the customer not to sell any securities in or make any changes to the account or portfolio."). While the FINRA guidance goes on to state that the rule generally would not cover an implicit recommendation to hold, it does not address the particular scenario in which a broker-dealer agrees to monitor an account (such as a quarterly review) and discloses the terms of that monitoring, and then during that review is silent on whether the customer should make any changes. *Id.; see also* FINRA Regulatory Notice 12–25 at Q3 and accompanying footnotes.

[215] *See* FINRA Regulatory Notice 11–25 at footnote 21.

[216] Our interpretation is generally consistent with a majority of the IAC's and other commenters' views regarding application of Regulation Best Interest to implicit hold recommendations in the context of agreed-upon account monitoring services. *See* IAC 2018 Recommendation ("We believe the best interest standard should be applied to the broker-dealer's monitoring of the customer account, where brokers provide ongoing services to the account. In essence, this would apply the best interest standard to the implicit "no recommendation" recommendation that a broker makes when reviewing the account and recommends no change."); NAIFA Letter (asserting broker-dealers should be free to agree to, and define the nature of, any ongoing relationship via contract, such as including monitoring services); AFL–CIO April 2019 Letter.

[217] FINRA Notice to Members 11–25 at Q7.

[218] Our approach does not require broker-dealers to undertake account monitoring, unless they choose to do so. *See* Solely Incidental Interpretation.

[219] *See, e.g.,* NASAA August 2018 Letter; FPC Letter.

[220] *See* Solely Incidental Interpretation. Absent an agreement with the customer (which would be required to be disclosed pursuant to the Disclosure Obligation), we do not consider this voluntary review to be "account monitoring" nor would it in itself create an obligation under Regulation Best Interest, provided of course that any recommendation made to the customer as a result of any such voluntary review would be subject to Regulation Best Interest.

[221] *See supra* footnotes 185–189 and accompanying text. *See, e.g.,* NASAA August 2018 Letter; Fiduciary Benchmarks Letter; IAC 2018 Recommendation.

[222] For example, where a broker-dealer informs a retail customer that based on age and other relevant factors, he or she needs to take a required minimum distribution, but does not otherwise recommend specifics, such as what securities to sell, or where to place the proceeds, the communication would generally not be a "recommendation" subject to Regulation Best Interest. As with other communications subject to broker-dealer regulation, an inquiry of whether a "recommendation" was made would depend on the facts and circumstances relating to the communication, as discussed more fully above. *See supra* Section II.B.2.a.

[223] As we stated in the Proposing Release, we believe that broker-dealers would generally be required to obtain sufficient facts about a customer to determine an account's primary purpose for purposes of Regulation Best Interest. *See* Proposing Release at 21595.

[224] *See* Proposing Release at Section II.C.4. Section 913(a) defines "retail customer" as a natural person, or the legal representative of such 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.

related to commercial or business purposes but for the definition to remain sufficiently broad to capture recommendations related to the various reasons retail customers may invest, such as saving for retirement, education expenses and other savings purposes. As such, the proposed definition applied to any persons who receive a recommendation from a broker or dealer or a natural person who is an associated person of a broker or dealer, provided that the recommendation is primarily for personal, family or household purposes. In the case of dual-registrants, the proposed definition was intended to apply only to recommendations made by broker-dealers in their brokerage capacity, based on a facts and circumstances analysis and consistent with existing guidance.[225] The proposed definition differed from the definition of "retail investor" in the Relationship Summary Proposal as the Relationship Summary was intended for a broader range of investors.[226]

The Commission requested comment on the scope and definition of retail customer and received a range of comments requesting: modification of the definition to focus on natural persons; clarification of the "personal, family or household purposes" qualification; harmonization with the definition in Form CRS; and further guidance surrounding the treatment of dual-registrants. In consideration of the comments received, the Commission is modifying the definition of "retail customer" to mean a natural person, or the legal representative of such natural 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 revised definition shifts the focus to natural persons, as opposed to any persons, but otherwise it is adopted largely as proposed. However, as discussed below, the Commission is providing additional interpretations, guidance and clarification regarding: The interpretation of the "personal, family, or household purposes" qualifier; the interaction of this definition with the definition of "retail investor" in Form CRS; what it means for a retail customer to "use" the recommendation; and the status of dual-registrants. Furthermore, we are providing guidance on who would be considered to be the legal representative of a natural person for purposes of this definition.

a. Focus on Natural Persons and Legal Representatives of Natural Persons

The Commission proposed to extend the definition of "retail customer" in Regulation Best Interest beyond natural persons to any persons to cover non-natural persons (*e.g.,* trusts that represent the assets of a natural person), which the Commission stated it believed would benefit from the protections of Regulation Best Interest.

Commenters generally suggested that the definition of retail customer be modified to focus on natural persons.[227] To that end, a number of commenters suggested eliminating the "personal, family or household purposes" qualifier from the definition under Dodd-Frank Section 913.[228] Many commenters suggested excluding institutional investors and professional advisers or fiduciaries, including retirement plan representatives [229] and family offices,[230] while a few stated that non-professional plan fiduciaries should have the same protections as retail customers.[231] Many commenters suggested harmonizing the definition with FINRA's definition,[232] in particular, by excluding: (1) Institutional accounts that would be exempted from certain suitability protections under FINRA Rule 2111 (Suitability) [233] or (2) institutional investors as defined in Rule 2210 (Communications with the Public),[234] which is broader [235] and would include, among others, certain workplace retirement plans. Conversely, a few commenters believed that Regulation Best Interest should apply to both retail and institutional customers.[236]

In response to comments, we are modifying the definition to focus on natural persons and their legal representatives, and are clarifying that we interpret "legal representatives" to mean non-professional legal representatives of a natural person, as we discuss below. We believe this change and clarification provides more certainty that institutions and certain professional fiduciaries are not covered for purposes of Regulation Best Interest. It would also retain, however, coverage of certain legal entities (*i.e.,* trusts that represent the assets of a natural person) specifically identified in the Proposing Release as "retail customers" within the scope of Regulation Best Interest, but would not exclude certain high-net-worth natural persons, as was suggested by some commenters [237] to match the current FINRA exclusion of such natural persons from customer-specific suitability requirements.[238]

While the Commission recognizes commenters' concerns regarding compliance costs and burdens if the definition of retail customer does not align with FINRA's exclusion of certain institutional accounts and institutional investors, we have decided not to align our definition with FINRA's exclusion because we believe conflicted recommendations can also result in harm to high net-worth individuals.[239]

[225] *Id.*

[226] *Id.*

[227] *See, e.g.,* Cetera August 2018 Letter; Invesco Letter.

[228] *See* FPC Letter; SIFMA August 2018 Letter; BlackRock Letter. *Contra* ACLI Letter (supporting the provision in Section 913 and positing that Regulation Best Interest appropriately implements this foundational threshold).

[229] *See, e.g.,* SIFMA August 2018 Letter; Vanguard Letter; Prudential Letter; ICI Letter; Fidelity Letter.

[230] *See, e.g.,* TIAA Letter; SIFMA August 2018 Letter; Letter from Stuart J. Kaswell, Executive Vice President and Managing Director, Managed Funds Association, and Jiri Krol, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association (Aug. 7, 2018) ("Managed Funds Association Letter").

[231] ARA August 2018 Letter; CFA August 2018 Letter.

[232] *See, e.g.,* UBS Letter; Bank of America Letter; Raymond James Letter; TIAA Letter; Letter from Joseph Giovanniello, Ladenburg Thalmann Financial Services Inc. (Jul. 30, 2018) ("Ladenburg Letter").

[233] FINRA Rule 2111(b). Institutional accounts include banks, savings and loan associations, insurance companies, registered investment companies, state and Federal Registered investment advisers, and other persons with total assets of at least $50 million.

[234] FINRA Rule 2210(a)(4). Institutional investors include, in addition to persons with institutional accounts, government entities and their subdivisions, employee benefit plans, qualified plans as defined in Exchange Act Section 3(a)(12)(C), broker-dealers and registered representatives, and persons acting solely on behalf of such institutional investors.

[235] *See, e.g.,* SIFMA August 2018 Letter; TIAA Letter; IPA Letter.

[236] NASAA August 2018 Letter, Better Markets August 2018 Letter; FPC Letter. *But see* Managed Funds Association Letter (suggesting that sophisticated investors should not be treated as retail customers).

[237] *See, e.g.,* Morgan Stanley Letter; FSI August 2018 Letter.

[238] *See* FINRA Rule 4512(c), which includes within the definition of "institutional account" any person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million. Currently, under FINRA rules, broker-dealers are exempt from the customer-specific suitability obligations with respect to these "institutional accounts" if certain conditions are met. FINRA Rule 2111(b).

[239] The Commission has brought numerous enforcement actions against financial professionals engaged in schemes to defraud certain high net-worth individuals, in particular, professional athletes. *See, e.g. SEC* v. *Charles A. Banks, IV,* Civil Action No. 16–CV–3399–TWT (N.D. Ga. Nov. 2, 2018) (former investment adviser who fraudulently induced a former professional athlete to invest $7.5 million in a sports team and apparel merchandise company based on a series of misrepresentations); *SEC* v. *Ash Narayan, The Ticket Reserve Inc. a/k/ a Forward Market Media, Inc., Richard M. Harmon,*

We believe the benefits of Regulation Best Interest justify compliance costs as these individuals could benefit from the protections included in Regulation Best Interest regardless of their net worth, which may not necessarily correlate to a particular level of financial sophistication.[240]

In addition, we view a "legal representative" of a natural person to only cover non-professional legal representatives (*e.g.,* a non-professional trustee that represents the assets of a natural person and similar representatives such as executors, conservators, and persons holding a power of attorney for a natural person),[241] thereby excluding certain institutions from Regulation Best Interest's coverage. In capturing non-professional legal representatives within the definition of retail customer, we are providing the protections of Regulation Best Interest to non-professional persons who are acting on behalf of natural persons but who are not regulated financial services industry professionals retained by natural persons to exercise independent professional judgment, such as registered investment advisers and broker-dealers, corporate fiduciaries (*e.g.,* banks, trust companies and similar financial institutions) and insurance companies, and the employees or other regulated representatives of such advisers, broker-dealers, corporate fiduciaries and insurance companies.[242] Our definition is intended to capture natural persons and their legal representatives who rely directly on the broker-dealer for the recommendation. Accordingly, such non-professional legal representatives would not include regulated financial industry professionals. We believe this responds to commenters who stated that it should not be necessary to provide the protections of Regulation Best Interest to regulated professionals.[243] Importantly, however, this will not relieve firms or financial professionals retained to represent the assets of natural persons from their own obligations to retail customers.[244]

We retained the "personal, family, or household purposes" qualifier,[245] but are providing additional guidance and clarification on our interpretation of this phrase to address comments received. In particular, we interpret "personal, family or household purposes" to mean that *any* recommendation to a natural person for his or her account would be subject to Regulation Best Interest, other than recommendations to natural persons seeking these services for commercial or business purposes. Accordingly, under this interpretation, "personal, family or household purposes" would not include, for example, an employee seeking services for an employer or an individual who is seeking services for a small business or on behalf of another non-natural person entity such as a charitable trust.[246] As discussed above [247] and pursuant to the Care Obligation,[248] we believe broker-dealers are able to obtain sufficient facts to determine the purpose for which a recommendation will be used.

We also confirm that "personal, family or household purposes" would cover retirement accounts, as retirement savings is a personal, household or family purpose. Accordingly, the definition of retail customer will include a natural person receiving recommendations [249] for his or her own retirement account, including but not limited to IRAs and individual accounts in workplace retirement plans, such as 401(k) plans and other tax-favored retirement plans.[250] For example, plan participants receiving recommendations about whether to take a distribution from a 401(k) plan or other workplace retirement plan and how to invest that distribution would be covered as retail customers. Similarly, a plan participant receiving recommendations for the participant's individual account held in a 401(k) plan or other workplace retirement plan would be a retail customer for purposes of Regulation Best Interest.[251]

The Commission acknowledges concerns from some commenters that workplace retirement plans and their representatives (*e.g.,* plan sponsors, trustees, other fiduciaries) and service providers should be included in the definition of retail customer.[252] However, we understand that plan representatives of workplace retirement plans typically are not receiving recommendations for their own account for personal, family or household purposes when they engage a broker-dealer to provide services to a retirement plan established, maintained,

and John A. Kaptrosky, Civil Action No. 16–CV–1417–M (N.D. Tex. May 24, 2016) (investment adviser who misappropriated millions of dollars from accounts he managed for professional athletes and invested them in online sports and entertainment ticket business on whose board he served).

In addition, reports indicate deficiencies in financial literary among the general population of retail investors. *See* Federal Research Division, Library of Congress, *Financial Literacy Among Retail Investors in the United States* (Dec. 30, 2011) at 25, *available at https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part2.pdf* ("Library of Congress Report").

[240] *See* Primerica Letter (noting challenges in using wealth and education as proxies for investment sophistication).

In addition, the definition of "retail customer" under Section 913(a) of the Dodd-Frank Act did not make a distinction based on net worth.

[241] A non-professional legal representative is covered pursuant to this rule even if another person is a trustee or managing agent of the trust.

[242] *See also* Relationship Summary Adopting Release.

[243] *See, e.g.,* Bank of America Letter; Invesco Letter; Letter from Bob Grohowski, Senior Legal Counsel, and Jon Siegel, Senior Legal Counsel, T. Rowe Price (Aug. 10, 2018) ("T. Rowe Letter"); Oppenheimer Letter; ICI Letter.

[244] *See also* Relationship Summary Adopting Release.

[245] Regulation Best Interest relies in part on the statutory authority provided in Section 913 of the Dodd-Frank Act which includes the statutory definition of "retail customer." *See* Section 913(a) of the Dodd-Frank Act.

[246] As discussed below, to the extent a plan representative who decides service arrangements for a workplace retirement plan is a sole proprietor or other self-employed individual who will participate in the plan, the plan representative will be a retail customer to the extent that the sole proprietor or self-employed individual receives recommendations directly from a broker-dealer primarily for personal, family or household purposes.

[247] *See supra* footnote 223 and accompanying text.

[248] Pursuant to the Care Obligation, a broker-dealer is required to ascertain the customer's investment profile which considers, among other things, financial situation and needs and investment objectives, in evaluating a recommendation and whether it is in a retail customer's best interest.

[249] *See* Section II.C.2 (describing what constitutes a "recommendation" for purposes of Regulation Best Interest).

[250] Such IRAs include, for example, individual retirement accounts and individual retirement annuities described by Internal Revenue Code section 408(a) and (b), "simplified employee pensions" (SEPs) described by Code section 408(k), and simple retirement accounts described by Code section 408(p) (SIMPLE IRAs). In response to commenters, we also clarify that workplace retirement plans include any arrangement available at a workplace that provides retirement benefits or allows saving for retirement, including, for example, any 401(k) plans or other plan that meet requirements for qualification under Code section 401(a), deferred compensation plans of state and local governments and tax-exempt organizations described by Code section 457, and annuity contracts and custodial accounts described by Code section 403(b). Likewise, the definition of retail investor includes natural persons seeking brokerage or advisory services for other tax-favored savings arrangements such as an Archer Medical Savings Account described by Code section 220(d), a Health Savings Accounts described by Code section 223(d) and any similar tax-favored health plan saving arrangement, a Coverdell education savings account described by Code section 530 and a qualified tuition program or "529 plan" established pursuant to Code section 529.

[251] For example, we understand that, although not common, some 401(k) plans and other individual account plans provide participants total discretion to choose a broker-dealer to provide services for their individual plan account. *See, e.g.,* 29 CFR 2550. 404c–1(f), Example 9.

[252] *See, e.g.,* ARA December 2018 Letter; FPC Letter. *But see* Empower Letter ("It would be helpful if the SEC could confirm that the definition of 'retail customer' under RBI does not include advice to managers of retirement plans or to their fiduciaries or representatives.").

and operated by an employer to provide pension or retirement savings benefits to employees; and further, as a legal representative of a plan participant, must comply with DOL rules.[253] As such, the Commission does not believe that workplace retirement plans or their representatives and service providers generally fall within the definition of retail customer for purposes of Regulation Best Interest because the workplace retirement plan is not a natural person, and therefore the workplace retirement plan representatives are not a non-professional representative of a natural person that is receiving a recommendation directly from a broker-dealer for "personal, family, or household purposes." [254]

We note, however, that some plan representatives may participate under their employer's workplace plan, for example, in the case of a workplace IRA or other workplace retirement plan that is established and maintained by a sole proprietor or other self-employed individual that includes one or more employees in addition to the plan representative. To the extent that a plan representative who decides service arrangements for a workplace retirement plan is a sole proprietor or other self-employed individual who will participate in the plan, the plan representative would be a retail customer for purposes of Regulation Best Interest to the extent the sole proprietor or self-employed individual receives recommendations directly from a broker-dealer primarily for personal, family or household purposes.

b. Retail Customer Use of the Recommendation

In the Proposing Release, the Commission did not specifically address whether recommendations subject to Regulation Best Interest needed to be for compensation, but did state that the proposed definition of retail customer would only apply to a person who "received a recommendation . . . from a broker or dealer or a natural person who is an associated person of a broker or dealer, and used the recommendation primarily for personal, family, or household purposes." We stated that this approach was appropriate because it builds upon the guidance provided for FINRA's suitability rule.[255] In response, a few commenters recommended that the Commission limit the application of Regulation Best Interest to recommendations made to retail customers for compensation.[256]

Regulation Best Interest applies to a retail customer that both *receives* a recommendation of any securities transaction or investment strategy involving securities by a broker-dealer and that *uses* that recommendation primarily for personal, family, or household purposes, and not simply those recommendations for which a broker-dealer receives compensation.[257] In response to commenters, we interpret that a retail customer "uses" a recommendation of a securities transaction or investment strategy involving securities when, as a result of the recommendation: (1) The retail customer opens a brokerage account with the broker-dealer, regardless of whether the broker-dealer receives compensation,[258] (2) the retail customer has an existing account with the broker-dealer and receives a recommendation from the broker-dealer, regardless of whether the broker-dealer receives or will receive compensation, directly or indirectly, as a result of that recommendation, or (3) the broker-dealer receives or will receive compensation, directly or indirectly as a result of that recommendation, even if that retail customer does not have an account at the firm.[259]

When a retail customer opens or has an existing account with a broker-dealer the retail customer has a relationship with the broker-dealer and is therefore in a position to "use" (*i.e.*, accept or reject) the broker-dealer's recommendation. In this context, tying "use" solely to a broker-dealer's receipt of compensation would inappropriately result in Regulation Best Interest not applying to the broker-dealer's recommendations to hold securities positions or to maintain an investment strategy (such as account type), recommendations to open an account, or recommendations that may

[253] It is our understanding that the investment responsibilities of plan representatives typically include, among other things, selecting and monitoring a menu of plan investment options and designating and monitoring "default" investments for investing account balances of participants who do not make their own investment elections, and that plan representatives typically make these investment selections for a workforce with diverse investment profiles. *See* ARA December 2018 Letter (describing obligations of plan fiduciaries selecting an investment menu and qualified default investment alternatives); Empower Letter (describing plan fiduciary obligations to select investment menus). We also understand that plan representatives may receive brokerage and advice services for plans together with or complimentary with, other services supporting the plan's establishment, maintenance and operation, such as plan design, recordkeeping and other administrative services. *See, e.g.*, Groom Letter (describing business models of firms offering brokerage and advice services together with other services); SPARK Letter (same). In this context, a plan representative would not be receiving recommendations from a broker-dealer for his or her own account and considerations material to the plan representative's investment decisions differ from a situation in which a retail customer receives a recommendation from a broker-dealer for his or her own account.

Further, we note that DOL has rules currently in place (not affected by the Fifth Circuit's decision vacating the DOL Fiduciary Rule) that address how plan representatives operate participant-directed plans and select investment menus for such plans, *see* 29 CFR 2550.404c–1, what actions, including disclosures, plan representatives must take to be able to raise a defense or claim for investment losses by a participant or beneficiaries, *see* 29 CFR 2550.404c–5, and also generally require broker-dealers making investment alternatives available for a participant-directed plan to disclose in writing (among other things) all direct and indirect compensation received in connection with providing plan services. *See* 29 CFR 2550.408b–2(c). *See also* Form 5500, Schedule C, requiring after-the-fact reporting by certain plans of information regarding direct and indirect compensation received by, among others, broker-dealers and investment advisers, in connection with services rendered or their position with the plan.

Accordingly, we agree with those commenters who recommended that plan representatives should not be included in the definition of retail customer. *See* Empower Letter; Groom Letter; Letter from Nora M. Everett, President, Retirement and Income Solutions, Principal Financial Group (Aug. 7, 2018) ("Principal Letter"); SPARK Letter; T. Rowe Price Letter; Transamerica August 2018 Letter.

[254] Although workplace retirement plans are not generally covered by the definition of retail customer in by Regulation Best Interest, based on preliminary discussions with DOL staff, we understand that the DOL is considering regulatory options in light of the Fifth Circuit's decision vacating the DOL Fiduciary Rule, including the types of protections available to such workplace retirement plans and their representatives. Department of Labor Regulatory Agenda, Fiduciary Rule and Prohibited Transaction Exemptions, Fall 2018, *available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1210-AB82.*

[255] *See* Proposing Release at 21596, footnote 160.

[256] *See* Morgan Stanley Letter; CCMC Letters.

[257] *See* paragraph (b)(1) of Regulation Best Interest.

[258] As discussed in Section II.B.2.b below, account recommendations, including recommendations of a securities account type generally, and recommendations to open an IRA or to roll over or transfer assets into an IRA, are covered by Regulation Best Interest regardless of whether those recommendations result in transactions or generate transaction-based compensation.

[259] *See* Proposing Release at 21596, footnote 160 and accompanying text. *See also* FINRA Regulatory Notice 12–55, Suitability—Guidance on FINRA's Suitability Rule (Dec. 2012) at Q6(b) ("The suitability rule would apply when a broker-dealer or registered representative makes a recommendation to a *potential investor* who then becomes a customer. Where, for example, a registered representative makes a recommendation to purchase a security to a *potential investor*, the suitability rule would apply to the recommendation if that individual executes the transaction through the broker-dealer with which the registered representative is associated or the broker-dealer receives or will receive, directly or indirectly, compensation as a result of the recommended transaction."); NASD Notice to Members 04–72, Transfers of Mutual Funds and Variable Annuities—Impermissible Use of Negative Response Letters for the Transfer of Mutual Funds and Variable Annuities (Changes in Broker-Dealer of Record) (Oct. 2004).

ultimately be rejected by the retail customer.

Whether the recommendation complies with Regulation Best Interest will be evaluated based on the circumstances that existed *at the time the recommendation was made* to the retail customer. Accordingly, broker-dealers should carefully consider the extent to which associated persons can make recommendations to prospective retail customers (*i.e.,* that have received, but not yet "used" the recommendation as noted above) in compliance with Regulation Best Interest, including having gathered sufficient information that would enable them to comply with Regulation Best Interest at the time the recommendation is made, should the prospective retail customer use the recommendation.[260]

c. Conformity With Form CRS

The proposed definition of "retail customer" differed from the definition of "retail investor" proposed in the Relationship Summary Proposal, which was a prospective or existing client or customer who is a natural person (an individual), regardless of the individual's net worth, including a trust or other similar entity that represents natural persons.[261] The proposed definition was different from the definition of "retail investor" because the Relationship Summary was intended for an earlier state of the relationship between an investor and a financial professional, was intended to be required regardless of whether the investor would receive investment advice primarily for personal, family, or household purposes, and was designed to be delivered by investment advisers as well as broker-dealers.[262] Many commenters recommended that we use the same definition to facilitate compliance for firms and avoid investor confusion.[263]

The Commission agrees with commenters that using a similar definition would provide consistency in the protections, and ease the compliance burden, of the package of rulemakings. Therefore, the definitions in Form CRS and Regulation Best Interest have been revised to generally conform to each other, consistent with our respective goals in each of these rulemakings.[264] As discussed above, the definition of "retail customer" for purposes of Regulation Best Interest has been revised to apply only to natural persons, not all persons, in line with the definition of "retail investor" for purposes of Form CRS. In addition, the definition in Form CRS as adopted now includes the "personal, family or household purposes" qualifier.

While the definitions have generally been harmonized across the package of rulemakings,[265] they differ to reflect differences between the Relationship Summary delivery requirement and the obligations of broker-dealers under Regulation Best Interest, including that the Relationship Summary is required whether or not there is a recommendation and covers any prospective and existing clients and customers (*i.e.,* a person who "seeks to receive or receives services") of investment advisers as well as broker-dealers.[266] For the reasons discussed in the Proposing Release and in response to commenters who requested clarification on whether Regulation Best Interest applies to prospective customers,[267] we would like to clarify that the definition of "retail customer" does not apply to prospective customers who do not receive and use recommendations from a broker-dealer,[268] as discussed above. This distinction reflects differences between the point in time the Relationship Summary is delivered to an investor and when the obligations of broker-dealers pursuant to Regulation Best Interest attach.

d. Treatment of Dual-Registrants

In the Proposing Release, the Commission stated that Regulation Best Interest applies only in the context of a brokerage relationship with a brokerage customer, and specifically, when a broker-dealer is making a recommendation in the capacity of a broker-dealer. In particular, for dual-registrants (for purposes of this section, a broker-dealer that is dually registered as an investment adviser with the Commission), the obligations associated with Regulation Best Interest were intended to apply only when they are acting in the capacity as a broker-dealer.[269] The Commission recognized the issues surrounding the determination of whether a dual-registrant is acting in the capacity of a broker-dealer or an investment adviser, and asserted that such a determination requires a facts and circumstances analysis, with no one factor being determinative.[270]

Many commenters requested that the Commission clarify the treatment of dual-registrants and what is expected when offering products in both types of accounts.[271] Some commenters asserted that dually registered financial professionals should be held to a fiduciary standard.[272] A few commenters requested clarification on how Regulation Best Interest applies to particular scenarios, some of which involved dual-registrants.[273]

In response, the Commission is reaffirming the guidance provided in the proposal and providing further clarification on when and how Regulation Best Interest would apply to dual-registrants. As stated in the proposal, Regulation Best Interest would not apply to investment advice provided to a retail customer by a dual-registrant when acting in the capacity of an investment adviser, even if the retail customer has a brokerage relationship with the dual-registrant or the dual-registrant executes the transaction in its brokerage capacity.[274] Similarly, as proposed, we are confirming that a dual-registrant is an investment adviser solely with respect to those accounts for which a dual-registrant provides investment advice or receives compensation that subjects it to the Advisers Act.[275]

While we acknowledge that some commenters believe all dual-registrants

[260] *See* FINRA Regulatory Notice 12–55 at Q6(b).

[261] *See* Relationship Summary Proposal.

[262] *See* Relationship Summary Proposal, Section II, footnote 29.

[263] *See, e.g.,* Invesco Letter; BlackRock Letter; ICI Letter; Committee of Annuity Insurers Letter; Bank of America Letter; CFA August 2018 Letter; Cetera August 2018 Letter; Fidelity Letter; Morgan Stanley Letter; Oppenheimer Letter; Raymond James Letter; SIFMA August 2018 Letter; TIAA Letter; Transamerica August 2018 Letter.

[264] *See* Relationship Summary Adopting Release.

[265] *Id.*

[266] *Id.*

[267] *See, e.g.,* SIFMA August 2018 Letter; Prudential Letter; Money Management Institute Letter.

[268] *See* Section II.B.3.b.

[269] Although this discussion focuses on the treatment of broker-dealers that are dually registered with the Commission as investment advisers, a broker-dealer should perform the same analysis when it is engaged in other financial services (such as, as a bank, a commodity trading advisor or a future commission merchant).

[270] Proposing Release at 21596.

[271] *See, e.g.,* SIFMA August 2018 Letter; CCMC Letters; NASAA August 2018 Letter.

[272] *See* PIABA Letter; AICPA Letter.

[273] *See* SIFMA August 2018 Letter; Letter from Michael Pieciak, NASAA President, Commissioner Vermont Department of Financial Regulation, NASAA (Feb. 19, 2019) ("NASAA February 2019 Letter").

[274] This analysis would apply even if the dual-registrant receives transaction-based compensation for executing the transaction because the dual-registrant did not provide a recommendation in its capacity as a broker-dealer. While Regulation Best Interest would not apply in this situation, other provisions of the federal securities laws and SRO rules would apply to the actions taken or services provided by the broker-dealer.

[275] *See* Proposing Release at 21596; *see also Certain Broker-Dealers Deemed Not To Be Investment Advisers,* Exchange Act Release No. 51523 (Apr. 12, 2005) at 8 ("Release 51523"); Interpretive Rule Under the Advisers Act Affecting Broker-Dealers, Advisers Act Release No. 2652 (Sep. 24, 2007). *See also* Fiduciary Interpretation.

should be held to a fiduciary standard, for the reasons discussed in Section II.A, the Commission believes that Regulation Best Interest enhances the obligations that apply when a broker-dealer makes a recommendation to a retail customer by drawing from key principles underlying the fiduciary obligation that applies to investment advisers under the Advisers Act, while being tailored to the broker-dealer model.[276]

As stated in the proposal, determining the capacity in which a dual-registrant is making a recommendation is a facts and circumstances test, with no one factor being determinative, but the Commission considers, among other factors, the type of account, how the account is described, the type of compensation and the extent to which the dual-registrant made clear to the customer or client the capacity in which it was acting.[277]

In addition and in response to a commenter's presentation [278] of particular scenarios in its comment letter,[279] we would like to confirm or correct the commenter's understanding of Regulation Best Interest in practice to provide further guidance to firms as it relates to their examples of dual-registrants.[280] For example, in the commenter's explanation of a scenario related to a recommendation to open a fee-based account, we agree that Regulation Best Interest would not apply when a dually registered financial professional of a dually registered broker-dealer and investment adviser, who is acting in the capacity of an investment adviser, recommends a fee-based account. We note, however, that the dually registered financial professional would need to comply with the Advisers Act as well as the requirements with respect to Form CRS for the firm.[281] In response to another scenario in which a financial professional who is dually registered provides a holistic review of the overall performance of a family's accounts, which are both brokerage and advisory, whether Regulation Best Interest applies depends on a facts and circumstances analysis. Regulation Best Interest would apply if the financial professional in her brokerage capacity (disclosed pursuant to the Disclosure Obligation), provides a recommendation of a securities transaction or investment strategy involving securities to the family in the course of the holistic review.[282]

C. Component Obligations

As proposed Regulation Best Interest's obligation to "act in the best interest of the retail customer . . . without placing the financial or other interest of the [broker-dealer] ahead of the retail customer" would have been satisfied by complying with four specified obligations: A Disclosure Obligation, a Care Obligation, and two Conflict of Interest Obligations.[283] Failure to comply with any of these proposed requirements would have violated Regulation Best Interest.[284]

As discussed above, we have determined to retain the overall structure and scope of the proposed rule, but are modifying and clarifying the component obligations that a broker-dealer must satisfy in order to meet the General Obligation. As adopted, the General Obligation is satisfied only if the broker-dealer complies with four specified component obligations: (1) The Disclosure Obligation; (2) the Care Obligation; (3) the Conflict of Interest Obligation; and (4) the Compliance Obligation. Each of these component obligations is discussed below. Whether a broker-dealer has acted in the retail customer's best interest under the General Obligation will turn on an objective assessment of the facts and circumstances of how these specific components of Regulation Best Interest are satisfied at the time that the recommendation is made (and not in hindsight). The specific component obligations of Regulation Best Interest are mandatory, and failure to comply with any of the components would violate Regulation Best Interest.

1. Disclosure Obligation

We proposed a Disclosure Obligation that would require a broker-dealer "to, prior to or at the time of [a] recommendation, reasonably disclose to the retail customer, in writing, the material facts relating to the scope and terms of the relationship with the retail customer and all material conflicts of interest associated with the recommendation." The Proposing Release states that, for purposes of the Disclosure Obligation, we would consider the following to be examples of material facts relating to the scope and terms of the relationship with the retail customer: (1) That the broker-dealer was acting in a broker-dealer capacity with respect to the recommendation; (2) fees and charges that would apply to the retail customer's transactions, holdings, and accounts; and (3) type and scope of services provided by the broker-dealer, including, for example, monitoring the performance of the retail customer's account.

As stated in the Proposing Release, we understand that broker-dealers typically provide information about their services and accounts, which may include disclosures concerning the broker-dealer's capacity, fees, services, and conflicts, on their firm websites and in their account opening agreements.[285] Furthermore, while broker-dealers are subject to a number of specific disclosure obligations when they effect certain customer transactions, and are subject to the antifraud provisions of the federal securities laws, broker-dealers are not currently subject to an explicit and broad disclosure requirement under the Exchange Act regarding the scope and terms of the broker-dealer relationship.[286] To promote broker-dealer recommendations that are in the best interest of retail customers, we determined it was necessary to impose a more explicit and broader disclosure obligation on broker-dealers than that which currently exists under the federal securities laws and SRO rules.[287]

We solicited comment on the Disclosure Obligation and commenters addressed several aspects of this proposed obligation, including the interpretation of each required element, as discussed in the relevant sections below.[288] In consideration of these comments, we are revising the Disclosure Obligation to require a broker-dealer, prior to or at the time of the recommendation, to provide to the retail customer, in writing, full and fair disclosure [289] of all material facts related to the scope and terms of the

[276] *See* Section I.

[277] Proposing Release at 21596.

[278] *See* SIFMA August 2018 Letter. For purposes of the presented scenarios, SIFMA has assumed that the customer is a "retail customer."

[279] *Id.*

[280] For purposes of this section, we have only addressed the scenarios applicable to dual-registrants and have not confirmed or rejected the commenter's analysis of the other scenarios.

[281] *See* Fiduciary Interpretation at Section II.B.1. In providing advice about account type, the adviser should consider both types of accounts (*i.e.*, brokerage and advisory accounts) when determining whether the advice is in the client's best interest. *See also* NASAA February 2019 Letter (stating that Regulation Best Interest would not apply but instead that the fiduciary duty under the Advisers Act would apply).

[282] *But see* NASAA February 2019 Letter (stating that "a full fiduciary duty" should be imposed on the financial adviser as to all accounts in this case as the family has probably entrusted their entire financial well-being to one financial professional).

[283] Proposing Release at 21598.

[284] *Id.*

[285] Proposing Release at 21599.

[286] Proposing Release at 21599–21600.

[287] Proposing Release at 21600.

[288] *See, e.g.*, Better Markets August 2018 Letter; CCMC Letters; LPL August 2018 Letter; Schwab Letter; Morgan Stanley Letter; CFA August 2018 Letter; IPA Letter; NASAA Letter; SIFMA August 2018 Letter.

[289] *See* Section II.C.1.c, Disclosure Obligation, Full and Fair Disclosure.

relationship with the retail customer and all material facts relating to conflicts of interest that are associated with the recommendation.[290] We are explicitly requiring in the rule text the disclosure of examples in the Proposing Release of the "material facts relating to the scope and terms of the relationship with the retail customer:" (1) That the broker, dealer or such natural person is acting as a broker, dealer or an associated person of a broker-dealer with respect to the recommendation; (2) the material fees and costs that apply to the retail customer's transactions, holdings, and accounts; and (3) the type and scope of services provided to the retail customer, including: any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer.

The Disclosure Obligation requires the disclosure of *all* material facts related to the scope and terms of the relationship with the retail customer. The material facts identified in Regulation Best Interest are the minimum of what must be disclosed. Similar to what was proposed, broker-dealers will need to disclose in writing prior to or at the time of a recommendation any material facts that relate to the "scope and terms of the relationship." As to what constitutes a "material" fact related to the "scope and terms of the relationship," the standard for materiality for purposes of the Disclosure Obligation is consistent with the one the Supreme Court articulated in *Basic* v. *Levinson.*[291] Specifically, a fact is material if there is "a substantial likelihood that a reasonable shareholder would consider it important." In the context of Regulation Best Interest, the standard is the retail customer, as defined in the rule.

In response to comments, we are also refining and clarifying the treatment of conflicts of interest under Regulation Best Interest by: (1) Generally consistent with the fiduciary duty under the Advisers Act, adopting for purposes of Regulation Best Interest, the definition of "conflict of interest" associated with a recommendation as "an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer—consciously or unconsciously—to make a recommendation that is not disinterested"; [292] and (2) revising the Disclosure Obligation to require disclosure of "material facts" relating to such conflicts of interest that are associated with the recommendation. Under this approach, all conflicts of interest as so defined will be covered by Regulation Best Interest (and thus, will be subject to the Conflict of Interest Obligation described below). However, only "material facts" regarding these conflicts of interest are required to be disclosed under the Disclosure Obligation.[293]

As discussed above, we are adopting a new set of disclosure requirements designed to reduce retail investor confusion in the marketplace for brokerage and advisory services and to assist retail investors with the process of deciding whether to engage a particular firm or financial professional and whether to establish an investment advisory or brokerage relationship.[294] Specifically, we are requiring broker-dealers and investment advisers to deliver to retail investors a Relationship Summary.[295] The Relationship Summary will provide succinct information about the relationships and services the firm offers to retail investors, fees and costs that retail investors will pay, specified conflicts of interest and standards of conduct, and disciplinary history, among other things.[296] The Relationship Summary has a distinct purpose: It is intended to summarize information about a particular broker-dealer or investment adviser in a format that allows for comparability among the enumerated items, encourages investors to ask questions, and highlights additional sources of information.

As a general matter, the Relationship Summary reflects an initial layer of disclosure, with the Disclosure Obligation reflecting more specific and additional, detailed layers of disclosure.[297] We believe the Relationship Summary and the Disclosure Obligation, while separate obligations with significant individual value, will complement each other and, consistent with our layered approach to disclosure, are designed to build upon each other to provide different levels of key information and may be required to be delivered at different times. In addition, we believe the Relationship Summary and Disclosure Obligation will improve the quality and consistency of disclosures and thus: (1) Reduce the information asymmetry that may exist between a retail customer and their broker-dealer, and (2) facilitate customer comparisons of different broker-dealers which we expect will, in turn, increase competition among broker-dealers, including with respect to fees and costs.[298]

As discussed below, we have identified those items of information that we consider to be "material facts" under the Disclosure Obligation. Though there are disclosures in the Relationship Summary that could satisfy the Disclosure Obligation, in most instances the Relationship Summary will not be sufficient.[299] Moreover, as discussed below, we believe the Disclosure Obligation can be satisfied to varying degrees with existing documents provided to retail customers, such as account opening documents, with a standalone document, or by some combination. However, we encourage broker-dealers, in deciding whether to rely on such an existing disclosure document or whether to include or repeat information from existing disclosures, to consider the usefulness and ease of understanding for retail customers of any existing disclosure document.

Oral Disclosure or Disclosure After a Recommendation

As discussed in more detail below, a number of commenters highlighted practical difficulties associated with delivering disclosure either in writing, or prior to or at the time of a recommendation in some instances. Although Regulation Best Interest requires that the Disclosure Obligation be made "in writing," we recognize the challenges associated with providing written disclosure in each instance that disclosure may be required. For example, a broker-dealer may need to supplement, clarify or update written disclosure it has previously made before

[290] As discussed in more detail below, aspects of the Disclosure Obligation may be satisfied by other regulatory requirements.

[291] *Basic, Inc.* v. *Levinson,* 485 U.S. 224 (1988).

[292] This is the same as the definition of "material conflict of interest" discussed in the Proposing Release but eliminates "material" and "a reasonable person would expect" for the reasons discussed below.

[293] The Conflict of Interest Obligation requires, among other things, that a broker-dealer establish written policies and procedures reasonably designed to identify and disclose all conflicts of interest associated with a recommendation. Such disclosure is required to be provided in accordance with the Disclosure Obligation. *See* Section II.C.3.d.

[294] *See* Relationship Summary Adopting Release.

[295] *See* Relationship Summary Adopting Release.

[296] *See* Relationship Summary Adopting Release at Section I. For purposes of Form CRS, "retail investor" is defined as "a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family, or household purposes."

[297] Nevertheless, as discussed below where relevant, in some instances disclosures made pursuant to Form CRS may be sufficient to satisfy some aspects of the Disclosure Obligation.

[298] *See infra* footnote 1192 and accompanying text.

[299] For example, as noted below, a standalone broker-dealer will be able to satisfy the Disclosure Obligation's requirement to disclose the broker-dealer's capacity by delivering the Relationship Summary to the retail customer.

or at the time it provides a customer with a recommendation. As we stated in the Proposing Release, we recognized that broker-dealers may provide recommendations by telephone and may need to offer clarifying disclosure orally in some instances subject to certain conditions, such as a dual-registrant informing a retail customer of the capacity in which the dual-registrant is acting in conjunction with a recommendation. We stated that a broker-dealer could orally clarify the capacity in which it is acting at the time of the recommendation if it had previously provided written disclosure to the retail customer beforehand disclosing its capacity as well as the method it planned to use to clarify its capacity at the time of the recommendation.

Similarly, although Regulation Best Interest requires a broker-dealer to disclose, prior to or at the time of a recommendation, all material facts relating to the scope and terms of the relationship with the retail customer and relating to conflicts of interest that are associated with the recommendation, we recognize that in some instances a broker-dealer may not have all the material facts at the time of the recommendation, or that such disclosure is provided to the retail customer pursuant to an existing regulatory obligation, such as the delivery of a product prospectus or a trade confirmation, after the execution of the trade.[300] In the Proposing Release we stated that in circumstances where a broker-dealer determines to provide an initial, more general disclosure (such as a relationship guide) followed by specific information in a subsequent disclosure that is provided after the recommendation (*e.g.*, a trade confirmation) the initial disclosure should address when and how a broker-dealer would provide more specific information regarding the material fact or conflict in a subsequent disclosure (*e.g.*, after the trade in the trade confirmation). We noted also that whether there is sufficient disclosure in both the initial disclosure and any subsequent disclosure would depend on the facts and circumstances.

We continue to believe that some flexibility with respect to the provision by broker-dealers of written and oral disclosure, as well as with respect to the timing that disclosure is made, is appropriate in certain circumstances, such as when a broker-dealer updates its written disclosures orally in order to reflect facts not reasonably known at the time the written disclosure is provided. In such circumstances, a broker-dealer may satisfy its Disclosure Obligation by making supplemental oral disclosure not later than the time of the recommendation, provided that the broker-dealer maintains a record of the fact that oral disclosure was provided to the retail customer.[301] In addition, in the limited instances where existing regulations permit disclosure after the recommendation is made (*e.g.*, trade confirmation, prospectus delivery), a broker dealer may satisfy its Disclosure Obligation regarding the information contained in the applicable disclosure document by providing such document to the retail customer after the recommendation is made. Before supplementing, clarifying or updating written disclosures in the limited circumstances described above, broker-dealers must provide an initial disclosure in writing that identifies the material fact and describes the process through which such fact may be supplemented, clarified or updated.

For example, with regard to product-level fees, a broker-dealer could provide an initial standardized disclosure of product-level fees generally (*e.g.*, reasonable dollar or percentage ranges), noting that further specifics for particular products appear in the product prospectus, which will be delivered after a transaction in accordance with the delivery method the retail customer has selected, such as by mail or electronically.[302] Similarly, with regard to the disclosure of a broker-dealer's capacity, a dual-registrant could disclose that recommendations will be made in a broker-dealer capacity unless otherwise expressly stated at the time of the recommendation, and that any such statement will be made orally. Or, a broker-dealer could disclose that its associated persons may have conflicts of interest beyond than those disclosed by the broker-dealer, and that associated persons will disclose, where appropriate, any additional material conflicts of interest not later than the time of a recommendation, and that any such disclosure will be made orally.

We believe it is in the public interest and consistent with the protection of investors to permit such flexibility in the delivery of information pursuant to the Disclosure Obligation. Providing retail customers written summary information about material facts relating to a recommendation and indicating that additional information will be forthcoming, the point at which the additional information will be delivered, and the method by which it will be conveyed, highlights for retail customers a useful summary of information while allowing for the practical realities of the process by which securities recommendations are made and transactions are executed and leaving longstanding existing disclosure regimes, particularly those relating to product issuer disclosure, undisturbed.

Other Liabilities Under the Federal Securities Laws

Further, the requirements under Regulation Best Interest that particular information be disclosed is not determinative of a broker-dealer or associated person's other potential liabilities under the general antifraud provisions of the federal securities laws for failure to disclose material information to a customer at the time of a recommendation.[303] In addition, we

[300] *See infra* footnote 525.

[301] *See* Section II.D, Record-Making and Recordkeeping.

[302] While using a percentage or dollar range to describe a fee can be appropriate, that range should be designed to reasonably reflect the actual fees to be charged. For example, if the firm offers in almost all instances funds with up-front sales charges of between 5% and 5.5%, but the disclosure states that mutual fund up-front sales charges may "range from 0.0% to 5.5%," then the broker-dealer would need to evaluate whether the disclosure should be revised to more accurately describe the sales charge. *See* discussion in Section II.C.1.a, Disclosure Obligation, Material Facts Regarding Scope and Terms of the Relationship, Fees and Costs, Particularly of Fees and Costs Disclosed.

[303] Broker-dealers are liable under the antifraud provisions for failure to disclose material information to their customers when they have a duty to make such disclosure. *See Basic* v. *Levinson*, 485 U.S. 224, 239 footnote 17 (1988) ("Silence, absent a duty to disclose, is not misleading under Rule 10b–5."); *Chiarella* v. *U.S.*, 445 U.S. 222, 228 (1980) (explaining that a failure to disclose material information is only fraudulent if there is a duty to make such disclosure arising out of "a fiduciary or other similar relation of trust and confidence"); *SEC* v. *Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999) (explaining that defendant is liable under Section 10(b) and Rule 10b-5 for material omissions "as to which he had a duty to speak"). Generally, under the antifraud provisions, a broker-dealer's duty to disclose material information to its customer is based upon the scope of the relationship with the customer, which is fact intensive. *See, e.g., Conway* v. *Icahn & Co., Inc.*, 16 F.3d 504, 510 (2d Cir. 1994) ("A broker, as agent, has a duty to use reasonable efforts to give its principal information relevant to the affairs that have been entrusted to it."). For example, where a broker-dealer processes its customers' orders, but does not recommend securities or solicit customers, then the material information that the broker-dealer is required to disclose is generally narrow, encompassing only the information related to the consummation of the transaction. *See, e.g., Press* v. *Chemical Inv. Servs. Corp.*, 166 F.3d 529, 536 (2d Cir. 1999). However, courts have found that a broker-dealer's duty to disclose material information under the antifraud provisions is broader when the broker-dealer is making a recommendation to its customer. *See, e.g., Hanly*, 415 F.2d 589, 597 (2d Cir. 1969). When recommending a security, broker-dealers generally are liable under the antifraud provisions if they do not give "honest and complete information" or disclose any material adverse facts or material conflicts of interest, including any economic self-

remind broker-dealers that even full and fair disclosure of the information required by the Disclosure Obligation is not sufficient, standing alone, to satisfy the Care Obligation, and that even sufficient disclosure cannot cure a violation of the Care Obligation.

Disclosures by Natural Persons Associated With a Broker-Dealer

The Disclosure Obligation applies to a broker, dealer, or natural person who is an associated person of a broker or dealer.[304] As stated in the Proposing Release, we are requiring not only the broker-dealer entity, but also individuals who are associated persons of a broker-dealer (*e.g.,* registered representatives) to comply with specified components of Regulation Best Interest when making recommendations to retail customers.[305] One commenter requested guidance on how an associated person should comply with the Disclosure Obligation.[306] In response, we believe that a natural person who is an associated person of a broker-dealer may in many instances rely on the disclosures provided by the broker-dealer with which he or she is associated to satisfy the Disclosure Obligation. However, when an associated person knows or should have known that the broker-dealer's disclosure is insufficient to describe "all material facts," the associated person must supplement that disclosure. For example, if an associated person of a broker-dealer that offers a full range of securities products is licensed solely as a Series 6 Registered Representative,[307] and can sell only mutual funds, variable annuities and other enumerated products, that limitation on the scope of services provided by the particular associated person must be sufficiently clear in the broker-dealer's disclosures; otherwise additional clarifying disclosure by the associated person would be necessary.

a. Material Facts Regarding Scope and Terms of the Relationship

As discussed above, the proposed Disclosure Obligation would require a broker-dealer to, among other things, "prior to or at the time of such recommendation, reasonably disclose to the retail customer, in writing, the material facts relating to the scope and terms of the relationship with the retail customer." We proposed to consider the following to be examples of material facts relating to the scope and terms of the relationship with the retail customer: (i) That the broker-dealer was acting in a broker-dealer capacity with respect to the recommendation; (ii) fees and charges that would apply to the retail customer's transactions, holdings, and accounts; and (iii) the type and scope of services provided by the broker-dealer, including, for example, monitoring the performance of the retail customer's account.

Commenters requested that we clarify which facts a broker-dealer would be required to disclose about the scope and terms of the relationship it has with a customer under Regulation Best Interest.[308] In particular, several commenters recommended that the Commission clarify how a dual-registrant should disclose its capacity regarding its recommendations.[309] Other commenters recommended that the Commission define the scope of fees a broker-dealer must disclose[310] and the form that disclosure should take.[311] In addition, some commenters requested clarity on the types of services that a broker-dealer would be required to disclose, including limitations on securities offered[312] and account monitoring services.[313]

As discussed below, in response to comments, we have revised the Disclosure Obligation to require disclosure of "all material facts relating to the scope and terms of the relationship with the retail customer, including: (i) That the broker, dealer or such natural person is acting as a broker, dealer or an associated person of a broker-dealer with respect to the recommendation; (ii) the material fees and costs that apply to the retail customer's transactions, holdings, and accounts; and (iii) the type and scope of services provided to the retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer."[314] In addition, we are clarifying the scope of the obligation.

As we did in the Proposing Release, we emphasize that although we have explicitly identified the capacity in which the broker-dealer is acting, material fees and costs, and the type and scope of services, as what would at a minimum be required to be disclosed as "material facts relating to the scope and terms of the relationship with the retail customer," the Disclosure Obligation requires broker-dealers and associated persons to disclose "*all* material facts relating to the scope of the terms of the relationship," (emphasis added) and broker-dealers and such associated persons thus will need to consider, based on the facts and circumstances, whether there are other material facts relating to the scope and terms of the relationship with the retail customer that need to be disclosed. This analysis generally should include consideration of whether information in the Relationship Summary constitutes a "material fact" that could appropriately be expanded upon in satisfying the Disclosure Obligation. It would be possible, but would be unlikely for most

interest. *See, e.g., De Kwiatkowski* v. *Bear, Stearns & Co.,* 306 F.3d 1293, 130 (2d Cir. 2002); *Chasins* v. *Smith, Barney & Co.,* 438 F.2d 1167, 1172 (2d Cir. 1970). *See* Proposing Release at 21599 footnote 176.

[304] Rule 15*l*–1(a)(2)(i).

[305] Proposing Release at 21592.

[306] *See* NASAA August 2018 Letter (recommending that the Commission provide specific instructions on how associated persons should disclose capacity in which they are acting).

[307] A candidate who passes the Series 6 exam is qualified for the solicitation, purchase and/or sale of the following securities products: Mutual funds (closed-end funds on the initial offering only), Variable annuities, Variable life insurance, Unit investment trusts (UITs), Municipal fund securities (*e.g.,* 529 savings plans, local government investment pools (LGIPs)). FINRA, Series 6—Investment Company and Variable Contracts Products Representative Exam, Permitted Activities, *available at: http://www.finra.org/industry/series6#permitted-activities.*

[308] *See, e.g.,* SIFMA August 2018 Letter; Edward Jones Letter; NASAA August 2018 Letter; AARP August 2018 Letter; PIABA Letter; Prudential Letter.

[309] *See, e.g.,* SIFMA August 2018 Letter; Edward Jones Letter.

[310] *See, e.g.,* Bank of America Letter (recommending that the Commission apply a "materiality" threshold to determine which fees should be disclosed).

[311] *See, e.g.,* SIFMA August 2018 Letter (stating that a broker-dealer's disclosure of a range of customer costs per product should be sufficient); CFA August 2018 Letter (stating a broker-dealer's disclosure of percentages or ranges of cost information would do little to enlighten investors about the true costs of brokers' advice services).

[312] *See, e.g.,* NY Life Letter (stating that an insurer may appropriately focus its career agents on the distribution of variable insurance products that the insurer manufactures, so long as limitations on the universe of available products are disclosed to consumers and supervisory procedures are in place to ensure that a variable insurance product is in the client's best interest); CFA Institute Letter (stating that the Disclosure Obligation should complement the information presented in Form CRS and provide greater specificity about, among other things, the type and scope of services offered by the broker-dealer).

[313] *See, e.g.,* IAA August 2018 Letter (recommending that the Commission clarify that Regulation Best Interest would apply to all advisory activities that broker-dealers agree to provide (*e.g.,* ongoing monitoring for purposes of recommending changes in investments)).

[314] Rule 15*l*–1(a)(2)(i)(A).

broker-dealers, for the abbreviated format of the Relationship Summary to sufficiently disclose "all material facts" regarding the scope and terms of the relationship such that no further information would be required to satisfy the Disclosure Obligation.

Capacity In Which the Broker-Dealer Is Acting

In the Proposing Release, the Commission identified that the capacity in which a broker-dealer is acting is a material fact relating to the scope and terms of a customer relationship subject to the Disclosure Obligation.[315] In so identifying this critical element of information, we hoped to promote greater awareness among retail customers of the capacity in which their financial professional or firm acts with respect to recommendations.

Several commenters requested additional guidance on how dual-registrants and their associated persons could comply with the proposed Disclosure Obligation in this respect.[316] Some commenters stated that repeated disclosures of capacity would distract customers from more important disclosures related to a recommendation and could lead to confusion.[317] While we received comments expressing concerns that our proposed approach might lead to investor confusion,[318] many of these commenters were seeking clarity regarding this requirement and not its elimination.[319]

In response to commenters, we are revising Regulation Best Interest to explicitly require disclosure of capacity, which the Proposing Release addressed in guidance. Therefore, Rule 15*l*–1(a)(2)(i)(A) requires that the broker, dealer, or natural person who is an associated person of a broker or dealer, prior to or at the time of the recommendation, provide the retail customer, in writing, full and fair disclosure of all material facts relating to the scope and terms of the relationship with the retail customer, including that the broker-dealer or such natural person is acting as a broker-dealer or an associated person of a broker-dealer with respect to the recommendation.

This disclosure is designed to improve awareness among retail customers of the capacity in which their financial professional or broker-dealer acts when it makes recommendations so that the retail customer can more easily identify and understand their relationship, a goal shared with the Relationship Summary.[320] Form CRS requires a firm to state the name of the broker-dealer or investment adviser and whether the firm is registered with the Commission as a broker-dealer, investment adviser, or both.[321] A standalone broker-dealer (*i.e.*, a broker-dealer not also registered as an investment adviser) will generally be able to satisfy the Disclosure Obligation's requirement to disclose the broker-dealer's capacity by delivering the Relationship Summary to the retail customer.

For broker-dealers who are dually registered, and for associated persons who are either dually registered or, who are not dually registered but only offer broker-dealer services through a firm that is dually registered, the information contained in the Relationship Summary will not be sufficient to disclose their capacity in making a recommendation. Although some commenters expressed concerns about potential investor confusion caused by "additional" disclosure regarding a dual-registrant's capacity, we believe that the Disclosure Obligation will not duplicate or confuse, but instead will provide clarifying detail on capacity to supplement the information contained in the Relationship Summary. Accordingly, we are clarifying that dually registered associated persons and associated persons who are not dually registered but only offer broker-dealer services through a firm that is dually registered as an investment adviser with the Commission or with a state, must disclose whether they are acting (or, in the case of the latter, that they are only acting) as an associated person of a broker-dealer to satisfy the Disclosure Obligation.[322] An associated person of a dual-registrant who does not offer investment advisory services must disclose that fact as a material limitation in order to satisfy the Disclosure Obligation.

Furthermore, as discussed in greater detail below, we would presume the use of the terms "adviser" and "advisor" by (1) a broker-dealer that is not also registered as an investment adviser or (2) a financial professional that is not also a supervised person of an investment adviser to be a violation of the Disclosure Obligation under Regulation Best Interest. Disclosure of capacity may, in part, be made orally under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation.* For example, a broker-dealer may disclose that: "All recommendations will be made in a broker-dealer capacity unless otherwise expressly stated at the time of the recommendation; any such statement will be made orally." In this case, no further oral or written disclosure would be required until a recommendation is made in a capacity other than as a broker-dealer. Similarly, a broker-dealer may disclose that: "All recommendations regarding your brokerage account will be made in a broker-dealer capacity, and all recommendations regarding your advisory account will be in an advisory capacity. When we make a recommendation to you, we will expressly tell you orally which account we are discussing"). In this instance, no further disclosure of capacity is necessary.

Capacity in the Context of Names, Titles, and Marketing Practices

The Relationship Summary Proposal included a proposed rule that would have restricted broker-dealers and their associated persons (unless they were registered as, or supervised persons of, an investment adviser), when communicating with a retail investor,

[315] Proposing Release at 21601.

[316] *See, e.g.,* NASAA August 2018 Letter (requesting that the Commission provide guidance to associated persons of dual-registrants explaining how they should disclose the capacity in which they are acting and whether they are providing a recommendation or advice); Better Markets August 2018 Letter; CFA August 2018 Letter; Fidelity Letter; IPA Letter; SIFMA August 2018 Letter; Edward Jones Letter; CCMC Letters.

[317] *See, e.g.,* Edward Jones Letter (recommending that the Commission not require repeated capacity disclosures to customers because it would be redundant and potentially confuse customers); SIFMA August 2018 Letter (stating that disclosure of capacity should not be required at the time of the recommendation as it would cause unnecessary delay and distract customers from more important disclosures regarding account features and recommendations); Better Markets August 2018 Letter (stating that one-time written disclosure about a dual-registrant's advisory capacity, followed by future oral disclosures when they change roles when making recommendations would be confusing).

[318] *See, e.g.,* Better Markets August 2018 Letter; CFA August 2018 Letter (stating that flexibility in disclosure will result in disclosures that do not effectively convey key information especially for dual-registrants as customers will not understand the capacity the dual-registrant is acting in at the particular time or its significance).

[319] *See, e.g.,* SIFMA August 2018 Letter (requesting that the Commission clarify the application of the Disclosure Obligation to dually registered firms and personnel, including what, and how frequently, disclosure is required to put customer on notice of their capacity); Edward Jones Letter; IPA Letter; CCMC Letters.

[320] *See* Relationship Summary Proposal at 21420.

[321] *See* Relationship Summary Adopting Release at Section II.C.

[322] Financial professionals with registrations to offer services as a representative of a broker-dealer and investment adviser may offer services through a dual-registrant, affiliated firms, or unaffiliated firms, or only offer one type of service notwithstanding their dual licensing. Financial professionals who are not dually registered may offer one type of service through a firm that is dually registered. *See* Relationship Summary Adopting Release at Section II.B.4.

from using the term "adviser" or "advisor" as part of a name or title ("Titling Restrictions").[323] After further consideration of our policy goals and the comments we received, and in light of the disclosure requirements under Regulation Best Interest, we do not believe that adopting a separate rule restricting these terms is necessary, because we presume that the use of the term "adviser" and "advisor" in a name or title by (1) a broker-dealer that is not also registered as an investment adviser or (2) an associated person that is not also a supervised person of an investment adviser, to be a violation of the capacity disclosure requirement under the Disclosure Obligation as discussed further below.[324]

We received several comments on the proposed Titling Restrictions, which we have also considered when determining to presume use of such names and titles to be a violation of the capacity disclosure.[325] Some commenters supported a restriction on the terms "adviser" and "advisor," noting, for example, that these particular terms are often associated with the statutory term "investment adviser,"[326] or that investors "typically associate" these terms with registered investment advisers.[327] A few commenters generally noted that the title "financial advisor" prevents investors from understanding whether they are engaging a financial professional who provides advisory services or who sells brokerage services.[328] Moreover, other commenters generally stated that names and titles containing "adviser" or "advisor" create investor confusion and/or could mislead investors about the differences between broker-dealers and investment advisers including the applicable standard of care[329] and the services to be provided.[330]

Other commenters did not support the proposed Titling Restrictions, believing that the terms "adviser" and "advisor" are more generically used and understood, and refer to financial professionals who provide advice and financial services more generally.[331] Several of these commenters stated that the restriction adds little additional investor protection when taken together with Regulation Best Interest and Form CRS (*i.e.*, it is duplicative).[332] Additionally, some commenters stated that Form CRS alone provides similar investor protections that alleviate the need for the restriction.[333] Along similar lines, one commenter stated that certain fraud-based securities laws and FINRA rules provide the same protections that the proposed restriction seeks to add, making it unnecessary.[334]

We also received several comments on the following alternative approaches to the Titling Restrictions on which we sought comment: (i) A broker-dealer that used the terms "adviser" or "advisor" as part of a name or title would not be considered to provide investment advice solely incidental to the conduct of its business as a broker-dealer, and (ii) a broker-dealer would not be providing investment advice solely incidental to its brokerage business if it "held itself out" as an investment adviser to retail investors.[335] This second alternative approach would have resulted in a restriction generally broader in scope than the Titling Restrictions, as it would also have encompassed communications and sales practices in addition to the use of names and titles.

In response to these alternatives, several commenters stated that the Titling Restrictions were too narrow in meeting the Commission's intended objective of mitigating the risk that investors could be misled by the use of certain names and titles because the Titling Restrictions did not address other confusing names or titles,[336] and,

[323] *See* Relationship Summary Proposal, *supra* footnote 12, at 21461–63. We also requested comment on whether we should explicitly restrict other terms, including "wealth manager" and "financial consultant." Additionally, we requested comment on whether we should restrict terms that are synonymous with "adviser" or "advisor."

[324] We recognize that, in adopting the fee-based brokerage rule in 2005, we declined to place any limitations on how a broker-dealer may hold itself out or the titles it may employ. *Certain Broker-Dealers Deemed Not to Be Investment Advisers*, Advisers Act Release No. 2376 (Apr. 12, 2005). However, as we noted in the Relationship Summary Proposal, comments we received in response to Chairman Clayton's request for comment and our experience prompted us to revisit our approach from 2005. In addition, given that the new disclosure requirements under Regulation Best Interest and Form CRS will and should necessitate a reassessment of a broker-dealer's names, titles, and communications with its customers, we believe it is necessary to re-evaluate the appropriateness of these practices in light of these new obligations. *See also generally* Relationship Summary Proposal, *supra* footnote 12, at 21459–61 (citing commenters and studies by the Siegel and Gale Consulting Group and the RAND Corporation that document investor confusion in the marketplace, all of which were conducted subsequent to the 2005 fee-based brokerage rule); Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers, Chairman Jay Clayton (Jun. 1, 2017), *available at https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31*. We also proposed rules (the "Affirmative Disclosures") that would have required a broker-dealer and an investment adviser to prominently disclose that it is registered as a broker-dealer or investment adviser, as applicable, with the Commission in print or electronic retail investor communications. As we discuss in a concurrent rulemaking, we are not adopting the Affirmative Disclosures. *See* Relationship Summary Adopting Release, *supra* footnote 12, at Section III.

[325] *See, e.g.*, CFA August 2018 Letter; IAA August 2018 Letter; LPL August 2018 Letter; Letter from Dennis M. Kelleher, President and CEO, et al., Better Markets (Aug. 7, 2018) ("Better Markets CRS Letter").

[326] *See* Letter from Lexie Pankratz, Owner, Trailhead Consulting, LLC (Aug. 7, 2018) ("Trailhead Letter").

[327] *See, e.g.*, Letter from Kurt N. Schacht, Managing Director, et al., CFA Institute (Aug. 7, 2018) ("CFA Institute CRS Letter"); Pickard Letter.

[328] *See, e.g.*, Letter from Gerald Lopatin (Jul. 30, 2018) ("Lopatin Letter"); Letter from Paula Hogan (Aug. 6, 2018) ("Hogan Letter"); Letter from Arlene Moss (Jul. 31, 2018) ("Moss Letter"); Letter from Daniel Wrenne (Jul. 31, 2018) ("Wrenne Letter").

[329] *See, e.g.*, FSI August 2018 Letter; Schwab Letter; CFA Institute CRS Letter; Betterment Letter.

[330] *See, e.g.*, NASAA August 2018 Letter (stating that "[t]his rule change will help forestall retail investors' confusion about the different roles and duties owed by broker-dealers/agents and investment advisers/investment adviser Representatives"); CFA Institute CRS Letter (stating that "[i]nvestor confusion about the roles and duties of different financial services providers who use "adviser/advisor" in their titles has become problematic from both an investor protection and trust standpoint. Use of the proposed CRS, alone, will not allay the substantial investor confusion in the marketplace about the differences between broker-dealers and investment advisers.")

[331] *See* LPL August 2018 Letter (stating that "restricting use of 'advisor' and 'adviser' is contrary to the plain English meaning the average investor associates with those terms . . . regardless of the legal contours of the service relationship."); NAIFA Letter (stating that "[m]any financial professionals are recognized as and/or refer to themselves as 'advisors/advisers' or 'financial advisors/advisers.' These words are (aptly) used by professionals who offer advice on any number of financial topics."); Letter from Investments & Wealth Institute ("IWI") (Aug. 6, 2018) ("IWI August 2018 Letter") (stating that an outright ban on the use of the terms "adviser" and "advisor" by broker-dealers would raise First Amendment concerns).

[332] *See, e.g.*, Letter from Robert D. Oros, Chief Executive Officer, HD Vest Financial Services (Aug. 7, 2018) ("HD Vest Letter"); LPL August 2018 Letter; SIFMA August 2018 Letter. *But see* Pickard Letter (supporting the restriction and our proposed alternative holding out approach by noting that "[w]e do not think that Reg BI or Form CRS as currently proposed is sufficient.")

[333] *See, e.g.*, LPL August 2018 Letter; Morgan Stanley Letter; Raymond James Letter.

[334] *See* Cambridge Letter.

[335] *See* Relationship Summary Proposal, *supra* footnote 12, at 21463–64. We are not adopting the proposed alternative approach that would have restricted a broker-dealer from availing itself of the solely incidental exclusion if it "held itself out" as an investment adviser. Use of the terms "adviser" or "advisor," however, could support a conclusion depending on other facts and circumstances, that the primary business of the firm is advisory in nature, in which case the advice provided by the broker-dealer would not be solely incidental to the conduct of its brokerage business. *See* Solely Incidental Interpretation, *supra* footnote 12, at Section II.B (providing the Commission's interpretation of the solely incidental prong of the broker-dealer exclusion from the Advisers Act).

[336] *See e.g.*, Letter from Barbara Roper, Director of Investor Protection, and Micah Hauptman, Financial Services Counsel, (Dec. 7, 2018) ("CFA December 2018 Letter"); State Treasurers Letter; Waters Letter (noting that the Titling Restrictions are too narrow of a fix for investor confusion because they fail "to address the numerous other titles professionals use. . . . As a result, most retail investors cannot easily distinguish between

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more specifically, because the Titling Restrictions did not address the broker-dealers who "hold themselves out" as investment advisers.[337] Several of these commenters instead advocated for precluding reliance on the solely incidental prong by any broker-dealer that holds itself out as an investment adviser.[338] Some commenters stated that certain marketing practices indicate that advice is the main function of the broker-dealer's service.[339] Additionally, one commenter stated that "the potential for investor confusion is at its greatest when dealing with broker-dealers and dual-registrants that routinely market their services as advisory in nature. . . ."[340]

Use of Terms "Adviser" or "Advisor"

Financial firms and their professionals, including broker-dealers and investment advisers, seek to acquire new customers and to retain existing customers by marketing their services, including through the use of particular terms in names and titles. Firms often spend time and money to market, brand, and create intellectual property by using these terms in an effort to shape investor expectations.[341] A name or title is generally used, and is designed to have significance, on its own without any additional context as to what it means. Given that the titles "adviser" and "advisor" are closely related to the statutory term "investment adviser," their use by broker-dealers can have the effect of erroneously conveying to investors that they are regulated as investment advisers, and have the business model, including the services and fee structures, of an investment adviser.[342] Such potential effect undermines the objective of the capacity disclosure requirement under Regulation Best Interest to enable a retail customer to more easily identify and understand their relationship.

As discussed above, the Disclosure Obligation requires broker-dealers to make full and fair disclosure of all material facts relating to the scope and terms of the relationship with a retail customer, including the capacity in which they are acting with respect to a recommendation. The capacity disclosure requirement is designed to improve awareness among retail customers of the capacity in which their firm and/or financial professional acts when it makes recommendations so that a retail customer can more easily identify and understand their relationship.[343] We believe that in most cases broker-dealers and their financial professionals cannot comply with the capacity disclosure requirement by disclosing that they are a broker-dealer while calling themselves an "adviser" or "advisor." Under the Disclosure Obligation, a broker-dealer, or an associated person, must, prior to or at the time of the recommendation, disclose that the broker-dealer or that associated person is acting as a broker or dealer with respect to the recommendation.[344] When a broker-dealer or an associated person uses the name or title "adviser" or "advisor" there are few circumstances[345] in which that broker-dealer or associated person would not violate the capacity disclosure requirement because the name or title directly conflicts with the information that the firm or professional would be acting in a broker-dealer capacity.[346] Therefore, use of the titles "adviser" and "advisor" by broker-dealers and their financial professionals would undermine the objectives of the capacity disclosure requirement by potentially confusing a retail customer as to type of firm and/or professional they are engaging, particularly since "investment adviser" is defined by statute separately from "broker" or "dealer."

As a result,[347] we presume that the use of the terms "adviser" and "advisor" in a name or title by (i) a broker-dealer that is not also registered as an investment adviser or (ii) an associated person that is not also a supervised person of an investment adviser to be a violation of the capacity disclosure requirement under Regulation Best Interest.[348]

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financial advisers who are mere salespeople and those that are investment advisers that must provide advice that is in the best interests of the investor."). *See also* NAIFA Letter (noting that restricting these terms for broker-dealers and their financial professionals only "and not for numerous other professionals using those words and delivering advice on a wide variety of financial topics creates more consumer confusion and does not enhance consumers' understanding of the specific obligations and standards that apply to their advisor(s).")

Additionally, several of the commenters who supported the restriction recommended modifications such as broadening the restriction to include other terms, including "wealth manager" and "financial consultant." *See, e.g.*, Financial Engines Letter; Comment Letter of Altruist Financial Advisors LLC (Aug. 7, 2018) ("Altruist Letter"); Letter from David John Marotta (April 22, 2018) ("Marotta Letter"); Galvin Letter; Letter from Pamela Banks, Senior Policy Counsel, Consumers Union (Oct. 19, 2018) ("Consumers Union Letter").

[337] *See, e.g.*, CFA August 2018 Letter; FPC Letter; IAA August 2018 Letter; Letter from Michael Kitces (Aug. 2, 2018) ("Kitces Letter"); LPL August 2018 Letter; MarketCounsel Letter; Waters Letter.

[338] *See, e.g.*, IAA August 2018 Letter (noting that "[w]hile names or titles are contributing factors to investor confusion and the potential for investors to be misled, we believe that other factors should be considered as well. In particular, previous studies noted the confusion arising from 'we do it all' advertisements and 'marketing efforts which depicted an ongoing relationship between the broker-dealer and the investor.' "); Betterment Letter; CFA August 2018 Letter; LPL August 2018 Letter.

[339] *See* CFA August 2018 Letter (citing to Micah Hauptman and Barbara Roper, Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways, January 18, 2017). *See also* Better Markets CRS Letter (stating that titles present a professional as not "only an expert in financial matters but also someone who will offer advice and recommendations"); Letter from Michael Palumbo (Aug. 7, 2018) ("Palumbo Letter"); Kitces Letter.

[340] *See* CFA August 2018 Letter. *See also* CFA Institute CRS Letter (stating that the proposal should address "those who may not expressly refer to themselves as 'adviser/[advis]or' but through their actions convey that meaning to investors. . . .").

[341] *See, e.g.*, Letter from Barbara Roper, Director of Investor Protection, and Micah Hauptman, Financial Services Counsel, CFA (Sep. 14, 2017) ("CFA September 2017 Letter") ("[O]ur study documents how everything from the titles brokers use to the way they describe their services is designed to send the message that they are in the business of 'providing expert investment advice, comprehensive financial planning, and retirement planning that is based on their clients' needs and goals and that is designed to serve their best interests.' ")

[342] *See* Relationship Summary Proposal, *supra* footnote 12, at 21461.

[343] Similarly, Form CRS is designed to reduce retail investor confusion in the marketplace for brokerage and investment advisory services and to assist retail investors with the process of deciding whether to engage, or to continue to engage, a particular firm or financial professional and whether to establish, or to continue to maintain, an investment advisory or brokerage relationship. A broker-dealer firm or financial professional's use of "adviser" or "advisor" in its name or title would inhibit a customer's full understanding of the contours of his or her relationship with the firm and financial professional, undermining Form CRS.

[344] *See* Rule 15*l*–1(a)(2)(i)(A)(i).

[345] *See infra* footnotes 349–351 and accompanying text.

[346] In the Relationship Summary Proposal, we stated that our proposed restriction on the terms "adviser" and "advisor" would not have applied to broker-dealers when communicating with institutions. *See* Relationship Summary Proposal, *supra* footnote 12, at 21462. Given that Regulation Best Interest and the Relationship Summary apply only to retail customers and retail investors, respectively, our presumption would only apply to the use of "adviser" and "advisor" in such contexts. Therefore, we do not believe that further clarification of communications by non-retail focused broker-dealers is necessary.

[347] Specifically, in the Proposing Release we stated that a standalone broker-dealer would satisfy the capacity disclosure by complying with the proposed Relationship Summary and Affirmative Disclosure requirements. We provided this proposed guidance in the context of concurrently proposing the Titling Restrictions. For the reasons discussed herein, we believe a presumption against the use of these titles by standalone broker-dealers is more appropriate than a restriction.

[348] If a financial professional is a registered representative of a broker-dealer that is a dual-registrant but the professional is not also a supervised person of an investment adviser, this professional would similarly be presumptively in violation of the capacity disclosure requirement if the financial professional uses the title "adviser" or "advisor." However, this financial professional may continue to use either the dual-registrant's materials or may use the firm's name in the financial professional's communications even if the firm's name includes the title "adviser" or "advisor"

Although using these names or titles creates a presumption of a violation of the Disclosure Obligation in Regulation Best Interest, we are not expressly prohibiting the use of these names and titles by broker-dealers because we recognize that some broker-dealers use them to reflect a business of providing advice other than investment advice to retail clients. A clear example is a broker-dealer (or associated person) that acts on behalf of a municipal advisor [349] or commodity trading adviser,[350] or as an advisor to a special entity,[351] as these are distinct advisory roles specifically defined by federal statute that do not entail providing investment advisory services. We also recognize that a broker-dealer may provide advice in other capacities outside the context of investment advice to a retail customer that would present a similarly compelling claim to the use of these terms. In these circumstances, firms and their financial professionals may in their discretion use the terms "adviser" or "advisor." [352] In most instances, however, when a broker-dealer uses these terms in its name or title in the context of providing investment advice to a retail customer, they will generally violate the capacity disclosure requirement under Regulation Best Interest.

because such firm is dually registered as an investment adviser and broker-dealer and is not presumptively violating the capacity disclosure requirement under Regulation Best Interest. Moreover, we believe it would be consistent for dual-registrants and dually registered financial professionals to use these terms as they would be accurately describing their registration status as an investment adviser.

[349] 15 U.S.C. 78o–4(e)(4).

[350] 15 U.S.C. 80b–2(a)(29).

[351] 15 U.S.C. 78o–8(h)(2)(A).

[352] Some commenters raised concerns that the proposed restriction would not permit financial professionals to indicate that they maintain particular certifications that include in the name or title "adviser" or "advisor." *See, e.g.,* IWI August 2018 Letter; Letter from IWI (Oct. 9, 2018) ("IWI October 2018 Letter"). *Cf.* Letter from John Robinson (Aug. 6, 2018) ("Robinson Letter") (suggesting that the Commission limit the use of the term "financial planner" to investment adviser representatives); FPC Letter (suggesting that the Commission clarify which certifications or professional designations may be used for financial planners). We recognize that these designations are intended to convey adherence to particular standards that financial professionals have met. However, these designations are not rooted in any statutory construct (as are the titles "commodity trading advisor" and "municipal advisor") and given that the terms "adviser" and "advisor" are still associated with the statutory term "investment adviser," even if used in a designation, a broker-dealer or associated person that uses these designations would similarly be in presumptive violation of the capacity disclosure requirement in Regulation Best Interest.

Marketing Communications

As discussed above, several commenters on the Titling Restrictions raised concerns that restricting the use of names and titles would be insufficient to address what they viewed as the larger issue of broker-dealer marketing communications where a broker-dealer and/or its financial professional appears to be holding itself out as an investment adviser. Marketing communications provide additional context to investors and are designed to persuade potential customers to obtain and pay for the firm's services and products.[353] They communicate to customers what services firms understand themselves to be providing—including, for broker-dealers, recommendations in connection with and reasonably related to effecting securities transactions.

The way in which a broker-dealer markets itself may have regulatory consequences. As noted above, Form CRS requires, among other items, broker-dealers (and investment advisers) to state clearly key facts about their relationship, including their registration status and the services they provide.[354] Broker-dealers (and investment advisers) will also be required through Form CRS to provide information to assist retail investors in deciding whether to engage in an investment advisory or brokerage relationship.[355] Additionally and as discussed above, we are adopting the capacity disclosure requirement under Regulation Best Interest, which requires broker-dealers and their financial professionals to affirmatively disclose the capacity (*e.g.,* brokerage) in which they are acting with respect to their recommendations.[356] These obligations are designed to improve awareness among retail customers of the capacity in which their firm or financial professional acts when it makes recommendations so that the retail customer can more easily identify and understand their relationship.

As noted above, we are not adopting the Commission's proposed alternative holding out approach that would have addressed broker-dealer marketing communications through the lens of the solely incidental exclusion.[357] However, under our interpretation of the solely incidental prong of the broker-dealer exclusion from the definition of investment adviser, a broker-dealer's investment advisory services do not fall within that prong if the broker-dealer's primary business is giving investment advice or if its investment advisory services are not offered in connection with and are not reasonably related to the broker-dealer's business of effecting securities transactions.[358] By more clearly delineating when a broker-dealer's performance of advisory activities renders it an investment adviser, this interpretation provides guidance that may be informative to broker-dealers when designing marketing communications that accurately reflect their activities.

Broker-dealers, dual-registrants, and affiliated broker-dealers of investment advisers that market their services together should consider whether modifications are needed in their marketing communications in light of these new obligations. As we noted in the Relationship Summary Proposal, broker-dealers can, and do, provide investment advice so long as such advice comports with the broker-dealer exclusion under Advisers Act section 202(a)(11)(C). While broker-dealers and their financial professionals may state that they provide "advice" in their marketing communications, those and other statements should not be made in a manner that contradicts the disclosures made pursuant to Regulation Best Interest and Form CRS, and should be reviewed in light of the Solely Incidental Interpretation.[359] We believe that the combination of new disclosure obligations and requirements and firms' implementation of these new obligations will appropriately address commenters' concerns regarding broker-dealers that hold themselves out as

[353] Affiliated firms may market advisory and brokerage services in a single set of communications. A dually registered firm also may seek to market the primary services provided by its advisory and brokerage business lines in a single set of communications. We believe this combined approach to providing customers with information about investment services enhances customer choice, and we understand that many such firms market in this way in an effort to provide a comprehensive picture of the firm's services.

See also Instructions to Form CRS, General Instruction 5. (Encouraging dual-registrants to prepare one relationship summary discussing both its brokerage and investment advisory services, but stating that they may prepare two separate relationship summaries for brokerage services and investment advisory services. Whether the firm prepares one relationship summary or two, the firm must present the brokerage and investment advisory information with equal prominence and in a manner that clearly distinguishes and facilitates comparison of the two types of services.).

[354] *See* Relationship Summary Adopting Release, *supra* footnote 12.

[355] *Id.*

[356] *See* Rule 15*l*–1(a)(2)(i)(A)(i).

[357] *See supra* footnote 335 and accompanying text.

[358] *See* Solely Incidental Interpretation, *supra* footnote 12, Section II.B (providing the Commission's interpretation of the solely incidental prong of the broker-dealer exclusion from the Advisers Act.)

[359] *See* Relationship Summary Proposal, *supra* footnote 12, at 21461.

investment advisers, particularly those who can change capacities when serving retail investors in a dual capacity.[360]

In addition to these new obligations, FINRA Rule 2210 (regarding its members' communications with the public) is designed to ensure that broker-dealer communications with the public are fair, balanced, and not misleading.[361] This rule includes general standards, such as a requirement to not make any false or misleading statements, and specific content standards, such as requirements on how to disclose the broker-dealer's name in marketing communications.[362] Accordingly, we anticipate that FINRA will be reviewing the application of these rules in light of these new disclosure obligations. The Commission staff also will evaluate broker-dealer marketing communications to consider whether additional measures may be necessary.

Fees and Costs

In the Proposing Release, we stated that fees and charges applicable to the retail customer's transactions, holdings, and accounts would also be examples of "material facts relating to the terms and scope of the relationship"[363] As such, these fees and charges would generally have needed to be disclosed in writing prior to, or at the time of, the recommendation. While we did not propose to mandate the form, specific content, or method for delivering fee disclosure, we stated that we would generally expect that, to meet the Disclosure Obligation, broker-dealers would build upon the proposed Relationship Summary by disclosing, among other things, additional detail regarding the types of fees and charges described in the proposed Relationship Summary.[364]

We received a number of comments on the proposed Disclosure Obligation relating to fees and charges. As discussed in more detail in the relevant sections below, these comments generally sought clarity on the scope of fees and charges to be disclosed, including the particularity of the fees and charges to be disclosed (*i.e.*, whether standardized or individualized disclosure would be required). In consideration of the comments received, and in light of the obligations being imposed by the Relationship Summary, we are revising Regulation Best Interest to explicitly require the disclosure of fees and costs, and are providing additional clarifying guidance. In addition, we are revising the Regulation Best Interest rule text to refer to "fees and costs" instead of "fees and charges," consistent with the approach taken in the Relationship Summary. Specifically, we are revising the Disclosure Obligation to require disclosure of "all material facts relating to the scope and terms of the relationship with the retail customer, including [. . .] the material fees and costs that apply to the retail customer's transactions, holdings and accounts."[365]

We are also providing additional guidance addressing the scope of fees and costs to be disclosed. Namely, the Disclosure Obligation requires disclosure of *material* fees and costs relating to the retail customer's transactions, holdings and accounts. This obligation would not require individualized disclosure for each retail customer. Rather, the use of standardized numerical and other non-individualized disclosure (*e.g.*, reasonable dollar or percentages ranges) is permissible, as discussed below.[366]

Scope of Fees and Costs To Be Disclosed

Several commenters asked for clarification about whether all fees and charges must be disclosed, or only those that are "material."[367] In response, we are revising Regulation Best Interest to make explicit that a material fact regarding the scope and terms of the relationship includes material fees and costs that apply to the retail customer's transactions, holdings and accounts. As noted above, the standard for materiality for purposes of the Disclosure Obligation is consistent with the one the Supreme Court articulated in *Basic* v. *Levinson;* fees and costs are material and must be disclosed, if there is "a substantial likelihood that a reasonable shareholder would consider it important."[368] As noted above, in the context of this Regulation Best Interest, the standard of materiality is based on the retail customer, as defined in the rule.

We would generally expect that, to satisfy the Disclosure Obligation, broker-dealers would build upon the material fees and costs identified in the Relationship Summary, providing additional detail as appropriate. These descriptions could include, for example, an explanation of how and when the fees are deducted from the customer's account (*e.g.*, such as on a per-transaction basis or quarterly). Although the fees and costs identified in the Relationship Summary may provide a useful starting point for the identification of the material fees and costs that may be disclosed pursuant to the Disclosure Obligation, there may be other categories of fees and costs that are material under the facts and circumstances of a broker-dealer's business model that must be disclosed pursuant to the Disclosure Obligation.

Particularity of Fees and Costs Disclosed; Individualized Disclosure

Several commenters recommended that the Commission not require that broker-dealers provide individualized fee disclosures to retail customers. Specifically, they recommended that the Commission clarify that broker-dealers could meet the Disclosure Obligation if they provide a range of fees and costs or use standardized and hypothetical amounts rather than requiring disclosure of actual dollar amounts based on proposed amounts to be invested (*i.e.*, individualized fees).[369] These commenters cited concerns about cost and practicality associated with generating individualized disclosures.[370] With regard to product-level fees in particular, several commenters expressed concern that

[360] *See, e.g.*, IAA August 2018 Letter; FPC Letter; Better Markets CRS Letter.

[361] *See* FINRA Rule 2210.

Additionally, broker-dealers and their financial professionals should keep in mind the applicability of the antifraud provisions of the federal securities laws, including section 17(a) of the Securities Act, and Exchange Act Section 10(b) and Rule 10b–5 thereunder, to their marketing practices.

[362] *See, e.g.*, FINRA Rule 2210(d)(1) and (d)(3).

[363] *See* Proposing Release at 21601.

[364] *See* Proposing Release at 21600.

[365] Rule 15*l*–1(a)(2)(i)(A)(ii).

[366] *See* Section II.C.1.a, Disclosure Obligation, Fees and Costs, *Particularity of Fees and Costs Disclosed; Individualized Disclosure*.

[367] *See, e.g.*, Bank of America Letter (recommending that the Commission: (i) Provide greater specificity regarding the fees to be disclosed under Regulation Best Interest, and (ii) apply a "materiality" threshold to those fees).

[368] *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 224 (1988).

[369] *See, e.g.*, Vanguard Letter (recommending that the Disclosure Obligation could be satisfied by relaying the types and ranges of costs associated with a recommendation, or by using standardized and hypothetical investments, rather than requiring computation of actual dollar amounts based on proposed amounts to be invested); Capital Group Letter (stating that customized mutual fund fee and expense disclosures for investors at the time of the recommendation would be impractical); SIFMA August 2018 (recommending the Commission permit disclosure of a range of customer costs per product); NASAA August 2018 Letter (suggesting that the Commission mandate its Model Fee Table along with disclosure of other fees paid for services and any other third party remuneration).

[370] *See, e.g.*, TIAA Letter (stating that broker-dealers would need to expend significant resources to build new systems and new compliance programs in order to provide individualized fee disclosure); ICI Letter (recommending that the Commission confirm that the Disclosure Obligation would not require a broker-dealer to separately calculate fund fees and expenses); Capital Group Letter (stating that individualized disclosures raise significant operational burdens and compliance issues in exchange for, at best, inconsistent utility).

broker-dealers could not easily calculate individualized fees and charges associated with the securities about which they provide recommendations and that doing so might lead to inadvertently providing inconsistent or inaccurate fee estimates to their retail customers.[371] In this vein, several commenters recommended that broker-dealers should be able to satisfy the Disclosure Obligation regarding product-level fees by providing retail customers with or referring them to an issuer's offering materials, such as a prospectus.[372] Other commenters, on the other hand, stated that the Commission should not allow the use of percentages or ranges because such a presentation does not adequately inform investors of the fees and charges they will incur.[373]

As adopted, the Disclosure Obligation does not mandate individualized fee disclosure particular to each retail customer. Instead, broker-dealers may disclose "material facts" about material fees and costs in terms of more standardized numerical and narrative disclosures, such as standardized or hypothetical amounts, dollar or percentage ranges, and explanatory text where appropriate. The disclosure should accurately convey why a fee is being imposed and when the fee is to be charged. Further, as discussed below,[374] a broker-dealer will need to supplement this standardized disclosure with more particularized information if the broker-dealer concludes that such information is necessary to fully and fairly disclose the material facts associated with the fee or charge. For example, a broker-dealer might initially disclose a range of product fees, and later supplement that information with more particularized information by delivering the product prospectus.[375]

Consistent with this approach, and also in response to comments, we are further clarifying that a broker-dealer recommending a securities transaction or an investment strategy involving securities can meet the Disclosure Obligation regarding fees and costs assessed at the product level by describing those fees and costs in initial, standardized terms and providing subsequent particularized disclosure as necessary. To the extent that such subsequent information regarding product-level fees and costs appears in a currently mandated disclosure document, such as a trade confirmation or a prospectus, delivery of that information in accordance with existing regulatory obligations will be deemed to satisfy the Disclosure Obligation, even if delivery occurs after the recommendation is made, under the circumstances outlined in Section II.C.1. Although it is not required by Regulation Best Interest, broker-dealers may refer the customer to any issuer disclosure of the security being recommended, such as a prospectus, private placement memorandum, or offering circular, where more particular information may be found.

We acknowledge that the desire for greater fee transparency was a consistent theme of our investor engagement and we believe that the Disclosure Obligation, in conjunction with the Relationship Summary, significantly advances that goal. Individualized fee disclosure may be helpful to some retail customers, but it can also be costly, prone to errors, and cause delays in trade execution. In addition, in some cases the precise amount of the fee may be based on the dollar value of the transaction, and would not be known prior to or at the time of the recommendation, meaning that it could only be expressed in more general terms, such as a percentage value or range, as an initial matter. We believe that adopting the Disclosure Obligation that allows for the use of standardized disclosure furthers our goal of informing investors about fees and costs by the time of a recommendation in a workable manner. Nothing in Regulation Best Interest prevents a broker-dealer from providing such individualized disclosure to its customers should it wish to do so, and we encourage firms to assist retail customers in understanding the specific fees and costs that apply, and to provide more individualized disclosure where appropriate, or in response to a retail customer's request. As a best practice, firms may also consider reviewing with their retail customers the effect of fees and costs on the retail customer's account(s) on a periodic basis.[376] The costs, errors, delays, and other practical obstacles to individualized fee disclosure are likely to fall over time. We will continue to consider whether to require more personalized fee disclosure, particularly as technology evolves to address operational and technological costs.

With regard to the disclosure of product-level fees in particular, while we support the goal of bringing greater transparency to all fees incurred, we are seeking to supplement, not supplant, the existing regulatory regime currently applicable to product-level fees with the adoption of Regulation Best Interest. We acknowledge that if a broker-dealer highlights such fees with particularity, it may raise a customer's awareness of them, and we encourage as a best practice that broker-dealers do so.[377] We acknowledge also that the nature and extent of product-level disclosures may vary. However, we do not believe that requiring broker-dealers to deliver product disclosures earlier than is currently required, to generate fee disclosure not currently required of issuers, or to recalculate or highlight specific product-level fees already disclosed in an issuer's offering materials will meaningfully improve fee disclosure and it may, in fact, be unduly burdensome and raise the possibility of errors if broker-dealers were to be obligated to project or calculate product fees based on product issuer information. Accordingly, we believe that allowing broker-dealers to meet the Disclosure Obligation with regard to product-level fees by describing those fees in standardized terms with further detailed, particularized information related to the recommendation provided either prior to or at the time of the recommendation or afterwards under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation,* strikes an

[371] *See, e.g.,* TIAA Letter (stating that calculating individualized fee information for any retail customer would be difficult and might lead to inadvertently providing inconsistent or inaccurate fee estimate); Capital Group Letter.

[372] *See* TIAA Letter (stating that broker-dealers should not be obligated to provide fund-level fee disclosure outside of a fund prospectus or to provide individualized fee disclosure to retail customers); ICI Letter (stating that when making a recommendation of a fund, a broker-dealer should be permitted to direct customers to the fund's prospectus as the source of information about fund fees and expenses); Oppenheimer Letter (stating that the fund, not the broker-dealer, is in a better position to provide these disclosures, in a manner that is accurate, consistent and complete).

[373] *See, e.g.,* CFA August 2018 Letter (stating that the Commission should not allow for percentages or ranges because it would do little to inform investors); PIABA Letter (stating that broker-dealers should disclose the specific charges that their customers will incur as a result of the particular recommendation); UMiami Letter (stating that customers should be provided with clear and concise information that fully and fairly discloses the specific charges the customer will incur as a result of a particular recommendation).

[374] *See* Section II.C.1.c, Disclosure Obligation, Full and Fair Disclosure, *Layered Disclosure.*

[375] *See supra* footnote 302.

[376] Although we encourage firms to have this conversation with their retail customers, we are not suggesting that engaging in such a best practice would, by itself, create any implied or explicit obligation to monitor such fees and costs.

[377] With regard to product-level fees, in particular, broker-dealers may wish to highlight certain categories of fees such as distribution fees, platform fees, shareholder servicing fees and sub-transfer agency fees, in order to enhance retail customers' understanding of these fees to the extent applicable to the customer's transactions, holdings, and accounts.

appropriate balance between costs to firms and benefits to retail customers.[378]

We believe this approach is bolstered by the existence of complementary obligations protective of retail customers that are imposed by Regulation Best Interest. For example, to the extent fees and costs incurred related to these products create conflicts of interest associated with a recommendation, we believe they are appropriately highlighted and addressed in the context of the conflicts and incentives they create to make a recommendation, and must be addressed as part of the obligation to disclose material facts about conflicts of interest associated with a recommendation, as discussed below.[379]

Moreover, under the Care Obligation, a broker-dealer recommending a securities transaction or investment strategy involving securities to a retail customer must consider costs associated with that recommendation when determining whether it is in the best interest of that retail customer. As a result, disclosure of product-level fees and costs to satisfy the Disclosure Obligation will be supplemented by other aspects of Regulation Best Interest.

While the Disclosure Obligation provides broker-dealers with flexibility in describing the material fees and costs that apply, the disclosure should accurately convey why the fee or charge is being imposed and when the fee or charge is to be assessed. For example, describing a commission or markup as a fee for "handling services" could inappropriately disguise the fee's true nature. Furthermore, while using a percentage or dollar range to describe a fee can be appropriate, that range should be designed to reasonably reflect the actual fee to be charged. For example, a statement that a charge may be "between 5 and 100 basis points" would not be accurate if the fee is in almost all instances between 85 and 100 basis points. However, in this case, a broker-dealer could accurately describe the fee, for example, as "generally being between 85 and 100 basis points, sometimes lower, but never above." In some cases, actual dollar values based on a hypothetical transaction may facilitate customer understanding.

A material fact about fees and costs could also include informing a retail customer of a fee's triggering event, such as a fee imposed because an account minimum falls below a threshold and whether fees are negotiable or waivable.

Type and Scope of Services Provided

In the Proposing Release, we provided guidance that the type and scope of services a broker-dealer provides its retail customers would also be an example of what typically would be "material facts relating to the terms and scope of the relationship," that would require disclosure pursuant to the Disclosure Obligation.[380] Specifically, we stated that broker-dealers should build upon their disclosure in the Relationship Summary, and provide additional information regarding the types of services that will be provided as part of the relationship with the retail customer and the scope of those services.[381]

In particular, we noted that under proposed Form CRS broker-dealers would provide high-level disclosures concerning services offered to retail investors, including, for example, recommendations of securities, assistance with developing or executing an investment strategy, monitoring the performance of the retail investor's account, regular communications, and limitations on selections of products.[382] We recognized that a broker-dealer that offers different account types, or offers varying additional services to the retail customer may not be able, within the content and space constraints of the Relationship Summary, to provide "all material facts relating to the scope and terms of the relationship" with the retail customer.[383] Thus, we stated that pursuant to the proposed Disclosure Obligation, we would have generally expected broker-dealers to disclose these types of material facts concerning the actual services offered as part of the relationship with the retail customer separately from the Relationship Summary.

Commenters generally agreed that it was important for broker-dealers to disclose to their customers material facts about the type and scope of services they provide to their customers.[384] However, commenters sought clarity regarding the application of this proposed guidance, and raised questions about whether firms would be specifically required to disclose certain services (*e.g.*, monitoring account performance and providing financial education) pursuant to Regulation Best Interest,[385] as discussed below, and the level of disclosure required under Regulation Best Interest.[386]

Consistent with our approach in the Proposing Release, we continue to believe that the type and scope of services a broker-dealer provides to its retail customers are "material facts relating to the scope and terms of the relationship." Accordingly, we are revising the rule text to explicitly require the disclosure of the "type and scope of services provided to the retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer," as part of the "material facts relating to the scope and terms of the relationship" that must be disclosed pursuant to the Disclosure Obligation.[387]

We are interpreting the Disclosure Obligation to only require disclosure of material facts relating to the type of services provided (*e.g.*, the fact that the broker-dealer monitors securities transactions and investment strategies) and the scope of services (*e.g.*, information about the frequency and duration of the services). In response to comments, we are also specifically addressing the disclosure of information regarding whether or not the broker-dealer provides account monitoring services and whether the broker-dealer has account minimums or similar requirements.

In addition, in response to comments, we are clarifying that pursuant to the Disclosure Obligation, broker-dealers need to disclose only material information relating to the "type and scope of services provided." As discussed in the context of the disclosure of fees and costs above, the standard for materiality of the type and scope of services to be disclosed is consistent with the standard articulated in *Basic* v. *Levinson:* Information related to the type and scope of services provided is material, and must be disclosed, if there is "a substantial likelihood that a reasonable shareholder

[378] *See* Section II.C.1, Disclosure Obligation, *Oral Disclosure or Disclosure After a Recommendation*.

[379] *See* Section II.C.1.b, Disclosure Obligation, Material Facts Regarding Conflicts of Interest.

[380] *See* Proposing Release at 21602.

[381] *Id.*

[382] *See* Relationship Summary Proposing Release at 31426.

[383] *See* Section II.C.1.a, Disclosure Obligation, *Standard of Conduct*.

[384] *See, e.g.*, Pacific Life August 2018 Letter; Cetera August 2018 Letter.

[385] *See, e.g.*, Betterment Letter (recommending that the Commission ensure that dual-registrants communicate which of their services are advisory in nature); Northwestern Mutual Letter.

[386] *See, e.g.*, Cetera August 2018 Letter (stating that a best interest standard should include a requirement to deliver a summary description of the relationship between the firm and customer, including the scope of services); Committee of Annuity Insurers Letter (recommending the Commission clarify that a broker-dealer could satisfy the Disclosure Obligation by disclosing the products and services available to its retail customers and does not need to disclose information particularized to a recommendation).

[387] Rule 15*l*–1(a)(2)(i)(A)(iii).

would consider it important." [388] As noted above, in the context of Regulation Best Interest, this standard would apply in the context of retail customers, as defined.

We believe the information included in the Relationship Summary may provide a useful starting point for the identification of the type and scope of services that must be disclosed pursuant to the Disclosure Obligation. For example, in the Relationship Summary a broker-dealer must describe its principal brokerage services offered, including buying and selling securities, and whether or not it offers recommendations to retail investors.[389] Additionally, in the Relationship Summary, if applicable, the broker-dealer must address whether or not the firm offers monitoring of investments.

We believe that broker-dealers will generally need to build upon the disclosures made in the Relationship Summary as appropriate, and to provide additional information regarding the types of services that will be provided as part of the relationship with the retail customer and the scope of those services (*e.g.*, the frequency and duration of the services), as necessary, in order to meet the Disclosure Obligation's requirement to disclose "all material facts" regarding the type and scope of services provided. Broker-dealers may be able to satisfy this aspect of the Disclosure Obligation by relying on their existing disclosures about the type and scope of their services, typically reflected in their account opening agreement or other account opening related documentation, so long as the disclosure as a whole addresses the material facts relating to the type and scope of services offered to the retail customer.

Disclosure of Material Limitations on Securities and Investment Strategies

In the Proposing Release, we included any limitations on the products and services offered as an example of a material fact relating to the terms and scope of the relationship that would need to be disclosed pursuant to the Disclosure Obligation. We agree with commenters who advocated for helping investors to understand whether a broker-dealer limits its product offerings, and to what extent, before entering into a relationship with a broker-dealer.[390] We continue to believe that broker-dealers that place material limitations on the securities or investment strategies involving securities that may be recommended to retail customers—such as recommending only proprietary products or a specific asset class—need to describe the material facts relating to those limitations.[391]

Therefore, in response to comments, we are revising Regulation Best Interest to explicitly require that, as part of the disclosure of the type and scope of services provided to the retail customer, a broker-dealer must include "any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer." [392] For purposes of this requirement, a "material limitation" placed on the securities or investment strategies involving securities could include, for example, recommending only proprietary products (*e.g.*, any product that is managed, issued, or sponsored by the broker-dealer or any of its affiliates), a specific asset class, or products with third-party arrangements (*e.g.*, revenue sharing, mutual fund service fees).[393] Similarly, the fact that the broker-dealer recommends only products from a select group of issuers, or makes IPOs available only to certain clients, could also be considered a material limitation. To cite another example, if an associated person of a dually registered broker-dealer only offers brokerage services, and is not able to offer advisory services, the fact that the associated person's services are materially narrower than those offered by the broker-dealer would constitute a material limitation.

We recognize that, as a practical matter, all broker-dealers limit their offerings of securities and investment strategies to a greater or lesser degree. We do not believe that disclosing the fact that a broker-dealer does not offer the *entire* possible range of securities and investment strategies would convey useful information to a retail customer, and therefore we would not consider this fact, standing alone, to constitute a material limitation.[394]

In addition, we believe that there are a number of reasonable practices by which appropriate limitations are determined, including processes for the selection of a "menu" of products that will be available for recommendations to retail customers. We further recognize that these limitations can be beneficial, such as by helping ensure that a broker-dealer and its associated persons understand the securities they are recommending, as required by paragraph (a)(2)(ii)(A) of the Care Obligation. We have also explicitly stated that Regulation Best Interest would not prohibit a broker-dealer from recommending, for example, a limited range of products, or only proprietary products, provided the broker-dealer satisfies the component obligations of Regulation Best Interest. Nonetheless, because these firm-wide threshold decisions have such a significant effect on the subsequent recommendations ultimately made to a retail customer, we are requiring disclosure of the material limitations on the securities or investment strategies involving securities that may be recommended—by the broker-dealer and its associated persons—as well as any associated conflicts of interest.

Explicitly requiring disclosure of these limitations is also consistent with our approach in the Care and Conflict of Interest Obligations. As discussed below, despite the potential beneficial aspects of some limitations, we are concerned that such limitations and any associated conflicts of interest can negatively affect the securities or investment strategies recommended to a retail customer.[395] In recognition of this concern, we have revised the Conflict of Interest Obligation to specifically require the establishment of policies and procedures to identify, disclose, and address that risk.[396] Furthermore, we reiterate that even if a broker-dealer discloses and addresses any material limitations on the securities or investment strategies involving securities recommended to a retail customer, and any associated conflicts of interest, as required by the Disclosure

[388] *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 224 (1988).

[389] *See* Form CRS, Item 2.B. (Description of Services).

[390] *See* CFA Institute Letter (stating that if a broker-dealer only offers proprietary products, it should clearly call attention to the higher product cost and the potential cost to the investor of such a limited offering); SIFMA August 2018 Letter (stating that a firm should be able to limit its offerings to a particular subset of its customers to proprietary product or revenue sharing products as long as: (1) The broker-dealer discloses that it is limiting its recommendation to a specific set of securities and (2) the specific set of securities contains appropriate securities to meet the customer's needs); SPARK Letter (recommending that the Commission permit broker-dealers that only offers proprietary products or a limited menu of investments to satisfy the conflict mitigation requirements by: (1) Disclosing any material limitations on the investment products being offered and (2) reasonably concluding that the limitations will not violate the Care Obligation).

[391] *See* Form CRS, Item 2.B.(iii).

[392] Rule 15*l*–1(a)(2)(A). *See also* Section II.C.1 for a discussion of the materiality standard under *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988).

[393] This is consistent with the approach we are taking in the Relationship Summary Adopting Release.

[394] *See Basic, Inc.* v. *Levinson*, 485 U.S. 224, 224 (1988).

[395] *See* Section II.C.3, Conflicts of Interest. *See* Proposing Release at 21608 (asking commenters to comment on whether, and, if so why, the Commission should require specific disclosure on product limitations).

[396] *See* Section II.C.4.

and Conflict of Interest Obligations, it would nevertheless need to satisfy the Care Obligation in recommending such products.[397]

Account Monitoring Services

In the Proposing Release, we identified as a material fact relating to the scope and terms of the relationship with the retail customer the type and scope of services provided by the broker-dealer, including, for example, monitoring the performance of the retail customer's account.[398] Additionally, the Proposing Release stated that to the extent that the broker-dealer agrees with a retail customer by contract to provide periodic or ongoing monitoring of the retail customer's investments for purposes of recommending changes in investments, Regulation Best Interest would apply to, and a broker-dealer would be liable for not complying with the proposed rule with respect to, any recommendations about securities or investment strategies made to retail customers resulting from such services.[399]

Commenters suggested that broker-dealers should be required to clearly define the nature of account monitoring services offered, with some commenters pointing to retail customer confusion on this topic.[400] One commenter stated that disclosure will not help a retail customer of a dual-registrant who has both brokerage and advisory accounts, who is unlikely to remember which accounts his or her financial advisor is responsible for monitoring, and for which accounts the customer bears that responsibility. Accordingly, the commenter recommends that we require broker-dealers to monitor all retail customers' accounts.[401]

As discussed in the Solely Incidental Interpretation, we disagree with commenters who suggested that any monitoring of customer accounts would require a broker-dealer to register as an investment adviser and we believe that it is important for retail customers to understand: (1) The types of account monitoring services (if any) a particular broker-dealer provides, and (2) whether or not the broker-dealer will be providing monitoring services for the particular retail customer's account. Accordingly, we believe that whether or not the broker-dealer will monitor the retail customer's account and the scope and frequency of any account monitoring services that a broker-dealer agrees to provide are material facts relating to the type and scope of services provided to the retail customer and must be disclosed pursuant to the Disclosure Obligation. This disclosure could indicate, for example, that the broker-dealer will monitor the account or investments at a stated frequency in light of the retail customer's investment objectives for the purpose of recommending an asset reallocation where appropriate, or that the broker-dealer will monitor the account periodically to determine whether a brokerage account continues to be in the retail customer's best interest. Or, broker-dealers that offer no account monitoring services could disclose that they will not monitor the account or consider whether any recommendations may be appropriate unless the retail customer specifically requests that they do so.[402]

The Relationship Summary requires broker-dealers to explain whether or not they monitor retail investors' investments, including the frequency and any material limitations.[403] However, as noted above, because the Relationship Summary provides high-level disclosure, in most cases it generally would not be sufficiently specific to inform investors about the scope and frequency of any account monitoring services applicable to the particular retail customer's account. The Disclosure Obligation is designed to provide investors with an expanded description of the material information relating to such services. Furthermore, as discussed in Section 2.B.2.b., Regulation Best Interest applies to recommendations resulting from agreed-upon account monitoring services (including implicit hold recommendations). Requiring disclosure of whether or not the broker-dealer will monitor the retail customer's account, and the scope and frequency of such monitoring, will help retail customers understand the terms applicable to the particular retail customer's account. While retail customers with multiple accounts will have to keep track of the accounts for which their broker-dealer has agreed to monitor, we believe that requiring disclosure of this service will provide those retail customers with sufficient clarity about the monitoring services they may expect. Requiring all broker-dealers to monitor all retail customer accounts, as one commenter suggested, would diminish the options available to retail customers, who may wish to have their accounts monitored to a greater or lesser degree (including not at all).

Account Balance Requirements

The Proposing Release did not address whether a broker-dealer offering brokerage accounts subject to account balance requirements is a "material fact relating to the scope and terms of the relationship." However, several commenters to the Form CRS proposal suggested that the Commission require firms to disclose any account balance requirements in the Relationship Summary.[404] We believe that account balance requirements are a material fact relating to the terms and scope of the relationship. Consequently, we are interpreting the Disclosure Obligation to include disclosure of whether a broker-dealer has any requirements for retail customers to open or maintain an account or establish a relationship, such as a minimum account size. We believe that if a broker-dealer will only open a brokerage account for a retail customer with a specific account minimum, such a basic operational aspect of the account is a material fact relating to the type and scope of services provided. If dollar thresholds or other requirements apply to a retail customer's ability to *maintain* an existing account, or to avoid additional fees when the threshold is crossed (for example, a "low account balance" fee), such requirements also would likely be of importance to a retail customer.[405] We further believe retail customers can use facts about different account size requirements for both current and future planning and decision-making purposes. Accordingly,

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[397] *See* Section II.C.2.

[398] Proposing Release at 21600.

[399] *Id.* at 21594.

[400] *See, e.g.,* NAIFA Letter (asserting broker-dealers should be free to agree to, and define the nature of, any ongoing relationship via contract, such as including monitoring services); *see also* RAND 2018 (stating that participants demonstrated a lack of clarity on how a financial professional would monitor an account); OIAD/RAND (stating that some participants perceived that continuous monitoring of a client's account is consistent with acting in the client's best interest).

[401] AFL–CIO April 2019 Letter.

[402] As discussed in footnote 167, we recognize that a broker-dealer may voluntarily, and without any agreement with the customer, review the holdings in a retail customer's account for the purposes of determining whether to provide a recommendation to the customer. We do not consider this voluntary review to be "account monitoring," nor would it in and of itself on its own to create an implied agreement with the retail customer to monitor the customer's account. Any explicit recommendation made to the retail customer as a result of any such voluntary review would be subject to Regulation Best Interest.

[403] *See* Form CRS, Item 2.B.(i).

[404] *See, e.g.,* NASAA Letter (stating that "Form CRS should specify minimum account size and include information on miscellaneous fees different categories of investors can expect to pay."); Cetera August 2018 Letter (stating that Form CRS should include "[w]hether or not the firm has established standards for the minimum or maximum dollar amount of various account types;" and submitting mock-up form that include disclosures of account minimums); Primerica Letter. *See* Relationship Summary Adopting Release.

[405] *See* Relationship Summary Adopting Release.

the Commission believes this information constitutes a "material fact" that must be disclosed pursuant to the Disclosure Obligation.

Other Material Facts Related to the Scope and Terms of the Relationship

In the Proposing Release, although we identified the broker-dealer's capacity, fees and charges, and type and scope of services provided as examples of what would generally be considered "material facts relating to the scope and terms of the relationship with the retail customer," we noted that the Disclosure Obligation would also require broker-dealers and their associated persons to determine, based on the facts and circumstances, whether there are other material facts relating to the scope and terms of the relationship that would need to be disclosed.[406] We also asked for comment on whether examples of other information relating to scope and terms of the relationship should be highlighted by the Commission as likely to be considered a material fact relating to the scope and terms of the relationship that would need to be disclosed.[407]

A number of commenters provided suggestions of additional examples of such material facts that the Commission should highlight or explicitly require to be disclosed as a "material fact relating to the scope and terms of the relationship." Specifically, commenters raised whether a broker-dealer's basis for,[408] and risks associated with,[409] a recommendation, or the standard of conduct applicable to a broker-dealer making a recommendation,[410] should be material facts relating to the scope and terms of the relationship.

Basis for and Risks Associated With the Recommendation

The Proposing Release did not address whether a broker-dealer's basis for a recommendation is a "material fact relating to the scope and terms of the relationship." However, several commenters requested that the Commission treat a broker-dealer's basis for a recommendation as a "material fact relating to the scope and terms of the relationship" that would likely need to be disclosed prior to, or at the time of the recommendation, pursuant to the Disclosure Obligation.[411] Similarly, several commenters suggested that the Commission should treat risks associated with a broker-dealer's recommendation as "material facts relating to the scope and terms of the relationship" that would likely need to be disclosed prior to, or at the time of the recommendation.[412] Other commenters opposed requiring particularized disclosure of the basis of individual recommendations, stating that it is sufficient to disclose that different products are available with different features rather than require firms specify why the broker-dealer recommended one product over another.[413]

Our view is that the general basis for a broker-dealer's or an associated person's recommendations (*i.e.,* what might commonly be described as the firm's or associated person's investment approach, philosophy, or strategy) is a material fact relating to the scope and terms of the relationship with the broker-dealer that must be disclosed pursuant to the Disclosure Obligation. The process by which a broker-dealer and an associated person develop their recommendations to retail customers is of fundamental importance to the retail customer's understanding of what services are being provided, and whether those services are appropriate to the retail customer's needs and goals. We believe that such a description can be made in standardized or summary form; however the disclosure should also address circumstances of when the standardized disclosure does not apply and how the broker-dealer will notify the customer when that is the case. For example, if an associated person has a distinct investment approach, as may be the case with persons associated with an independent contractor broker-dealer, the broker-dealer's standardized disclosure should indicate how its associated persons will notify retail customers of their own investment approach.

While the general basis for the recommendation is a material fact for purposes of the Disclosure Obligation, we decline to require disclosure of the basis for each recommendation, an approach that could involve significant costs and in many cases may simply repeat the more standardized disclosure that we are already requiring. With regard to how conflicts of interest may affect the basis for a particular recommendation, we note that the Disclosure Obligation requires disclosure of the material facts relating to the conflicts of interest associated with the recommendation, which will help retail customers evaluate the incentives a broker-dealer or associated person may have in making a recommendation; and the Conflict of Interest Obligation requires a broker-dealer to have policies and procedures to mitigate, and in certain instances, eliminate, specified conflicts of interest. Accordingly, to the extent the basis for any recommendation is subject to any conflicts of interest, the Commission believes that the Care Obligation's substantive requirement to have a reasonable basis for the recommendation, combined with the Disclosure, Conflict of Interest and Compliance Obligations, provides sufficient protections to broker-dealers' retail customers.

Similarly, we are interpreting disclosure of the risks associated with a broker-dealer's or associated person's recommendations in standardized terms as a material fact related to the scope and terms of the relationship that needs to be disclosed. For example, a broker-dealer could disclose: "While we will take reasonable care in developing and making recommendations to you, securities involve risk, and you may lose money. There is no guarantee that you will meet your investment goals, or that our recommended investment strategy will perform as anticipated. Please consult any available offering documents for any security we recommend for a discussion of risks associated with the product. We can provide those documents to you, or help you to find them." This example is purely illustrative. Whether any

[406] *See* Proposing Release at 21600–21601.

[407] *See* Proposing Release at 21607.

[408] *See infra* footnote 411.

[409] *See infra* footnote 412.

[410] *See infra* footnote 417.

[411] *See, e.g.,* PIABA Letter (recommending that broker-dealers be required to provide a clear and understandable explanation as to the other lower cost investments which are available, and why the higher cost investment is being recommended); Morningstar Letter (recommending that the Commission require a firm to disclose its analysis of the reasons it is recommending a rollover from an ERISA-covered retirement plan to an IRA and why it is in the participant's best interest).

[412] *See, e.g.,* PIABA Letter (recommending that the Commission extend the Disclosure Obligation to include the risks, benefits, and ramifications of a recommendation).

[413] *See, e.g.,* LPL August 2018 Letter (stating that a broker-dealer could satisfy the Care Obligation if it recommends a more expensive investment product so long as it discloses that the recommended product is not the least expensive among the alternatives and is otherwise in the investor's best interest); Committee of Annuity Insurers Letter (recommending that the Commission clarify that a broker-dealer could satisfy the Disclosure Obligation through the use of a disclosure describing the products and services available to its retail customers and related conflicts of interest, and that a broker-dealer or associated person need not provide a disclosure particularized to a recommendation). *See also* CCMC Letters (requesting that the SEC confirm that it is sufficient to disclose that different products are available with different features rather than require firms to also document why the firm recommended one product over another); IPA Letter (requesting additional guidance regarding specificity of disclosure needed to demonstrate why a broker-dealer recommended one of multiple different products (with different terms, cost structures and conditions) that each meet the customer's investment objective).

particular disclosure by a broker-dealer is sufficient to meet the Disclosure Obligation will depend on the facts and circumstances.

The risks associated with a particular recommendation would be relevant to a retail customer. However, we believe that broker-dealers may rely on the existing disclosure regime governing securities issuers to disclose the risks associated with any issuer, security or offering,[414] and it is not our intent to require the broker-dealer to duplicate or expand on those disclosures. Consistent with our approach, discussed above, to disclosure of product-level fees and costs, we believe that describing product-level risks in standardized terms, with additional information in any available issuer disclosure documents delivered in accordance with existing regulatory requirements would satisfy the Disclosure Obligation. As noted above, we are not seeking to supplant the developed regulatory regime currently applicable to offering disclosure with the adoption of Regulation Best Interest.

While we believe that a standardized discussion of risks is a material fact that must be disclosed to satisfy the Disclosure Obligation, we decline to impose a disclosure requirement specific to each recommendation. As with regard to the disclosure of the individualized basis for each recommendation, we believe that such specific disclosure could involve significant costs and in many cases simply repeat the more standardized disclosure that we are requiring, which we believe will sufficiently inform retail customers, in broad terms, of the nature of the risks associated with a recommendation.

In addition, under the Care Obligation, a broker-dealer making a recommendation of a securities transaction or investment strategy involving securities to a retail customer must consider the risks when determining whether it has a reasonable basis for believing that the recommended transaction or investment strategy could be in the best interest of at least some retail customers, and is in the best interest of a particular retail customer. Moreover, under paragraph (a)(2)(B) of Regulation Best Interest, discussed below, broker-dealers need to disclose "all material facts relating to conflicts of interest that are associated with the recommendation," which will require disclosure of what we believe to be a significant risk associated with a broker-dealer's recommendations—the broker-dealer's conflicts of interest. For these reasons, we believe that standardized written disclosure of this information in general terms is sufficient.

Consistent with the Compliance Obligation, broker-dealers should consider developing policies and procedures that address the circumstances under which the basis for a particular recommendation would be disclosed to a retail customer. As a best practice, firms also should encourage their associated persons to discuss the basis for any particular recommendation with their retail customers, including the associated risks, particularly where the recommendation is significant to the retail customer. For example, the decision to roll over a 401(k) into an IRA may be one of the most significant financial decisions a retail investor could make. Thus, a broker-dealer should discuss the basis of such recommendations with the retail customer. Similarly, we encourage broker-dealers to record the basis for their recommendations, especially for more complex, risky or expensive products and significant investment decisions, such as rollovers and choice of accounts, as a potential way a broker-dealer could demonstrate compliance with the Care Obligation.

Standard of Conduct[415]

As stated in the Proposing Release, the Commission intended the Relationship Summary to touch on issues that are also contemplated under the Disclosure Obligation, such as facilitating greater awareness of key aspects of a relationship with a firm or financial professional, such as the applicable standard of conduct.[416] Several commenters on Regulation Best Interest also requested that the Commission treat the standard of conduct applicable to a broker-dealer making the recommendation to its retail customer as a "material fact relating to the scope and terms of the relationship" that would likely need to be disclosed prior to, or at the time of the recommendation under the Disclosure Obligation.[417] Specifically, these commenters requested that the Commission require a firm to disclose whether it is providing a recommendation subject to Regulation Best Interest or advice subject to a fiduciary duty.[418]

The Commission also carefully considered numerous comments concerning the standard of conduct disclosure in proposed Form CRS, along with the results of investor testing and the Commission's Feedback Form.[419] As discussed more fully in the Relationship Summary Adopting Release, we are adopting a requirement in Form CRS for a description of a firm's applicable standard of conduct using prescribed wording.[420] This "standard of conduct" disclosure (as modified from proposed Form CRS) both eliminates technical words, such as "fiduciary," and describes the legal obligations of broker-dealers, investment advisers, or dual-registrants using similar terminology in plain English. The prescribed wording

[414] *See, e.g.*, Item 503(c) of Reg. S–K (requiring disclosure of the "most significant" factors that make an offering "speculative or risky," as well as an explanation of how each risk "affects the issuer or the securities being offered." *See also* Form 10–K (requiring a description of the 503(c) risk factors that are "applicable to the registrant"). In some cases, SRO Rules applicable to recommendations of particular securities may also require disclosure of risks. *See, e.g.*, FINRA Rule 2330 (requiring a FINRA member or its associated persons recommending deferred variable annuity to have a reasonable belief that the customer has been informed of, among other things, market risk). *See also* FINRA Rule 2210(d), requiring, among other things, that statements in member communications "are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits."

[415] *See* Section II.C.1.a, Disclosure Obligation, *Capacity in Which the Broker-Dealer is Acting.*

[416] *See* Proposing Release at 21600.

[417] *See, e.g.*, NASAA 2018 Letter (recommending that the Commission provide specific instructions on how associated persons of dually registered firms should disclose capacity in which they are acting and whether the information they are providing is a recommendation subject to "best interest" or advice subject to a fiduciary duty). *See also* Betterment Letter (recommending that the Commission require broker-dealers to disclose that they are "salespeople who are providing sales recommendations and not advice" in lieu of the adoption of a fiduciary duty on broker-dealers).

[418] *Id.*

[419] Most commenters did not object to the proposal's requirement that broker-dealers and investment advisers provide disclosure regarding their standards of conduct or that such disclosure be standardized. *See, e.g.*, CFA Institute Letter (urging the Commission to require disclosure of the standard of conduct under which broker-dealers operate); IAA August 2018 Letter. In addition, results of investor studies and surveys indicate that retail investors view this information as helpful. *See* RAND 2018 (almost one third of survey respondents selected this section as one of the two most useful; Letter from Mark Quinn, Director of Regulatory Affairs, Cetera (Nov. 19, 2018) ("Cetera November 2018 Letter") (88% of survey respondents somewhat or strongly agreed "the firm's obligations to you" is an important topic"). *See also* Schwab Letter I (Hotspex) ("obligations the firm and its representatives owe me" ranked third where survey participants were asked to identify four topics as most important for a firm to communicate"). Similarly, commenters on Feedback Forms found this information to be useful. *See* Feedback Forms Comment Summary (38% of commenters on Feedback Forms graded the "Our Obligations to You" section of the relationship summary as "very useful" and 46% graded this section as "useful").

[420] Form CRS, Item 3.B.(i).a (stating that "If you are a broker-dealer that provides recommendations subject to Regulation Best Interest, include: 'When we provide you with a recommendation, we have to act in your best interest and not put our interest ahead of yours' ").

also highlights when a firm must satisfy its legal obligation—specifically, in the case of a broker-dealer, when making a recommendation.

We believe the standard of conduct owed to a retail customer under Regulation Best Interest is a material fact relating to the scope and terms of the relationship. However, given that Form CRS requires firms to disclose in prescribed language the applicable standard of conduct and, as discussed above, the Disclosure Obligation requires broker-dealers to disclose the capacity (*i.e.,* brokerage) in which they are acting with respect to a recommendation, we believe this disclosure to be sufficient and thus requiring any additional disclosure would be duplicative.

b. Material Facts Regarding Conflicts of Interest

As noted above, in addition to requiring disclosure of the "material facts relating to the scope and terms of the relationship," the proposed Disclosure Obligation would have required a broker-dealer to disclose "all material conflicts of interest associated with the recommendation." We proposed to interpret a "material conflict of interest" as a conflict of interest that a reasonable person would expect might incline a broker-dealer—consciously or unconsciously—to make a recommendation that is not disinterested."[421] We generally modeled this proposed interpretation on the Advisers Act approach to identifying conflicts of interest for which investment advisers may face antifraud liability in the absence of full and fair disclosure.[422] We expressed our preliminary belief that a material conflict of interest that generally should be disclosed would include material conflicts associated with recommending: Proprietary products, products of affiliates, or a limited range of products, or one share class versus another share class of a mutual fund; securities underwritten by the broker-dealer or an affiliate; the rollover or transfer of assets from one type of account to another (such as a recommendation to roll over or transfer assets in an ERISA account to an IRA); and allocation of investment opportunities among retail customers (*e.g.,* IPO allocation).[423]

While commenters supported the disclosure of conflicts of interest, some sought clarity on the standard for determining which conflicts should be disclosed,[424] and others requested clarity on whether conflicts involving certain actions (*e.g.,* rollovers)[425] and products (*e.g.,* proprietary products)[426] should be disclosed.[427]

Several commenters urged the Commission to define "conflicts of interest" without a reference to the terms "consciously or unconsciously."[428] These commenters claim that discerning a broker's conscious or unconscious state of mind is "confusing and inherently unknowable."[429] Similarly, one commenter stated that a broker-dealer would be unable to draft adequate policies and procedures that address an individual's mindset, noting that it would be impossible for a broker-dealer to anticipate an individual's unconscious conflicts.[430] Instead, these commenters suggested revised language that eliminates the notion of conscious or unconscious inclination.[431]

Similarly, several commenters opposed the Commission's use of the term "not disinterested."[432] These commenters believe that the term is not clear and could, among other things, suggest the elimination of all conflicts.[433] One of these commenters recommended that the Commission eliminate the term "not disinterested"[434] while another suggested that the Commission clarify whether "material" and "not disinterested" are intended to be identical or different standards for brokers and advisers.[435] Other commenters opposed the proposed standard, arguing that it was not as broad as the disclosure obligation applicable to investment advisers. In particular, some commenters urged the Commission to apply the standard for disclosure applicable to investment advisers as articulated by the Supreme Court in *SEC.* v. *Capital Gains Research Bureau.*[436] Specifically, commenters requested that the Commission require disclosure of not only material conflicts but also the *material facts* related to a recommendation.[437]

We are adopting the obligation to disclose conflicts of interest, with several modifications and clarifications to the Proposing Release. Specifically, Paragraph (a)(2)(i)(B) of Regulation Best Interest requires that broker-dealers disclose "material facts relating to conflicts of interest that are associated with the recommendation."[438]

[421] Proposing Release at 21602.

[422] *See id.* (citing *Capital Gains* (stating that as part of its fiduciary duty, an adviser must fully and fairly disclose to its clients all material information in accordance with Congress's intent "to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested")).

[423] *See* Proposing Release at 21603.

[424] *See, e.g.,* SIFMA August 2018 Letter, Edward Jones Letter (requesting clarity on the definition of materiality with regards to conflicts); Ameriprise Letter (stating that the definition of "material conflicts of interest" should follow well known and understood principles); Fidelity Letter (stating that the Commission should not distinguish between conflicts of interest based on financial incentives and all other conflicts of interest); Morgan Stanley Letter; CCMC Letters; TIAA Letter; Mass Mutual Letter; Empower Letter. *See also* IRI Letter (stating that requiring a registered representative to predict what a hypothetical reasonable person might think is confusing); ICI Letter (stating that rather than focusing on what a "reasonable person would expect . . ." the standard should focus on that nature of the incentive and its effect on a broker-dealer's conduct).

[425] *See, e.g.,* CFA Institute Letter.

[426] *See, e.g.,* SIFMA August 2018 Letter; State Attorneys General Letter; CFA Institute Letter.

[427] *See, e.g.,* Ameriprise Letter; State Attorneys General Letter; CFA August 2018 Letter.

[428] *See, e.g.,* Edward Jones Letter (urging the Commission to articulate a definition of materiality that does not refer to a person's unconscious activity); Empower Letter; Ameriprise Letter.

[429] *Id.*

[430] *See* Great-West Letter.

[431] *See, e.g.,* Edward Jones Letter (suggesting that the Commission define "material conflict" as an activity that: (i) Affects financial compensation of a person making a recommendation; and (ii) a reasonable investor would likely view as important to the total mix of information available when considering that recommendation); Ameriprise Letter (suggesting that the Commission define "material conflict of interest" as a conflict of interest that a reasonable person might conclude has the potential to influence the recommendation); Pacific Life August 2018 Letter (suggesting the Commission define "material conflict of interest" as a financial interest of the financial professional making a recommendation that a reasonable person would expect to affect the impartiality of such recommendation).

[432] *See, e.g.,* IPA Letter (stating that the use of the term "not disinterested" may require unnecessary legal interpretation); Empower Letter.

[433] *See, e.g.,* Empower Letter.

[434] *See id.*

[435] *See* IPA Letter.

[436] 375 U.S. 180 (1963). *See, e.g.,* CFA August 2018 Letter; Schnase Letter.

[437] *See, e.g.,* CFA August 2018 Letter.

[438] This supplements the disclosure required in the Relationship Summary regarding ways in which the broker-dealer and its affiliates make money from brokerage or investment advisory services they provide to retail investors, and about the related material conflicts of interest. The Relationship Summary requires firms to disclose, if applicable, conflicts related to compensation it could receive from proprietary products, third-party payments, revenue sharing, or principal trading. If firms do not have any of these conflicts, the firm must disclose at least one other material conflict of interest that affects retail investors. As described in the Relationship Summary Adopting Release, we declined to make a change pursuant to comments that suggested that Regulation Best Interest's and Form CRS's conflicts disclosures be coordinated, and that any conflict disclosure obligations under Regulation Best Interest should be satisfied upon delivery of the Relationship Summary. We recognize that broker-dealers may need to disclose additional conflicts at a point in time other than at the beginning of the relationship with a retail investor. Broker-dealers also may need to include additional information about conflicts of interest summarized in the Relationship Summary. The Relationship Summary will provide a high-level

Continued

However, as discussed in more detail below, in response to comments and in the light of the Relationship Summary, we are: (1) Adopting for purposes of Regulation Best Interest a definition of "conflict of interest" associated with a recommendation "as an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer—consciously or unconsciously—to make a recommendation that is not disinterested;" and (2) revising the Disclosure Obligation to require disclosure of "material facts" regarding such conflicts of interest. Under this approach, all conflicts of interest as interpreted under the Proposing Release will be covered by Regulation Best Interest.

We believe distinguishing between "conflicts of interest" and "material facts" regarding such conflicts that would be disclosed would make the Disclosure Obligation more consistent with the proposal's intent. In the Proposing Release, the Commission discussed limiting the disclosure of conflicts under the Disclosure Obligation "consistent with case law under the antifraud provisions, which limit disclosure obligations to "material facts."

After considering the comments, we have determined to retain the proposed approach to conflicts of interest as described in *Capital Gains.* In particular, we acknowledge commenter concerns about discerning a broker's conscious or unconscious state of mind. However, the description of conflicts of interest in *Capital Gains* is well established, familiar to many in the industry, particularly dual-registrants, and guidance already exists regarding what constitutes a conflict of interest under this standard. To provide clarity that this interpretation is limited to Regulation Best Interest, however, we are revising Regulation Best Interest to explicitly provide that a "conflict of interest" "means an interest that might incline a, broker, dealer, or natural person who is an associated person of a broker-dealer—consciously or unconsciously—to make a recommendation that is not disinterested," [439] consistent with the scope of the meaning of "conflict of interest" for investment advisers under *Capital Gains.*[440]

Several commenters also made suggestions regarding the Commission's interpretation of the term "material" as used in the proposed Disclosure Obligation (*i.e.,* the proposed requirement to disclose "all material conflicts of interest that are associated with the recommendation").[441] Many commenters agreed with the Commission's decision to use a "materiality" standard to determine those facts about conflicts of interest that must be disclosed.[442] However, several other commenters asked the Commission to clarify the meaning of "material." [443] These latter commenters stated, among other things, that the term "material" in proposed Regulation Best Interest was not clearly defined and would be subjectively interpreted.[444] Accordingly, many of these commenters recommended that the Commission adopt a materiality standard based on the standard articulated in *Basic* v. *Levinson.*[445]

The Supreme Court in *Basic* articulated a standard for materiality, stating that information is material if there is "a substantial likelihood that a reasonable shareholder would consider it important." [446] This definition of "material" is well established and thus limiting disclosure to material facts in the Disclosure Obligation will eliminate confusion and reduce the compliance burden on broker-dealers in fulfilling the Disclosure Obligation. It will also help focus the information made available to retail customers.[447] Accordingly, we interpret "material facts" consistent with the *Basic* standard. Moreover, while the Regulation Best Interest definition of "conflict of interest" is modeled on the regulatory regime applicable to investment advisers, and is not by its terms explicitly limited to "material" conflicts of interest, it would be difficult to envision a "material fact" that must be disclosed pursuant to the Disclosure Obligation that is not related to a conflict of interest that is also material under the *Basic* standard.[448]

Interpretation of Disclosure of Material Facts Relating to Conflicts of Interest

In response to comments, we are providing our view regarding what we would consider "material facts relating to conflicts of interest that are associated with a recommendation" that would need to be disclosed under the Disclosure Obligation. We believe the conflicts of interest identified in the Relationship Summary may provide a useful starting point for the identification of material facts that need to be disclosed pursuant to the Disclosure Obligation.[449] In addition, we also view how a broker-dealer's investment professionals are compensated, and the conflicts associated with those arrangements, as material facts relating to conflicts of interest that are associated with a recommendation.[450] While these conflicts of interest must be summarized in the Relationship Summary to the extent they are applicable, we believe that additional details regarding many of these conflicts need to be disclosed under the Disclosure Obligation as "material facts" relating to conflicts of interest associated with a recommendation.

Disclosure of Compensation

Broker-dealers receive compensation that typically varies depending on what securities transaction or investment strategy involving securities is being recommended. The source of the compensation may also vary, for example being paid directly by the investor, or by a product sponsor, or a combination of both. A broker-dealer may also pay its associated persons different rates of compensation depending on the type of security they sell.[451] Similarly, broker-dealers can receive different payments from

summary for retail investors so that they can engage in a conversation with their financial professional about investment advisory or brokerage services, and so that the retail investors can choose the type of service that best meets their needs, but will not necessarily include all material facts related to a particular conflict of interest. We believe many firms may not be able to capture all of the necessary disclosures about their conflicts in this short standardized disclosure.

[439] Rule 15*l*–1(b)(3).

[440] For the same reasons, we have eliminated the phrase "a reasonable person would expect" that was included in the definition of "material conflict of interest" discussed in the Proposing Release at 21602.

[441] *See, e.g.,* Transamerica August 2018 Letter; Fidelity Letter; SIFMA August 2018 Letter; Morgan Stanley Letter; IPA Letter; Great-West Letter.

[442] *See, e.g.,* Morgan Stanley Letter; Great-West Letter.

[443] *See, e.g.,* FSI August 2018 Letter (recommending the Commission publish examples of when a conflict is material); Wells Fargo Letter; Cetera August 2018 Letter; IPA Letter.

[444] *See, e.g.,* Great-West Letter (stating that the Commission appears to have created a very subjective standard to determine materiality).

[445] *See, e.g.,* Mass Mutual Letter; SIFMA August 2018 Letter; Bank of America Letter; CCMC Letters; TIAA Letter; Cetera August 2018 Letter; Fidelity Letter.

[446] *Basic* v. *Levinson.*

[447] As stated in the Proposing Release, we are sensitive to the potential that broker-dealers could adopt an approach that results in lengthy disclosures that undermine the Commission's goal of facilitating meaningful disclosure to assist retail customers in making informed investment decisions. Proposing Release at 21604.

[448] *See* Fiduciary Interpretation.

[449] *See, e.g.,* Form CRS, Item 3 (Fees, Costs, Conflicts, and Standard of Conduct).

[450] *See* Form CRS, Item 3.C.(i) ("*Description of How Financial Professionals Make Money:* Summarize how your financial professionals are compensated, including cash and non-cash compensation, and the conflicts of interest those payments create.").

[451] *See* NASD NTM 03–54.

different product providers (*e.g.*, mutual funds) for a variety of reasons, such as payments for inclusion on a broker-dealer's menu of products offered (sometimes referred to as shelf space). These compensation arrangements create a variety of conflicts of interest that must be addressed under both Form CRS and the Disclosure Obligation.

We believe that compensation associated with recommendations to retail customers and related conflicts of interest—whether at the broker-dealer or the associated person level—is a conflict of interest about which material facts must be disclosed as part of the Disclosure Obligation. This disclosure should summarize how the broker-dealer and its financial professionals are compensated for their recommendations and, as importantly, the conflicts of interest that such compensation creates. This summary should include the sources and types of compensation received, and may include the fact that fees and costs disclosed pursuant to Paragraph (a)(2)(i)(A) of Regulation Best Interest that a retail customer may pay directly or indirectly are a source of compensation, if that is the case. For example, if a broker-dealer receives compensation derived from the sale of securities or other investment products held by retail customers of the firm, including asset-based sales charges or service fees on mutual funds, that fact and the conflicts associated with the receipt of such compensation should be fully and fairly described.

Broker-dealers could meet the Disclosure Obligation by making certain required disclosures of information regarding conflicts of interest to their customers at the beginning of a relationship, and this form of disclosure may be standardized. However, if standardized disclosure, provided at such time, does not sufficiently identify the material facts relating to conflicts of interest associated with any particular recommendation, the disclosure would need to be supplemented so that such disclosure is tailored to the particular recommendation. For example, with regard to mutual fund transactions and holdings, a broker-dealer might disclose broadly that it is compensated by funds out of product fees or by the funds' sponsors, and that such compensation gives it an incentive to recommend certain products over other products for which the broker-dealer receives less compensation; later, when a broker-dealer recommends a particular fund, it could provide more specific detail about compensation arrangements, for example revenue sharing associated with the fund family. In the alternative, so long as the "material facts" regarding the conflicts associated with a recommendation of a mutual fund were disclosed at the outset of the relationship, no further disclosure need be made at the time of recommendation; we are not requiring that information regarding conflicts be disclosed on a recommendation-by-recommendation basis.

The Disclosure Obligation also does not require specific written disclosure of the amounts of compensation received by the broker-dealer or the financial representative. For example, we are not requiring broker-dealers to disclose the amount, if any, they compensate their financial professionals per transaction, or for year-end bonuses. We believe that disclosure of the material facts regarding conflicts of interest associated with a recommendation need not entail such individualized numerical disclosure, and that in any event such a level of detail may be difficult and costly to calculate with accuracy, and also confusing to investors in many instances. Instead, disclosure regarding conflicts must reasonably inform investors so that the investor may use the information to evaluate the recommendation, and that can be done without specific disclosure of the amount of the compensation. Although disclosure of specific compensation amounts is not required, depending on facts and circumstances, full and fair disclosure may require disclosure of the general magnitude of the compensation.[452]

We are also clarifying that while product fees and costs can be a significant source of compensation received by broker-dealers and associated persons, no disclosure regarding the particular amounts of these fees and costs is required under Regulation Best Interest with regard to conflicts of interest. Instead, what must be disclosed under Paragraph (a)(2)(i)(B) of Regulation Best Interest are the "material facts relating to conflicts of interest" created by compensation sourced from product fees and costs, rather than the fees and costs themselves.

Differences in Compensation and Proprietary Products

Several commenters recommended that required conflict disclosure address recommendations where a less expensive alternative is available, or condition the ability to recommend a more expensive product on the adequacy of a broker-dealer's conflict disclosures.[453] Similarly, several commenters expressed differing views on how payment of varying compensation should be handled under the "best interest" standard of Regulation Best Interest and how related conflicts should be disclosed.[454] For example, one commenter identified compensation differences within product lines as an example of a conflict that should be disclosed.[455] Several commenters also recommended that the Commission require disclosure of conflicts of interest related to use of proprietary products, and whether the broker-dealer offers alternatives to proprietary products.[456] Similarly, several commenters requested that the Commission clarify that broker-dealers can limit their offerings to proprietary products or products that make revenue sharing payments if, among other

[452] *See, e.g.*, Advantage Investment Management, Advisers Act Release No. 4455 (Jul. 18, 2016) (settled order) (the Commission brought an enforcement action against an adviser for failing to disclose the existence, nature and magnitude of a forgivable loan from a broker-dealer that the adviser had engaged to provide services to the adviser's clients); Taberna Capital Management LLC, Advisers Act Release No. 4186 (Sep. 2, 2015) (settled order) (the Commission brought an enforcement action against an adviser for failing to disclose the existence, nature, and extent of a conflict of interest raised by the adviser's receipt of certain fees from issuers); BISYS Fund Services, Inc., Advisers Act Release No. 2554 (Sep. 26, 2006) (settled order) (the Commission brought an enforcement action against a mutual fund administrator for failure to disclose information concerning the existence or magnitude of the conflicts of interest created by a marketing arrangement that called for BISYS to rebate a portion of its administrative fees to 27 mutual fund advisers so that the fund advisers would continue to recommend BISYS as an administrator).

[453] *See* PIABA Letter (stating that where less expensive alternatives are available, disclosure should include an explanation of why the recommendation is nevertheless in the best interest given other factors associated with the recommendation); LPL August 2018 Letter (recommending that the Commission clarify that a broker-dealer can recommend a product involving costs and charges that are within a range of reasonableness that has been disclosed to the investor in advance provided the recommendation is otherwise in the investor's best interest); UMiami Letter; SIFMA August 2018 Letter.

[454] *See, e.g.*, CFA August 2018 Letter (recommending that the Commission include compensation differences within product lines as an example of a conflict that should be disclosed); Ameriprise (stating that differential compensation for diverse products aligns with Regulation Best Interest provided the firm mitigates the potential related conflicts); Pacific Life August 2018 Letter (stating that the definition of "material conflicts of interest" must encompass, among other things, the types of compensation received by the person making the recommendation).

[455] *See* CFA August 2018 Letter.

[456] *See, e.g.*, Money Management Institute Letter (recommending the SEC allow firms to meet the Conflict of Interest Obligation with respect to their preference for proprietary products through disclosure); CFA Institute Letter; IRI Letter; SIFMA August 2018 Letter.

things, appropriate disclosure is made.[457]

As discussed above, we agree with commenters who stated that it may be compatible with the Care Obligation to recommend a more expensive product that is otherwise in a retail customer's best interest when there are less expensive alternatives available, to receive compensation that varies among products, and to recommend proprietary products.[458] However, we also believe that the conflicts of interest associated with such practices constitute "material facts" relating to conflicts of interest that must be disclosed under the Disclosure Obligation.

The receipt of higher compensation for recommending some products rather than others, whether received by the broker-dealer, the associated person, or both, is a fundamental and powerful incentive to favor one product over another.[459] While we are requiring firms to establish policies and procedures reasonably designed to mitigate the conflicts of interest that create an incentive for financial professionals to place the interest of the professional or broker-dealer ahead of the interest of the retail customer, we believe also that full and fair disclosure of the material facts concerning conflicts raised by variable compensation schemes is of particularly critical importance for an investor seeking to evaluate a recommendation under such circumstances, a concern further underscored by our approach under the Conflict of Interest Obligation of requiring policies and procedures to mitigate or eliminate certain conflicts.[460]

The benefits that accrue to a broker-dealer and its financial professionals from recommending proprietary products also raise conflicts of interest that must be disclosed. Material facts relating to the conflicts of interest associated with recommending proprietary products could include, as relevant, that the broker-dealer owns the product, and that in addition to any commission associated with purchasing the product, the broker-dealer or an affiliate may receive additional fees and compensation [461] related to that product.[462]

c. Full and Fair Disclosure

As proposed, the Disclosure Obligation would have required broker-dealers to "reasonably disclose" material facts relating to the scope and terms of the relationship with the retail customer, including all material conflicts of interest associated with the recommendation. The Commission used this formulation in order to give flexibility to broker-dealers in determining the most appropriate way to meet the proposed Disclosure Obligation depending on their individual business practices. The Commission also provided preliminary guidance on what it believed would be to "reasonably disclose" in accordance with the Disclosure Obligation by setting forth the aspects of effective disclosure, including the form and manner of disclosure and the timing and frequency of disclosure.

In this regard, the Commission requested comment on whether broker-dealers should be required to "reasonably disclose" and whether additional guidance as to how broker-dealers could meet this standard should be provided. The Commission also requested comment on whether disclosure should explicitly be required to be "full and fair." In response, some commenters raised questions about using the term "reasonably disclose" [463] and whether broker-dealers should be subject to less rigorous disclosure obligations for recommendations made to retail customers than investment advisers.[464] These commenters recommended that the Commission explicitly require broker-dealers to provide full and fair disclosure of material facts.[465] One commenter reasoned that the Commission should not make Regulation Best Interest any more stringent than in the Proposing Release, stating that "full and fair" is both inapplicable and unnecessary given the proposed standard under the Disclosure Obligation.[466]

After careful consideration of the comments received, the Commission is adopting the Disclosure Obligation with revisions to require "full and fair disclosure" of all material facts relating to the scope and terms of the relationship with the retail customer and all material facts relating to conflicts of interest associated with the recommendation for the reasons described below.

While we do not believe that adopting a "full and fair disclosure" standard is significantly different from the proposed requirement to "reasonably disclose," we believe that the Regulation Best Interest serves the Commission's goal of facilitating disclosure to assist retail customers in making informed investment decisions.[467] In addition,

[457] *See, e.g.*, SIFMA August 2018 Letter (stating that a firm should be allowed to limit its offerings to proprietary products or revenue sharing products, as long as: (a) The broker-dealer discloses to its customer that it is limiting the recommendation to a specific set of securities, and (b) the specific set of securities contains appropriate securities to meet the customer's needs); CFA Institute Letter (stating that when a firm only offers proprietary products it should disclose not only the higher product cost, but the potential cost to the investor of such a limited offering).

[458] *See generally* Section II.A.1, Commission's Approach.

[459] *See* Proposing Release at 21578 (referencing the Commission's long-held concerns about the incentives that commission-based compensation provides to churn accounts, recommend unsuitable securities, and engage in aggressive marketing of brokerage services); FINRA Report on Conflicts of Interest (Oct. 2013), *available at https://www.finra.org/sites/default/files/Industry/p359971.pdf* ("FINRA Conflicts Report") at p. 4.

[460] *See generally* Section II.C.3.

[461] For example, a broker-dealer's sale of proprietary products potentially generates a compensation stream for the broker-dealer, in addition to commissions, which may need to be disclosed under paragraph (a)(2)(i)(A).

[462] As discussed further in Section II.C.3, in addition to disclosure of such conflicts, broker-dealers are also required under the Conflict of Interest Obligation to establish, maintain, and enforce written policies and procedures reasonably designed to mitigate or address the conflicts presented.

[463] *See, e.g.*, CFA August 2018 Letter (stating that a "reasonable" disclosure standard gives firms too much discretion to determine how the disclosures will be presented); Galvin (arguing that the proposed standard would give broker-dealers more opportunities to argue that they acted "reasonably" under the rules).

[464] *See, e.g.*, CFA August 2018 Letter (stating that "[t]he Commission offers no explanation for why broker-dealers should be subject to less rigorous disclosure obligations than investment advisers").

[465] *See, e.g.*, Pace Investor Rights Clinic August 2018 Letter (urging the Commission to require broker-dealers to provide full and fair disclosure of any conflicts that are not eliminated or mitigated); Better Markets August 2018 Letter (urging the Commission to further enhance the Disclosure Obligations by requiring broker-dealers to make full and fair disclosure of all information required to be disclosed); State Attorneys General Letter; NASAA August 2018 Letter.

[466] *See* SIFMA August 2018 Letter.

[467] This approach is consistent with the rationale articulated in the Fiduciary Interpretation. *See* Fiduciary Interpretation at Section II.C (stating, "In order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent. For example, it would be inadequate to disclose that the adviser has 'other clients' without describing how the adviser will manage conflicts between clients if and when they arise, or to disclose that the adviser has 'conflicts' without further description. Similarly, disclosure that an adviser 'may' have a particular conflict, without more, is not adequate when the conflict actually exists." [However,] "[t]he word 'may' could be appropriately used to disclose to a client a potential conflict that does not currently exist but might reasonably present itself in the future."). *See also In the Matter of The Robare Group, Ltd., et al.*, Advisers Act Release No. 4566 (Nov. 7, 2016) (Commission Opinion) (finding, among other things, that adviser's disclosure that it *may* receive a certain type of compensation was inadequate because it did not reveal that the adviser actually had an arrangement pursuant to which it received fees that presented a potential conflict of interest); *aff'd in part and rev'd in part on other grounds Robare Group, Ltd., et al.* v. *SEC*, 922 F.3d 468 (D.C. Cir. 2019); *SEC* v. *Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (disclosure that investment adviser "may" trade in recommended securities for its own

Regulation Best Interest will more closely align the Disclosure Obligation with existing requirements for investment advisers [468] and is consistent with disclosure standards in other contexts under the federal securities laws.[469]

The full and fair disclosure standard that the Commission is adopting for broker-dealers under the Disclosure Obligation is generally similar to the disclosure standard applicable to investment advisers under the Advisers Act.[470] Similar to the Proposing Release's interpretation of the phrase "reasonably disclose," broker-dealers' obligation to provide full and fair disclosure should give sufficient information to enable a retail investor to make an informed decision with regard to the recommendation.[471]

We disagree with commenters who believe the "full and fair" standard is too stringent. While the general standard for broker-dealers under the Disclosure Obligation will be generally similar to the disclosure requirements applicable to investment advisers, the scope of the required disclosure is not as broad. For example, the Disclosure Obligation only requires disclosure of material facts relating to the *scope and terms* of the relationship with the broker-dealer, and material facts relating to conflicts of interest associated with a broker-dealer's recommendations, and not of all material facts relating to the relationship. In addition, the Disclosure Obligation only applies to retail customers. In contrast, the disclosure requirements imposed by the fiduciary duty under the Advisers Act generally and Form ADV in particular are broader (*e.g.,* Form ADV requires disclosure of the adviser's principal owner(s) and certain financial industry activities and affiliations, which are not explicitly required under the Disclosure Obligation; Form ADV and the fiduciary duty also go to disclosure of the entire relationship while the Disclosure Obligation is tailored to the recommendation and also given at relevant points in time). We designed our approach to avoid having retail customers receive overwhelming amounts of information.[472]

Some commenters suggested that disclosure and informed consent should be required in order to comply with the obligations under Regulation Best Interest, similar to the approach taken under the fiduciary duty under the Advisers Act.[473] We have carefully considered these comments. As noted above, under the Disclosure Obligation, broker-dealers are required to provide full and fair disclosure such that a retail customer can make an informed decision with regard to the recommendation (*i.e.,* whether to accept (or reject) that recommendation). In making such an informed decision after being provided with full and fair disclosure, we believe that the retail customer has provided "informed consent" in a manner that is analogous to the informed consent required to be provided by a client in the context of an investment adviser-client relationship.[474] An investment advisory client must provide informed consent to the adviser's conflicts of interest in the context of the entire relationship, which can be broader than the informed consent provided by a retail customer when making an informed decision to accept or reject a particular recommendation by a broker-dealer. We believe this is appropriate because the investment-adviser client relationship is generally broader and can include, for example, unlimited investment discretion by the investment adviser to conduct securities transactions on behalf of the client. The broker-dealer customer relationship on the other hand is generally transaction-based and the retail customer must accept (or reject) each recommendation by a broker-dealer after the broker-dealer has provided full and fair disclosure as required under the Disclosure Obligation. Thus, in this regard, Regulation Best Interest will more closely align the Disclosure Obligation with the existing requirements for investment advisers, as noted above, but is tailored to the broker-dealer relationship.[475] The Commission believes that the final Disclosure Obligation along with the protections provided by the requirements of Regulation Best Interest, including the Care Obligation and Conflict of Interest Obligation, will further serve to enhance the protections available to retail customers.

One commenter recommended that the Commission clarify what a broker-dealer is required to deliver to a retail customer in order to permit the retail customer to make an "informed decision," and asked the Commission to confirm that it does not require a case-by-case analysis of what is reasonable to permit the retail customer to make an informed decision.[476] In addition, other commenters underscored the importance of providing retail customers with sufficient time to review and comprehend the disclosed information prior to making an informed decision about a recommendation.[477] Other commenters

account was false and misleading where the adviser actually invested in 10%–25% of the publicly available stock of the companies it recommended); ICI Letter (commenting on the Fiduciary Interpretation proposing release).

[468] *See* Fiduciary Interpretation at Section II.A (stating that "[t]he [investment adviser's] fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement provided that there is *full and fair disclosure* and informed consent" (emphasis added)).

[469] For instance, the Municipal Securities Rulemaking Board requires that municipal advisors provide full and fair disclosure of material conflicts of interest and material legal or disciplinary events. *See* MSRB Rule G–42. In addition, the registration and disclosure requirements of the Securities Act of 1933 ("Securities Act") are based on the concept that investors in a public offering should be provided with full and fair disclosure of material information needed for an informed investment decision. *See* Securities Act Concepts and Their Effects on Capital Formation, Securities Act Release No. 7314 (Jul. 25, 1996); 61 FR 40044 (Jul. 31, 1996) at text accompanying footnote 13; *see also SEC* v. *Ralston Purina Co.,* 346 U.S. 119, 124 (1953). Finally, Regulation FD under the Securities Act was "designed [in part] to promote the full and fair disclosure of information by issuers." *See* Selective Disclosure and Insider Trading, Securities Act Release No. 7881 (Aug. 15, 2000), 65 FR 51715 (Aug. 24, 2000).

[470] *See supra* footnote 468. *See also* Fiduciary Interpretation, stating that the disclosure "should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent."

[471] *See* Proposing Release at 21604, footnote 208.

[472] Commenters pointed out that requiring too much information regarding conflicts of interest would go beyond the standard of materiality set forth under *Basic. See, e.g.,* SIFMA August 2018 Letter; Cetera August 2018 Letter (citing *Basic* at 231, noting that "an avalanche of trivial information" would not be "conducive to informed decision making."). *See also* Letter from David Schwartz, President and CEA, Florida International Bankers Association ("FIBA") (Feb. 8, 2019) FIBA ("February 2019 Letter") (stating that "the amount of required disclosure may overwhelm rather than educate").

[473] *See, e.g.,* ASA Letter (stating that the Commission should reaffirm that broker-dealers can address conflicts of interest by disclosing them and obtaining informed consent); Primerica Letter (suggesting that the Commission clarify that broker-dealers can effectively address all material conflicts by providing full and fair disclosure and obtaining customer consent); Morgan Stanley Letter.

[474] As discussed in the Fiduciary Interpretation, a client's informed consent can be either explicit or, depending on the facts and circumstances, implicit. *See* Fiduciary Interpretation at Section II.C. Under Regulation Best Interest, however, assuming the retail customer has been provided with full and fair disclosure, the retail customer will be considered to have provided informed consent by *affirmatively* accepting a recommendation.

[475] *See* Fiduciary Interpretation (describing an investment adviser's obligation to provide disclosure designed to put a reasonable client in a position to be able to understand and provide informed consent).

[476] *See, e.g.,* CCMC Letters.

[477] *See, e.g.,* Financial Planning Coalition Letter (stating that disclosures should be made prior to the recommendation so a retail customer has sufficient time to review and understand them, as well as to

Continued

questioned whether providing "sufficient information" to enable a retail customer to make an informed decision broadens the Disclosure Obligation beyond "material facts" and "material conflicts."[478]

We have considered the issues raised by the commenters and in the sections that follow are providing guidance on what we believe constitutes "full and fair disclosure" for purposes of the Disclosure Obligation, including the form and manner, and the timing and frequency, of the disclosure. Similar to the proposal, in lieu of setting explicit requirements by rule for what constitutes full and fair disclosure of all material facts, we are providing broker-dealers flexibility in determining the most appropriate way to meet the Disclosure Obligation depending on each broker-dealer's specific business practices.

As we noted in the Proposing Release, while we are providing flexibility to broker-dealers to meet the Disclosure Obligation, we continue to be sensitive to the potential that broker-dealers could opt to disclose *all* facts, including those that do not meet the materiality threshold.[479] We are cognizant of the likelihood that some broker-dealers could provide lengthy disclosures that do not meaningfully convey the material facts regarding the scope and terms of the relationship and material facts regarding conflicts of interest, an outcome that could undermine the Commission's goal of facilitating disclosure to assist retail customers in making an informed investment decision. To this end, broker-dealers will only be required to disclose material facts about the scope and terms of the relationship or conflicts of interest.

Although we are adopting the requirement with revisions to require full and fair disclosure of all material facts, we still believe it is important to clarify that broker-dealers' compliance with the Disclosure Obligation will be measured against a negligence standard, not against a standard of strict liability, consistent with the Proposing Release. The Commission has taken this position in other contexts where full and fair disclosure is required, including under the fiduciary duty under the Advisers Act.[480]

Form and Manner

In the Proposing Release, the Commission noted that it was not proposing to specify by rule the form (*e.g., narrative* v. *graphical/tabular)* or manner (*e.g.,* relationship guide or other written communications) of disclosure required under the Disclosure Obligation. The Commission stated that disclosure should be concise, clear and understandable to promote effective communication between a broker-dealer and a retail customer.[481] We also stated that broker-dealers would be able to deliver disclosure required pursuant to Regulation Best Interest consistent with the Commission's guidance regarding electronic delivery of documents.[482] Although we preliminarily believed that broker-dealers should have the flexibility to make disclosures by any means, as opposed to requiring a standard written document at the outset of the relationship, we stated our belief that any such disclosure should be provided in writing.[483]

Commenters sought further guidance in a number of areas relating to disclosure, including the extent to which the Relationship Summary or other disclosures may satisfy the Disclosure Obligation,[484] the circumstances under which standardized disclosure could be sufficient, as well as how, and the extent to which, disclosures made pursuant to the Disclosure Obligation should be made in writing.[485] In response to comments we are providing additional guidance. We are also reaffirming guidance that we provided in the Proposing Release.

Prescribed Form of Disclosure

As noted in the Proposing Release, we believe it is important to provide broker-dealers with flexibility in determining the most appropriate and effective way to meet the Disclosure Obligation to reflect the structure and characteristics of their relationships with retail customers.[486] Many commenters agreed with this reasoning, arguing that there was a need to preserve flexibility for broker-dealers to comply with the Disclosure Obligation as proposed.[487] Other commenters believed, however, that the proposed Disclosure Obligation gave broker-dealers too much discretion.[488]

After careful consideration of these comments, the Commission has decided not to require any standard written disclosures (other than the Relationship Summary) at this time. Although we recognize the potential value to retail customers of standardizing the disclosures required pursuant to the Disclosure Obligation, we believe that retail customers can derive value from disclosures that accommodate the structure and characteristics of the particular broker-dealer. On balance, we recognize the wide variety of business models and practices and we continue to believe it is important to provide broker-dealers with flexibility to enable them to better tailor disclosure and information that their retail customers can understand and may be more likely to read at relevant points in time, rather

ask questions); CFA August 2018 Letter (stating that if the Commission wants to give investors time to consider the information and make an informed choice disclosure should be provided as soon as reasonably feasible and, when possible, no later than the point of recommendation).

[478] *See, e.g.,* IPA Letter (requesting clarification on whether providing sufficient information to enable a retail investor to make an informed decision broadens the disclosure obligation beyond material facts); CCMC Letters.

[479] *Id.*

[480] While establishing scienter is a requirement to establish violations of Section 206(1) of the Advisers Act, it is not required to establish a violation of Section 206(2); a showing of negligence is adequate. *See SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 195 (1963); *see also SEC* v. *Steadman,* 967 F.2d at 643 and footnote 5; *Steadman* v. *SEC,* 603 F.2d 1126, 1132–34 (5th Cir. 1979), *aff'd on other grounds,* 450 U.S. 91 (1981). *See also* Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, Advisers Act Release No. 2628 (Aug. 3, 2007). In its adoption of Rule 206(4)–8 under the Advisers Act, the Commission stated that it would not need to demonstrate that an adviser violating the rule acted with scienter.

[481] *See* Proposing Release at 21604, footnote 211.

[482] *Id.* at 21604 and footnote 214.

[483] *Id.* at 21604 and footnote 213.

[484] *See, e.g.,* Cambridge Letter (arguing that the Relationship Summary and Disclosure Obligation are duplicative requirements); CUNA Mutual Letter (seeking greater clarification regarding the extent to which information provided in other documents could satisfy the Disclosure Obligation); Financial Services Institute August 2018 Letter (arguing that providing the Relationship Summary should be deemed to satisfy the requirements of the broker-dealer's Disclosure Obligation); Morningstar Letter (arguing that due to the brevity of the Relationship Summary, additional broker-dealer disclosures would be necessary); Wells Fargo Letter (recommending that the requirements of the Disclosure Obligation be incorporated into Form CRS).

[485] *See, e.g.,* Schwab Letter (arguing that because most recommendations occur over the phone and through various digital means, the Commission should remove the "in writing" requirement and allow firms to determine the best method for disclosure depending on the situation); SIFMA August 2018 Letter (seeking clarification that oral disclosure at the time of the recommendation may be sufficient to satisfy the Disclosure Obligation in certain circumstances). *But see* AARP August 2018 Letter (stating that oral disclosures should never be permitted).

[486] *See* Proposing Release at 21604.

[487] *See, e.g.,* Prudential Letter; SIFMA August 2018 Letter; TIAA Letter; UBS Letter.

[488] *See, e.g.,* Better Markets August 2018 Letter (arguing that proving broker-dealer discretion in this area will virtually assure a failure to communicate helpfully with investors); CFA August 2018 Letter (arguing that the flexibility the Commission provides will result in disclosure that does not effectively convey key information). *See also* Morningstar Letter (supporting the expansion of disclosures, but arguing that "publicly available disclosures with a standard taxonomy work best because they empower third parties such as "fintech" and "reg-tech" firms to analyze and contextualize critical information and amplify a call to action for ordinary investors").

than, for example, mandating a standardized all-inclusive (and likely lengthy) disclosure.[489]

We disagree that flexibility will prevent investors from obtaining information necessary to make an informed investment decision and do not believe that requiring a standard written disclosure beyond the Relationship Summary is necessary at this time. We emphasize, however, that the adequacy of the disclosure will depend on the facts and circumstances. We intend to evaluate broker-dealer disclosure practices in response to Regulation Best Interest over time to determine whether additional disclosure initiatives may be appropriate.

Relying on Other Disclosures and Standardized Documents

In the Proposing Release, we described how the Disclosure Obligation builds upon the requirements of Form CRS and the disclosures in the Relationship Summary.[490] We also stated that we anticipated that broker-dealers may elect to use other documents to satisfy elements of the Disclosure Obligation, such as an account agreement, a relationship guide, or a fee schedule.[491]

Several commenters requested guidance on their ability to use other documents to meet the requirements of the Disclosure Obligation. For example, some commenters recommended that the Commission harmonize the Disclosure Obligation with the broad, firm-level disclosure obligations of Form CRS so that firms can use the Relationship Summary to help satisfy the Disclosure Obligation.[492] Commenters also recommended that broker-dealers should be permitted to satisfy the Disclosure Obligation by using standardized language generally to describe the broker-dealer's products and services available to their retail customers and related conflicts of interest, including the ranges of remuneration payable to a broker-dealer in connection with its recommendation of different products.[493] Several commenters also suggested that the Commission should clarify that the Disclosure Obligation should not apply where an existing disclosure regime already exists.[494] Similarly, other commenters recommended that the Commission clarify whether broker-dealers could meet the Disclosure Obligation by referencing information required to be disclosed pursuant to other regulatory requirements such as FINRA disclosure rules.[495]

After careful consideration of the comments, the Commission is providing guidance to permit a broker-dealer to utilize existing disclosures and standardized documents, such as a product prospectus, relationship guide, account agreement, or fee schedule to help satisfy the Disclosure Obligation. The Commission recognizes that broker-dealers are subject to disclosure requirements other than the Disclosure Obligation and Form CRS, and believes utilizing such existing disclosures where appropriate is a reasonable and cost-effective way to satisfy the requirements of the Disclosure Obligation, and can also help avoid duplicative or voluminous disclosure by not requiring the creation of new disclosure documents.[496] We recognize also that in many instances, information necessary to satisfy the Disclosure Obligation may be broadly applicable to a broker-dealer's retail customers, and therefore the use of standardized disclosure may be appropriate.

However, while broker-dealers may choose to standardize certain forms of their disclosure, whether such materials would be sufficient to satisfy the Disclosure Obligation will depend on the facts and circumstances.[497] For example, disclosures may need to be tailored to a particular recommendation if the standardized disclosure does not sufficiently identify the material facts about a conflict of interest presented by a particular recommendation. Accordingly, a broker-dealer remains responsible for disclosing all material facts relating to the scope and terms of the relationship with the retail customer (as discussed above), as well as all material facts relating to conflicts of interest that are associated with a recommendation whether or not the firm relies on other materials to fulfill that obligation.

With regard to commenters' request that the Relationship Summary be considered sufficient to satisfy the Disclosure Obligation, we note that the Relationship Summary will provide succinct information and is designed to assist retail investors with the process of deciding whether to engage, or to continue to engage, a particular firm or financial professional, deciding whether to establish or continue to maintain a brokerage or investment advisory relationship, and asking questions and easily finding additional information.

[489] With respect to the length of disclosure documents, investor testing of proposed Form CRS examined retail investors' likelihood of reading only longer documents (such as Form ADV Part II or an account opening agreement), only a short document (Form CRS), both, or neither when choosing a financial professional, account type or firm. Although the context was specific to Form CRS and the retail investor's initial determination regarding a financial professional, account type or firm, the survey suggests that retail investors may be more likely to read either both longer and shorter disclosures or just shorter disclosures. *See* RAND 2018 ("Whereas Figure 2.20 shows that half of all investors reported having reviewed neither a Form ADV nor an account opening agreement in the past and another 20 percent reported not knowing whether they had ever done so, Figure 2.21 shows that about 70 percent of all respondents and of all investors reported that they would be likely to read either both types of documents or only the Relationship Summary when choosing a financial professional in the future. Just 2 percent of investors and 1 percent of noninvestors reported being likely to read only the longer documents, whereas 29 percent of investors and 13 percent of noninvestors were likely to read only the Relationship Summary." More specifically, Figure 2.21 shows that over 40% of all respondents indicated they would read both and under 30% indicated that they would read only the Relationship Summary.)

[490] *See* Proposing Release at 21600.

[491] *See id.* at 21605.

[492] *See, e.g.,* Cambridge Letter (recommending that providing the Form CRS should fulfill the broker-dealer's Disclosure Obligation under Regulation Best Interest); ACLI Letter (noting that a single disclosure fulfilling Regulation Best Interest and Form CRS would reduce the disclosure burdens and increase the likelihood consumers will read the required information); FSI August 2018 Letter; Mutual of America Letter; Northwestern Mutual Letter; IPA Letter; Transamerica August 2018 Letter; NAIFA Letter.

[493] *See, e.g.,* LPL August 2018 Letter (recommending that all investors be provided with general disclosures setting forth the ranges of remuneration payable to broker-dealers in connection with its recommendations of different products); Committee of Annuity Insurers (urging the Commission to clarify that a broker-dealer can satisfy the Disclosure Obligation through disclosure describing products and services available to its retail customers and need not provide a disclosure particularized to a recommendation).

[494] *See, e.g.,* SIFMA August 2018 Letter (asking the Commission to clarify that the Disclosure Obligation does not apply in contexts where there is an existing regime, such as for equity and debt research); Transamerica August 2018 Letter (recommending that the Commission recognize that existing disclosure regimes suffice to meet certain disclosure requirements).

[495] *See, e.g.,* Transamerica August 2018 Letter (stating that the disclosure obligation should expressly take into consideration existing disclosures).

[496] *See* Proposing Release at 21599, footnotes 175 and 176. For example, broker-dealers must disclose information about a transaction on trade confirmations pursuant to Exchange Act Rule 10b–10. 17 CFR 240.10b–10. *See also* Morgan Stanley Letter (noting that the securities laws and FINRA rules already require firms to provide significant disclosures to clients at natural touchpoints in the client relationship).

[497] Similarly, we also note that a number of broker-dealers are modeling their disclosure of fees other than transaction-based fees on the NASAA Schedule of Miscellaneous Account and Service Fees. *See* NASAA August 2018 Letter. A broker-dealer may use this schedule to comply in part with its obligation to disclose fees and costs pursuant to the Disclosure Obligation. We note, however, that the NASAA Schedule may recommend the disclosure of certain fees that may not be required under the Disclosure Obligation depending on the facts and circumstances, for example those that are not "material facts" for purposes of Regulation Best Interest.

We recognize that additional details regarding many of the topics (*e.g.*, services, fees and conflicts of interest) would in many cases be necessary to satisfy the Disclosure Obligation. Thus, although a broker-dealer could use a Relationship Summary and other standardized disclosures about its products and services to help satisfy the Disclosure Obligation, these disclosures may not be sufficient to satisfy the Disclosure Obligation. Whether the Relationship Summary standing alone, or any additional or existing disclosures, satisfy any of these required disclosures in full would depend on the facts and circumstances. In most instances, broker-dealers will need to provide additional information beyond that contained in the Relationship Summary in order to satisfy the Disclosure Obligation.

In Writing

We proposed requiring that disclosures be provided in writing.[498] We also stated that requiring written disclosures would help facilitate investor review of the disclosure, promote compliance by firms, facilitate effective supervision, and facilitate more effective regulatory oversight to help ensure and evaluate whether the disclosure complies with the requirements of Regulation Best Interest.[499] We also stated that the "in writing" requirement could be satisfied either through paper or electronic means consistent with existing Commission guidance on electronic delivery of documents. We also provided guidance on how broker-dealers could comply with the "in writing" requirement when recommendations are given over the telephone.[500]

A number of commenters supported the "in writing" requirement.[501] Other commenters, however, recommend that the Commission also permit the use of oral disclosure.[502] For example, several commenters recommend that the Commission permit broker-dealers to orally disclose information to their customers provided they later follow-up in writing.[503] Other commenters highlighted concerns associated with such oral disclosure.[504]

After carefully considering the comments, we are adopting the "in writing" requirement as proposed, subject to discussion in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation.* As stated above, we believe that retail customers would benefit from receiving a written disclosure to assist their investment decisions and form the basis of an informed investment decision.[505] However, we also believe that broker-dealers require flexibility to make proper written disclosures to their customers. Accordingly, the Commission is not requiring a specific form or method of written disclosure.

Although we are requiring that disclosure be made "in writing," we recognize that a broker-dealer may need to supplement, clarify or update written disclosure it has previously made before it provides a retail customer with a recommendation. For instance, as we stated in the Proposing Release, we recognized that broker-dealers may provide recommendations by telephone and offer clarifying disclosure orally in some instances subject to certain conditions,[506] such as a dual-registrant informing a retail customer of the capacity in which the dual-registrant is acting in conjunction with a recommendation.[507] In such instances, we believe that it may be necessary as a practical matter to provide oral disclosure of a material fact to supplement, clarify, or update written disclosure made previously.[508] Therefore, firms may make oral disclosures under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation.*[509]

When making such an oral disclosure, firms must maintain a record of the fact that oral disclosure was provided to the retail customer.[510] We are not explicitly requiring broker-dealers to create a record documenting the *substance* of the oral disclosure itself, but rather a record of the fact that such oral disclosure was made.[511] This record should include documentation sufficient to demonstrate that disclosure was made to the retail customer, which could include, for example, recordings of telephone conversations or contemporaneous written notations. Nonetheless, although it is not required by Regulation Best Interest, as a best practice we encourage broker-dealers that make oral disclosures to subsequently provide to their retail customers in a timely manner written disclosure summarizing the information conveyed orally.

Plain English

In the Proposing Release, we stated that broker-dealers should apply plain English principles to written disclosures including, among other things, the use of short sentences and active voice, and avoidance of legal jargon, highly technical business terms, or multiple negatives.[512] Similarly, several commenters recommended that whatever format broker-dealers use for their disclosure, they should be written in plain English and easy to understand.[513] Accordingly, although it

[498] *See* Proposing Release at 21604.

[499] *Id.*

[500] *Id.*

[501] *See, e.g.*, Vanguard Letter (recommending that the Commission require a consolidated written disclosure of all material conflicts); CFA August 2018 Letter.

[502] *See* Schwab Letter (recommending that the Commission eliminate the "in writing" requirement and allow firms to design and document the best method depending on the situation); SIFMA August 2018 Letter; TIAA Letter. *But see* AARP August 2018 Letter (stating that oral disclosures should never be permitted).

[503] *See* PIABA Letter (recommending that the Commission allow broker-dealers to discharge their disclosure obligations by: (i) Orally explaining the relationship, any conflicts, how the broker-dealer is paid, and the features, benefits and risks of the recommendation; and (ii) confirming the discussion by letter or email, which is signed or confirmed as being accurate by the customer, and retained in customer's file); SIFMA August 2018 Letter (recommending that the Commission clarify that oral disclosure at the time of the recommendation may satisfy the Disclosure Obligation if: (1) The associated person documents that the oral disclosure was made, or (2) the firm provides written disclosure after the trade); USAA Letter (suggesting that the Commission could allow oral product-level disclosures, while providing the client the choice to request confirming disclosure in writing at her option).

[504] *See* Edward Jones Letter (expressing concern that the Commission is implying that a dual-registrant would need to provide an oral point of sale disclosure regarding the capacity in which it is acting when it makes a recommendation, and that such oral disclosure would be difficult to supervise and of little value); CCMC Letters (stating that a dual-registrant should not have to make an oral disclosure of the capacity for each and every conversation it has with retail customers).

[505] One commenter stated that certain foreign laws do not permit firms to provide their customers with written materials prior to entering into a contractual relationship. *See* FIBA February 2019 Letter. In response, we note that the Disclosure Obligation requires disclosure to be provided prior to or at the time of the recommendation and is not tied to a contractual relationship. In addition, the staff will continue to evaluate the application of the Disclosure Obligation in circumstances such as the one raised by this commenter. Interested parties are invited to provide further feedback on issues involving non-U.S.- resident retail customers.

[506] *See* Proposing Release at 21604, footnote 213.

[507] *See id.* at 21605, footnote 216. We stated that a broker-dealer could orally clarify the capacity in which it is acting at the time of the recommendation if it had previously provided written disclosure to the retail customer beforehand disclosing its capacity as well as the method it planned to use to clarify its capacity at the time of the recommendation.

[508] For more discussion on guidance relating to updating disclosures, see Section II.C.1.d, Disclosure Obligation, *Updating Disclosure.*

[509] *See* Section II.C.1, Disclosure Obligation, *Oral Disclosure or Disclosure After a Recommendation.*

[510] *See* Section II.D.

[511] *See* Section II.C.1, Disclosure Obligation, *Oral Disclosure or Disclosure After a Recommendation.*

[512] Proposing Release at 21604, footnote 213.

[513] *See* State Attorneys General Letter (stating that all disclosures must be in plain language and easily

is not required, the Commission encourages broker-dealers to use plain English in preparing any disclosures they make in satisfaction of the Disclosure Obligation.

Electronic Delivery

In the Proposing Release, we took the position that broker-dealers could deliver written disclosures required by Regulation Best Interest in accordance with the Commission's existing guidance regarding electronic delivery of documents.[514] This framework consists of the following elements: (1) Notice to the investor that information is available electronically; (2) access to information comparable to that which would have been provided in paper form and that is not so burdensome that the intended recipients cannot effectively access it; and (3) evidence to show delivery (*i.e.*, reason to believe that electronically delivered information will result in the satisfaction of the delivery requirements under the federal securities laws).[515] We have furthermore clarified that one method to satisfy the evidence of delivery element is to obtain informed consent from investors.[516]

Several commenters agreed with this approach.[517] These commenters typically supported the use of electronic disclosure and recommended various methods (*e.g.*, hyperlinks to web-based documents) but recommended paper delivery as the default option.[518] Other commenters recommended permitting electronic delivery for required disclosures.[519] While investor testing on the proposed Relationship Summary indicated that some retail investors generally support some form of electronic copies, most participants in the study "generally liked having a paper version of the Relationship Summary."[520] Similarly, as stated in the Form CRS adopting release, the IAC has cited one study indicating that nearly half of investors (49%) still prefer to receive paper disclosures through the mail, compared with only 33% who prefer to receive disclosures electronically, either through email (27%) or accessing them online (6%).[521]

After considering investor testing results and commenters' concerns and recommendations, the Commission reaffirms the application of existing Commission guidance relating to paper and electronic delivery of disclosure documents to broker-dealers in meeting the Disclosure Obligation. Specifically, we believe that broker-dealers should be able to satisfy the Disclosure Obligation by using electronic delivery.[522] However, if a broker-dealer is providing its customers with electronic delivery (upon their consent) it cannot solely offer electronic delivery and must make paper delivery available, upon request. Both Regulation Best Interest and Form CRS require firms to provide electronic delivery of documents within the framework of the Commission's existing guidance regarding electronic delivery.[523]

d. Timing and Frequency

We proposed requiring broker-dealers to provide the disclosures required by the Disclosure Obligation "prior to or at the time of" the recommendation. We noted the importance of determining the appropriate timing and frequency of disclosure that may be effectively provided "prior to or at the time of" the recommendation.[524] In cases where a broker-dealer determines that disclosure may be more effectively be provided in an initial, more general disclosure (such as a relationship guide) followed by specific information in a subsequent disclosure that is provided at a later time, the initial disclosure would address when and how a broker-dealer would provide more specific information regarding the material fact or conflict in a subsequent disclosure. We stated also that in circumstances where a broker-dealer determines to provide an initial, more general disclosure (such as a relationship guide) followed by specific information in a subsequent disclosure that is provided after the recommendation (such as a trade confirmation), the initial disclosure must address when and how a broker-dealer would provide more specific information regarding the material fact or conflict in a subsequent disclosure (*e.g.*, after the trade in the trade confirmation).[525] We also stated

understood by investors); CFA Institute (recommending that the Commission require a clear English listing of all conflicts of interest in which a broker-dealer engages). One commenter requested that the Commission consider clarifying that the Plain English standard in the Disclosure Obligation is not an English-only requirement to address the needs of certain non-U.S. customers. *See* FIBA February 2019 Letter. In response, we note that any disclosure should be made consistent with Plain English principles.

[514] *See* Proposing Release at 21604. We cited to a number of prior Commission releases on electronic delivery in the Proposing Release, including Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information, Exchange Act Release No. 37182 (May 9, 1996), 61 FR 24644 (May 15, 1996) ("1996 Release") (providing Commission views on electronic delivery of required information by broker-dealers, transfer agents and investment advisers) and Use of Electronic Media, Exchange Act Release No. 42728 (Apr. 28, 2000), 65 FR 25843 (May 4, 2000) ("2000 Release") (providing updated interpretive guidance on the use of electronic media to deliver documents on matters such as telephonic and global consent; issuer liability for website content; and legal principles that should be considered in conducting online offerings).

[515] *See* 1996 Release at 24646–47; *see also* Relationship Summary Proposing Release at 21454.

[516] *See* 2000 Release at 25845–46 (clarifying how market intermediaries and other market participants can obtain consent for electronic delivery).

[517] *See, e.g.*, CFA August 2018 Letter (stating that giving firms discretion to choose the delivery mechanism would all but ensure that many investors would never see the disclosures); AARP August 2018 Letter (recommending that the Commission prohibit firms from solely providing electronic access to disclosures and require delivery of paper copies).

[518] *Id. See also* LPL August 2018 Letter (noting that modern communication practices underscore the need for the Commission to provide more flexibility to broker-dealers to satisfy their document delivery obligations; and requesting that the Commission confirm that broker-dealers can deliver disclosures in compliance with existing guidance regarding electronic delivery of documents (which requires paper delivery as a default)).

[519] *See, e.g.*, IPA Letter (urging the Commission to confirm that all required disclosures may be delivered electronically); *see also* AXA Letter (urging the Commission to encourage the use of appropriate electronic disclosures, which can make information available to consumers more quickly and in a more digestible format); Prudential Letter (recommending that electronic delivery be deemed to comply with the Disclosure Obligation).

[520] *See* RAND 2018.

[521] Relationship Summary Adopting Release at Section II.D.3.a (citing Investor Advisory Committee, *Recommendation of the Investor as Purchaser Subcommittee: Promotion of Electronic Delivery and Development of a Summary Disclosure Document for Delivery of Investment Company Shareholder Reports* (Dec. 7, 2017), *available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-promotion-of-electronic-delivery-and-development.pdf* (citing FINRA Investor Education Foundation, "Investors in the United States 2016," December 2016, *available at http://bit.ly/2hMrppX*).

[522] *See* 1996 Release (stating that "the Commission believes that broker-dealers . . . similarly should have reason to believe that electronically delivered information will result in the satisfaction of the delivery requirements under the federal securities laws. Thus, whether using paper or electronic media, broker-dealers . . . should consider the need to establish procedures to ensure that applicable delivery obligations are met"); *see also* 2000 Release.

[523] *See* Relationship Summary Adopting Release, Section II.C.3.

[524] *See* Proposing Release at 21605.

[525] The Commission has granted exemptions to certain dual-registrants, subject to a number of conditions, from the written disclosure and consent requirements of Advisers Act Section 206(3) (which makes it unlawful for an adviser to engage in a principal trade with an advisory client, unless it discloses to the client in writing before completion of the transaction the capacity in which the adviser is acting and obtains the consent of the client to the transaction). The exemptions are subject to several conditions, including conditions to provide disclosures at multiple points in the relationship, including disclosure that the entity may be acting in a principal capacity in a written confirmation at or before completion of a transaction. *See, e.g.*, In the matter of Merrill Lynch Pierce Fenner & Smith, Incorporated, Investment Advisers Act Release No. 4595; (Dec. 28, 2016); In the matter of Robert W. Baird & Co., Incorporated, Advisers Act Release No. 4596 (Dec. 28, 2016); In the matter of UBS Financial Services, Inc., Advisers Act Release No. 4597 (Dec.

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that disclosure after the recommendation, such as in a trade confirmation for a particular recommended transaction would not, by itself, satisfy the Disclosure Obligation, because the disclosure would not be "prior to, or at the time of the recommendation." We noted also that whether there is sufficient disclosure in both the initial disclosure and any subsequent disclosure would depend on the facts and circumstances.[526]

Several commenters supported the Commission's proposal to require broker-dealers to make disclosure prior to or at the time of the recommendation, but disagreed about the precise timing with which disclosure should be provided.[527] For example, some commenters recommended that the Commission require or allow broker-dealers to meet the Disclosure Obligation prior to or at account opening.[528] Similarly, several commenters recommended that the Commission require broker-dealers to provide disclosure prior to a recommendation or investment decision.[529] Specifically, commenters recommended that the Commission require disclosures to be made with enough time prior to a recommendation that a retail customer has sufficient time to review and understand them, as well as ask questions.[530]

Several other commenters, however, recommended that the Commission clarify whether broker-dealers could meet the Disclosure Obligation at the point of sale[531] or after a recommendation is made.[532] Conversely, several commenters recommended that the Commission clarify that it will not require point of sale or point of recommendation disclosure obligations.[533]

After carefully considering the comments received, we are providing our view on what it means for broker-dealers to provide the required disclosures in writing "prior to or at the time of" the recommendation. As with the "form and manner" of making disclosures, the Commission continues to believe that broker-dealers should have flexibility with respect to the "timing and frequency" of providing disclosure to determine the most appropriate and effective way to meet the Disclosure Obligation. Accordingly, the Commission has decided not to provide any prescriptive requirements for the timing and frequency of written disclosures, other than requiring disclosure prior to or at the time of the recommendation.

In order to make an informed decision about a securities recommendation, retail customers must have appropriate information at the time or before a recommendation is made. Being in possession of relevant information gives investors the tools with which to judge the merits of acting on a particular recommendation. As stated in the Proposing Release, the Commission believes that broker-dealers should provide retail customers information early enough in the process to give them adequate time to consider the information and promote the investor's understanding in order to make informed investment decisions.[534] Similarly, the Commission believes that broker-dealers should not provide information so early that the disclosure fails to provide meaningful information (*e.g.,* does not sufficiently identify material conflicts presented by a particular recommendation, or overwhelms the retail customer with disclosures related to a number of potential options that the retail customer may not be qualified to pursue).[535] Nevertheless, in order to provide broker-dealers the flexibility to determine how and when to make relevant disclosures pursuant to the Disclosure Obligation, we are not mandating a requirement that disclosures be made within a certain timeframe preceding a recommendation. However, we continue to encourage broker-dealers to consider whether it would be helpful to repeat or highlight disclosures already made pursuant to the Disclosure Obligation at the time of the recommendation.

We are also clarifying the ability of a broker-dealer to supplement, clarify, or update information *after* making a recommendation.[536] In particular, if a broker-dealer determines to disclose information, in part, after the recommendation, such as in a prospectus or trade confirmation, that disclosure may be used to supplement, clarify, or update the initial, general disclosure. For example, any necessary

28, 2016); In the matter of Wells Fargo Advisors, LLC, Wells Fargo Advisors Financial Network, LLC, Advisers Act Release No. 4598 (Dec. 28, 2016).

[526] *See* Proposing Release at 21605.

[527] *See, e.g.,* CFA August 2018 Letter (stating that any information that can be provided before the transaction is entered into should be provided to give investor time to consider it); AARP August 2018 Letter (stating that all key disclosures should be made significantly in advance of an investment decision; disclosure made at the time of or immediately prior to investing is not adequate); Bank of America Letter (stating that disclosure of material conflicts of interest can be satisfied in advance of a particular recommendation on a one-time basis); Pacific Life August 2018 Letter (stating that disclosure of material conflicts of interest must be disclosed at or prior to the point of sale or at the time the recommendation is made); FPC Letter.

[528] *See, e.g.,* TIAA Letter (recommending that the Commission require firms to meet their Regulation Best Interest and CRS disclosure obligations at or before the point the investor: (i) Opens a brokerage account; or (ii) engages the broker-dealer to provide advice services (including for recommendations provided by phone)).

[529] *See, e.g.,* Better Markets August 2018 Letter (stating that disclosure should be provided in a timely fashion so investors have a meaningful opportunity to read, digest, understand, and discuss them); FPC Letter; AARP August 2018 Letter.

[530] *See, e.g.,* NAIFA Letter (recommending that disclosure be provided at or before the time of a recommendation because it helps consumers better understand and evaluate the recommendations they receive and preserves flexibility for professionals who may be interacting with clients of various levels of financial sophistication, duration of relationship, and investment history); CFA August 2018 Letter (recommending that transaction-specific information should be provided, whenever possible, at the point of recommendation rather than at the point of sale); Groom Letter (recommending that the Commission require disclosure of material conflicts of interest related to investing plan distribution proceeds at the inception of any discussions of the matter); PIABA Letter (recommending that the Commission require firms to provide specific charges prior to or at the time the recommendation is made); FPC Letter (stating that 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); Better Markets August 2018 Letter; AARP August 2018 Letter; Bank of America Letter.

[531] *See* Pacific Life August 2018 Letter (stating that material conflicts of interest must be disclosed at or prior to the point-of-sale or at the time the recommendation is made).

[532] *See, e.g.,* LPL August 2018 Letter (suggesting that the Commission permit a broker-dealer to satisfy the Disclosure Obligation by directing an investor in writing to review the recommended product's offering documents, along with hyperlinks to those documents, prior to the recommendation or shortly thereafter via a trade confirmation); SIFMA August 2018 Letter (recommending that the Commission confirm that firms would be permitted to provide disclosures on a website or on a post-trade basis, provided customers have been informed in advance of the timing of those disclosures).

[533] *See, e.g.,* SIFMA August 2018 Letter (requesting the Commission clarify that there is no requirement for a point of sale or point of recommendation disclosure, as such a requirement would be unworkable for the industry); Morgan Stanley Letter (noting that point-of-sale disclosures pose operational issues and may not afford clients sufficient time to adequately consider and understand them); HD Vest Letter (recommending that the Commission not mandate written point of recommendation or point of sale disclosure); Prudential Letter (requesting that the Commission clarify that it is not mandating a point of sale or point of recommendation disclosure obligation). *But see* NASAA August 2018 Letter (stating that only a transaction-by-transaction disclosure obligation will ensure that broker-dealers are meeting their "best interest" duties and provide investors the level of protection they deserve); AARP August 2018 Letter (recommending that the Commission require firms to disclose their fees any time a recommendation is made).

[534] Proposing Release at 21605.

[535] *Id.*

[536] *See id.* In the proposal, we noted that there may be material information that the broker-dealer may not be in a position to disclose at or prior to the recommendation that may be revealed following the transaction, such as the final transaction information contained in a trade confirmation.

information in a product offering document, such as information about product risks or fees, may be provided in accordance with existing disclosure mechanisms that occur after a transaction, such as the delivery of a trade confirmation or a prospectus, private placement memorandum, or offering circular.[537] However, the broker-dealer must comply with the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation,* in order to make any such disclosure after the recommendation.

Layered Disclosure

We proposed to require broker-dealers to provide disclosure prior to or at the time of the recommendation but gave guidance on a number of approaches they could take to achieve this requirement, including providing layered disclosure, in which more general information is supplemented by more detailed information provided either at the same time or subsequently.[538] We received a number of comments supporting our proposed guidance concerning a layered approach to the Disclosure Obligation.[539] In addition, investor testing illustrates that many retail investors support a layered approach as well.[540]

We have considered these comments and results of investor testing and will continue to permit broker-dealers to use a layered approach to disclosure. We acknowledge that different investors have different preferences for the type and length of disclosures they receive, and that some investors may not read additional information provided in any particularized disclosure that supplements initial, standardized disclosure. Nonetheless, we believe that permitting broker-dealers to provide their retail customers with a standardized summary of information supplemented by more particularized information will help avoid the likelihood that retail customers receive a single, potentially voluminous disclosure document, and enable the many investors who prefer a shorter, summary document to have it available to them, with additional information available should they wish to have it. This approach to layering information is also consistent with our concurrent effort in Form CRS to provide retail investors with high level information and context concerning key material facts, supplemented by additional layers of information regarding their relationship.

We also continue to believe that broker-dealers should have flexibility in determining when to make disclosures and whether, in light of their retail customer base, certain material facts would be more effectively conveyed in a more general manner in an initial written disclosure accompanied or followed by more specific information in a separate disclosure. Similarly, we believe that providing broker-dealers with flexibility to best target their disclosures to their particular retail customer base will increase the likelihood that investors will view them.

The Commission is not prescribing specific procedures obligating broker-dealers to fulfill the Disclosure Obligation in a particular way. Rather, Regulation Best Interest as adopted provides broker-dealers with flexibility to provide disclosures that are consistent with the various ways in which broker-dealers may already provide disclosure to their customers.[541] This could include, for example, providing multiple or "layered" disclosures either initially or over time, but that in total constitute full and fair disclosure of the information required by the Disclosure Obligation. While we are not setting forth a prescriptive approach regarding exactly when disclosures should be made as suggested by some commenters, we believe that a broker-dealer may determine that certain disclosures are most effective if they are made at multiple points of the relationship, or alternatively, certain material facts may be conveyed in a more general manner in an initial written disclosure accompanied or followed by more specific information.[542]

Updating Disclosures

Several commenters recommend that the Commission clarify under what circumstances a broker-dealer would be required to update prior disclosures made pursuant to the Disclosure Obligation.[543] Among the suggestions are to only require broker-dealers to update their disclosures when there are material changes to the disclosed

[537] In instances where a recommended transaction is not acted upon by the retail customer, and therefore there is no subsequent delivery of disclosure otherwise required by the transaction, the fact that such information is not provided would not be a violation of the Disclosure Obligation.

[538] *See* Proposing Release at 21605 (suggesting the Disclosure Obligation could be satisfied, for example, at multiple points in the relationship or through a layered approach to disclosure, such as an initial disclosure conveying more general information regarding the material fact or conflict followed by more specific information in a subsequent disclosure).

[539] *See, e.g.,* Commonwealth Letter (supporting a layered disclosure approach that includes (i) the Relationship Summary at the inception of the relationship; (ii) the traditional disclosures included in account-opening agreements; (iii) product-specific point-of-sale disclosures (*e.g.,* prospectuses and alternative investment offering documents); and (iv) more detailed disclosures on the firm's website); IRI Letter (supporting a principles-based disclosure regime, which leverages the benefits of layered disclosure to combat information overload); Morgan Stanley Letter (concurring with the Commission's proposed layered approach to disclosure of material facts regarding the scope of the relationship with the client and fees, as well as material conflicts of interest associated with the recommendation); Stifel Letter; Mass Mutual Letter; Triad Advisors Letter; Investacorp Letter; Ladenburg Letter.

[540] *See, e.g.,* Study Regarding Financial Literacy Among Investors As Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, August 2012 at iv. A key finding of the SEC staff's 917 study was that Investors favor "layered" disclosure and, wherever possible, the use of a summary document containing key information about an investment product or service. That study described layered disclosure as an "approach to disclosure in which key information is sent or given to the investor and more detailed information is provided online and, upon request, is sent in paper or by email." *See* Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Securities Act Release No. 8998 (Jan. 13, 2009). This layered approach is "intended to provide investors with better ability to choose the amount and type of information to review, as well as the format in which to review it (online or paper)." *Id.* Other studies that considered the use of hyperlinks for layered disclosure in proposed Form CRS suggested that retail investors are generally interested in receiving additional information, but recognized the possibility that retail investors may not click on a hyperlink. *See, e.g.,* RAND 2018 (finding 58% of participants selecting "very likely" and another 32% selecting "somewhat likely" to click on a hyperlink relating to fees; although no other potential hyperlink generated a majority with "very likely" usage, other potential hyperlinks concerning services, conflicts and investor education generated a majority when combining responses of "very likely" and "somewhat likely" to click on the hyperlink). *See also* Kleimann Communication Group, Inc., *Report on Development and Testing of Model Client Relationship Summary, Presented to AARP and Certified Financial Planner Board of Standards, Inc.* (Dec. 5, 2018), *available at https://www.sec.gov/comments/s7-07-18/s70718-4729850-176771.pdf* (indicating that while some participants were interested in additional information, others admitted they would not follow the links because it was extra effort, they were uninterested, or the link did not itself suggest what would be there).

[541] *See* Proposing Release at 21605.

[542] *See id.*

[543] *See, e.g.,* LPL August 2018 Letter (recommending that the Commission provide additional guidance with respect to the updating and amendment requirements that apply to the Disclosure Obligation); CFA Institute Letter (recommending that the Commission require broker-dealers to provide updated disclosures at least 30 days before raising or imposing new fees); Bank of America Letter (recommending that the Commission require firms to update existing disclosures when there are changes to material conflicts of interest, as well as annually); NAIFA Letter (recommending that the Commission not require regular disclosure (*e.g.,* quarterly, annual, etc.) of any new information items, unless the information has materially changed).

information;[544] require broker-dealers to update their disclosures at least 30 days before raising or imposing new fees;[545] and require broker-dealers to update their disclosures when changes are made, as well as annually.[546]

The Commission has carefully considered the commenters' suggestions and is providing guidance on a broker-dealer's duty to update disclosures made to customers under Regulation Best Interest. The Disclosure Obligation requires broker-dealers to provide their retail customers with full and fair disclosure of material facts related to several aspects of their relationship with their customers. Therefore, a broker-dealer cannot provide customers with full and fair disclosure if the disclosures contain materially outdated, incomplete, or inaccurate information. Additional disclosure will be necessary when any previously provided information becomes materially inaccurate, or when there is new relevant material information (*e.g.*, a new material conflict of interest has arisen that is not addressed by the standardized disclosure).[547] Therefore, a broker-dealer's duty to update disclosures made to its customers under Regulation Best Interest is based on the facts and circumstances.

While we are not prescribing an explicit timeframe in which required updates must be made, generally the Commission encourages broker-dealers to update their disclosures to reflect material changes or inaccuracies as soon as practicable, and thus generally should be no later than 30 days after the material change; in the meantime, broker-dealers are encouraged to provide, supplement, or correct any written disclosure with oral disclosure as necessary prior to or at the time of the recommendation.[548] However, if updated information is to be provided either orally, or after a recommendation, such disclosure must be made under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation.*

[544] *See* NAIFA Letter.

[545] *See* CFA Institute Letter.

[546] *See* Bank of America Letter.

[547] *See* Proposing Release at 21605.

[548] The 30-day period aligns with other requirements to update disclosures in similar contexts. For instance, NASD Notice to Members 92–11, Fees and Charges for Services (Feb. 1992) states that its member firms need to provide written notification to customers of all service charges when accounts are opened, and . . . written notification at least 30 days prior to the implementation or change of any service charge. Failure to do so could be construed as conduct inconsistent with just and equitable principles of trade under FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade).

2. Care Obligation

We proposed the Care Obligation to require a broker-dealer, when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer, to exercise reasonable diligence, care, skill, and prudence to: (1) Understand the potential risks and rewards associated with the recommendation, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers; (2) have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks and rewards associated with the recommendation; and (3) have a reasonable basis to believe that a series of recommended transactions, even if in the retail customer's best interest when viewed in isolation, is not excessive and is in the retail customer's best interest when taken together in light of the retail customer's investment profile. As we indicated in the Proposing Release, the Care Obligation was intended to incorporate and enhance existing suitability requirements applicable to broker-dealers under the federal securities laws by, among other things, imposing a "best interest" requirement that will require a broker-dealer to not place its own interest ahead of the retail customer's interest, when making recommendations.[549]

Commenters generally supported the proposed Care Obligation, including its principles-based approach, but many commenters requested additional guidance or clarification on how a broker-dealer could satisfy the Care Obligation under different circumstances and regarding specific products.[550] Relatedly, several commenters requested further guidance regarding the role of costs and other relevant factors when making a best interest determination,[551] while other commenters expressed concern over the usage of the term "prudence"[552] or expressed concern that Regulation Best Interest is not a major change from FINRA's suitability rule.[553] Numerous commenters also requested clarification on the meaning and scope of "reasonably available alternatives" and "otherwise identical securities," including how the phrase "reasonably available alternatives" would apply in situations where a broker-dealer operated in an open architecture environment,[554] or maintained a limited product menu such as where broker-dealers limited available offerings to proprietary products.[555] Finally, several commenters recommended the Commission include other factors in building a retail customer's investment profile, such as longevity risk,[556] market risk,[557] or income profile.[558]

We are adopting the Care Obligation substantially as proposed, but with certain modifications and additional guidance to address comments. As discussed in more detail below, in response to comments, we are revising the Care Obligation to remove the term "prudence," as we have concluded that its inclusion creates legal uncertainty and confusion, and it is redundant of what we intended in requiring a broker-dealer to exercise "diligence, care, and skill," and its removal does not change the requirements under the Care Obligation. Accordingly, the Care Obligation will require broker-dealers to "exercise reasonable diligence, care, and skill" to meet the three components of the Care Obligation.

In addition, after careful consideration of the comments received, we are expressly adding cost to the rule text as a factor that a broker-dealer must consider in fulfilling the Care Obligation. While certain commenters expressed concerns about the prominence of cost and how cost would be balanced against other factors under the Care Obligation,[559] other

[549] As discussed in the Fiduciary Interpretation, the duty of care of the investment adviser's fiduciary duty includes a duty to provide investment advisory services that are in the best interest of the client. *See* Fiduciary Interpretation at footnote 34.

[550] *See, e.g.*, NASAA August 2018 Letter; Cambridge Letter; BlackRock Letter.

[551] *See, e.g.*, Wells Fargo Letter; Primerica Letter; CFA Institute Letter.

[552] *See, e.g.*, BISA Letter; Raymond James Letter; Transamerica August 2018 Letter.

[553] *See, e.g.*, CFA August 2018 Letter (stating "[n]owhere does the Commission explain how the standard differs from, or even whether it improves upon, the existing suitability standard under FINRA rules"); AFL–CIO April 2019 Letter (stating "that the intent of [proposed Regulation Best Interest] is to codify, rather than enhance, protections investors currently receive under FINRA's suitability standard").

[554] For purposes of this requirement, we use the term "open architecture" to mean a firm's product menu that includes both third-party and proprietary products, or as a concept wherein a firm offers a large range of products to their retail customers that are not limited, for example, to a small list of approved managers or funds (*i.e.*, a product menu that is not limited to proprietary products or otherwise constrained to certain retail customers or registered representatives). *See generally* FINRA 2013 Conflicts Report; Morgan Stanley Letter.

[555] *See, e.g.*, Fidelity Letter; ICI Letter; LPL August 2018 Letter; SIFMA August 2018 Letter; Prudential Letter; Morningstar Letter.

[556] *See, e.g.*, CCMC Letters; Lincoln Financial Letter; Pacific Life August 2018 Letter.

[557] *See, e.g.*, Jackson National Letter.

[558] *See, e.g.*, Lincoln Financial Letter.

[559] *See, e.g.*, ICI Letter; Putnam Letter; Morgan Stanley Letter; Letter from Eric R. Dinallo,

commenters supported incorporating cost into the rule text.[560] As noted in the Relationship Summary Adopting Release, participants in investor testing and roundtables also overwhelmingly supported including fees in the Relationship Summary, and believed that the "fees and costs" section was the most important for determining which type of investment accounts and services are right for that person.[561] We believe that while the factors that a broker-dealer should understand and consider when making a recommendation may vary depending upon the particular product or strategy recommended, cost—along with potential risks and rewards—will always be a relevant factor that will bear on the return of the security or investment strategy involving securities.[562] This would include, for example, both costs associated with the purchase of the security, as well as any costs that may apply to the future sale or exchange of the security, such as deferred sales charges or liquidation costs. Elevating cost to the rule text clarifies that this factor must *always* be considered when making a recommendation. Thus, a broker-dealer, in fulfilling its obligation to make a recommendation in the best interest of its retail customer, must exercise reasonable diligence, care, and skill to understand the "potential risks, rewards, *and costs*" associated with the recommendation and have a reasonable basis to believe that the recommendation is in the best interest of the retail customer based on these factors.

Importantly, however, while cost, like potential risks and rewards, is always a factor that a broker-dealer must consider in making a recommendation, it is not a dispositive factor and its inclusion in the rule text is not meant to limit or foreclose the recommendation of a more costly or complex product that a broker-dealer has a reasonable basis to believe is in the best interest of a particular retail customer.[563] Moreover, we are reiterating that the standard does not necessarily require the lowest cost option, and that while cost is an important factor that always needs to be taken into consideration in making a recommendation, it is not the only one.[564] Rather, as explained more fully below, the evaluation of cost would be more analogous to a broker-dealer's best execution analysis, which does not require the lowest possible cost, but rather looks at whether the transaction represents the best qualitative execution for the customer using cost as one factor.[565]

Several commenters expressed concern over the emphasis of "cost" and suggested that, for example, more emphasis be placed on additional or subjective factors beyond specific product attributes.[566] Those commenters stated that the emphasis on cost may discourage certain products or investment strategies. Our intent is not to discourage or otherwise limit the recommendation of products or investment strategies where a broker-dealer concludes that the recommendation is in the best interest of the retail customer. Instead, we believe that cost will always be relevant to a recommendation and accordingly should be a required consideration as set forth in the rule text. It should never be the only consideration. Additional factors such as those cited by commenters also should be taken into consideration as the broker-dealer formulates a recommendation consistent with the best-interest standard.[567]

Though we are declining to expressly define "best interest" in the rule text, as discussed above,[568] we are providing guidance regarding the application of the Care Obligation and in particular what it means to make a recommendation in the retail customer's "best interest." In addition, to emphasize the importance of determining that each recommendation is in the best interest of the retail customer and that it does not place the broker-dealer's interests ahead of the retail customer's interests, we are expressly incorporating into the rule text of Paragraph (a)(2)(ii)(B) and Paragraph (a)(2)(ii)(C) of Regulation Best Interest that a broker-dealer must have a reasonable basis to believe that the recommendation "does not place the financial or other interest of the [broker-dealer] . . . ahead of the interest of the retail customer." While we acknowledge that a broker-dealer and an associated person can and will have some financial interest in a recommendation, as noted above, this addition to the Care Obligation makes clear these interests cannot be placed ahead of the retail customer's interests when making a recommendation.[569]

Finally, we believe that by explicitly requiring in the rule text that the broker-dealer have a reasonable basis to believe that a recommendation is both in the retail customer's "best interest" and

Executive Vice President, General Counsel, Guardian Life (Aug. 7, 2018) ("Guardian August 2018 Letter") (cautioning against inclusion of "costs" into rule text or overemphasizing its importance).

[560] *See, e.g.,* AFL–CIO April 2019 Letter (stating "If, as has been suggested, one goal is to ensure that brokers give greater consideration to costs in determining what investments to recommend, [Regulation Best Interest] should incorporate an explicit requirement to consider costs in the rule text."); NASAA August 2018 Letter; U. of Miami Letter (supporting addition of "costs" into rule text). *See also* CFA August 2018 Letter (supporting the Commission's emphasis of cost and associated financial incentives as more important factors, and stating "[t]his requirement would be clearer, however, if it were incorporated into the rule text, which requires the broker to consider the 'potential risks and rewards associated with the recommendation,' rather than the material characteristics, including costs, of the recommended investment or investment strategy.").

[561] *See* Relationship Summary Adopting Release.

[562] *See* Vanguard Letter ("We agree that costs and remuneration should play a central role in meeting the revise best interest standards. Cost is a critical factor because of its compounding effect upon performance.").

[563] *See* Proposing Release at 21587–21589; 21610–21612.

[564] *See* Proposing Release at 21610.

[565] Under the antifraud provisions of the federal securities laws and SRO rules, broker-dealers have a legal duty to seek to obtain best execution of customer orders. *See* Regulation NMS, Exchange Act Release No. 51808 (Jun. 9, 2005) ("Regulation NMS Release"); FINRA Rule 5310 (Best Execution and Interpositioning). A broker-dealer's duty of best execution requires a broker-dealer to seek to execute customers' trades at the most favorable terms reasonably available under the circumstances. *See* Regulation NMS Release at 160; *see also* Proposing Release at 21615. Certain commenters pointed to best execution analysis as an example of a rule or guidance that is facts-and-circumstances-based. *See, e.g.,* CFA August 2018 Letter ("Just as compliance with the best execution standard will not always be met by sending trades to the exchange where the lowest cost is displayed, compliance with a best interest standard will not always be satisfied by recommending the lowest cost option.").

[566] *See, e.g.,* ICI Letter; BlackRock Letter; Putnam Letter; Transamerica August 2018 Letter; Northwestern Mutual Letter; *see also* Vanguard Letter (recognizing the importance of cost, but urging the Commission to maintain a principles-based approach recognizing the importance of "holistic advice that necessarily contemplates factors beyond cost.").

[567] *See, e.g.,* BlackRock Letter (citing consideration of investors' needs and desired outcomes relative to service offerings of several different managers); Vanguard Letter ("considerations include important factors such as product structure, investment features, liquidity, volatility, issuer reputation, brand and business practices (securities lending activities, portfolio tracking error, or usage of derivatives in a portfolio)"); ICI Letter (citing several subjective factors, such as the "nature and quality of a provider's services (including advantages to the investor of consolidating investments as a single firm, such as higher levels of service that may be offered), minimum initial investments, and firm reputation"); FIBA February 2019 Letter (citing "highly personalized non-economic reasons underlying cross-border investment").

[568] *See* Section II.A.2.

[569] *See id. See also* AFL–CIO April 2019 Letter (noting "Adopting a standard that explicitly states that brokers are prohibited form placing their own interests ahead of the retail customer's interests reinforces [investors' reasonable expectations that the financial professionals they rely on for investment advice will put their interests first]" and asserting that "a requirement to place the customer's interests ahead of the brokers' interests must be included in the operational provisions of Reg BI. . . .").

does "not place the financial or other interest" of the broker-dealer ahead of the retail customer's interests, we are enhancing the Care Obligation by imposing obligations beyond existing suitability obligations. Under existing suitability requirements, a broker-dealer is required to make recommendations that are "suitable" for the customer. While certain cases and guidance have interpreted FINRA's suitability rule to require that "a broker's recommendations must be *consistent with his customers' best interests,*" and FINRA has further interpreted the requirement to be "consistent with the customer's best interest" to prohibit a broker-dealer from placing his or her interests ahead of the customer's interests, this obligation is not explicitly required by FINRA's rule (or its supplementary material), nor does the interpretation require recommendations to be *in the* best interest (as opposed to "*consistent with* the best interest") of a retail customer.[570] We believe that requiring recommendations to be in the best interest is declarative of what must be done, and therefore stronger than, requiring recommendations to be "consistent with" the best interest of the retail customer, which we believe at a minimum creates ambiguity as to whether the recommendation must be in the retail customer's best interest or something less.[571]

The Care Obligation significantly enhances the investor protection provided as compared to current suitability obligations by: (1) Explicitly requiring in Regulation Best Interest that recommendations be in the best interest of the retail customer and do not place the broker-dealer's interests ahead of the retail customer's interests; (2) explicitly requiring by rule the consideration of costs when making a recommendation; and (3) applying the obligations relating to a series of recommended transactions (currently referred to as "quantitative suitability") irrespective of whether a broker-dealer exercises actual or *de facto* control over a customer's account.[572] In addition, it is our view that a broker-dealer should consider "reasonably available alternatives" as part of having a "reasonable basis to believe" that the recommendation is in the best interest of the retail customer, which we also believe is an enhancement beyond existing suitability expectations.[573]

a. Exercise Reasonable Diligence, Care, and Skill

A broker-dealer is required to "exercise reasonable diligence, care, and skill" to satisfy the three components of the Care Obligation set forth in Regulation Best Interest. In the Proposing Release, we included "prudence," and explained that "prudence" "conveys the fundamental importance of conducting a proper evaluation of any securities or investment strategy recommendation in accordance with an objective standard of care." [574] Further, we solicited comment on all aspects of the Care Obligation, and also asked specifically whether there was adequate clarity and understanding regarding the term "prudence," or whether other terms were more appropriate in the context of broker-dealer regulation.

Several commenters supported adopting a principles-based obligation, thus requiring the broker-dealer to assess the adequacy of a recommendation based on the facts and circumstances of each recommendation.[575] We also received numerous comments asking for further guidance relating to recommendations of specific securities or asking how the Care Obligation applies to certain factual scenarios.[576] With respect to the term "prudence," a number of comments requested removal of the term, stating that such language is unnecessary given the other requirements to satisfy the Care Obligation, as well as the fact that the term introduces legal confusion and uncertainty.[577] Other commenters supported the use of the term "prudence" because they believed that Regulation Best Interest's component obligations generally rested on a "prudence" standard or maintained that the Care Obligation "echoes elements found in the common law 'prudent person rule,' " and thus thought its addition was appropriate to capture, or describe, these obligations.[578]

After careful consideration of comments, we are revising the Care Obligation to remove the term

[570] *See* FINRA Regulatory Notice 12–25 at Q1. *See also* FINRA Letter to Senators Warren, Brown, and Booker (Aug. 3, 2018) ("FINRA 2018 Letter") (stating that "[w]hile FINRA's suitability rule implicitly requires a broker-dealer's recommendations to be consistent with customer's best interests, the SEC's proposed best interest standard explicitly establishes the customer's best interest as an overarching standard of care for broker-dealers." (internal citations omitted)). Some commenters have also made this point. *See, e.g.,* CFA August 2018 Letter ("In enforcing that standard, however, FINRA has only rarely and very narrowly enforced the obligation to do what is best for the customer—typically in cases that involve recommending the most appropriate share class of a particular mutual fund. . . . Indeed, as we detailed in our July 2015 comment letter to the Department of Labor, most of the cases in which FINRA and the Commission have asserted an obligation for brokers to act in customers' best interest have involved egregious frauds rather than questions of whether customers' best interests were being served.").

[571] *See, e.g.,* CFA August 2018 Letter.

[572] *See* FINRA 2018 Letter (noting that proposed Regulation Best Interest augments and enhances current requirements by, among other things: "explicitly impos[ing] a 'best interest' standard, making clear that a broker-dealer cannot put its interests ahead of the interests of its customers. While FINRA's suitability rule implicitly requires a broker-dealer's recommendations to be consistent with customers' best interests, the SEC's proposed best interest standard explicitly establishes the customer's best interest as an overarching standard of care for broker-dealers;" "explicitly requir[ing] broker-dealers to consider 'reasonably available alternatives' to a recommended security and justify any choice of a more costly product. . . . Although case law and FINRA guidance establish cost and available alternatives as factors to consider as part of a FINRA suitability assessment, particularly regarding mutual fund share classes, proposed Reg BI expressly establishes the significance of these factors"; and "remov[ing] the 'control' element for purposes of quantitative suitability, which would make this obligation more enforceable.") (internal citations omitted).

[573] *See infra* Section II.C.2.c, Application of the Care Obligation—Reasonably Available Alternatives and Otherwise Identical Securities.

[574] Proposing Release at 21609.

[575] *See, e.g.,* SIFMA August 2018 Letter; Vanguard Letter; Morningstar Letter; Edward Jones Letter.

[576] *See, e.g.,* SIFMA August 2018 Letter; Direxion Letter; Chapman Letter.

[577] *See, e.g.,* Primerica Letter (stating ". . . . the term [prudence] raises numerous interpretative issues and compliance risks. Regulatory and judicial interpretations of ERISA 'prudence' and its requirements abound, but these are exclusive to employee benefit plan duties and do not address duties with respect to retail accounts for individual customers."); Transamerica August 2018 Letter ("The term 'prudence' is one used primarily in the ERISA context and is not generally used in the federal securities laws. We believe inclusion of the term 'prudence' in describing the care obligation is unnecessary and could lead to confusion in interpretation of the care obligation set forth in the Proposal"); IPA Letter (" 'Prudence' is an ERISA term based on trust law that is not generally used under the federal securities laws"). *See also* Fein Letter (discussing that the "duties of loyalty and care are the core fiduciary standards that apply across all fiduciary fields, including trust law, agency law, and employee benefits law;" that "[b]oth of these duties are reflected in the existing regulation of broker-dealers and investment advisers when they give investment advice to retail customers;" and that the "duty of care—also called 'prudence'—requires a fiduciary to act with care, skill and diligence in fulfilling his designated functions.") (internal citations omitted).

[578] *See* LPL August 2018 Letter ("We believe that each of the four component obligations identified in Regulation BI generally rests on a 'prudence' standard that is the foundation of the common law principles and the Federal law that have governed the activities of financial services providers for decades. The obligation to provide prudent recommendations that are appropriate for an investor's circumstances is a principal component of the suitability obligations that apply to investment advisers under the [Advisers Act]" (internal citations omitted); FPC Letter (stating that "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. . . ."); *see also* CFA August 2018 Letter; NAIFA Letter.

"prudence." Accordingly, the Care Obligation will require broker-dealers to "exercise reasonable diligence, care, and skill" to meet the three components of the Care Obligation. We are persuaded by commenters that its inclusion in the proposed rule text to satisfy the components of the Care Obligation is superfluous and unnecessarily presents the possibility for confusion and legal uncertainty.[579] We believe requiring broker-dealers "to exercise reasonable diligence, care, and skill" conveys "the fundamental importance of conducting a proper evaluation of any securities recommendation in accordance with an objective standard of care" [580] that was intended by the inclusion of "prudence." Removing "prudence" does not lessen nor otherwise change the requirements or our expectations under the Care Obligation, or Regulation Best Interest more broadly as it was duplicative of the phrase "diligence, care, and skill." [581] The revised obligation, in requiring the broker-dealer to "exercise[ ] reasonable diligence, care and skill" and to have a "reasonable basis to believe that the recommendation is in the best interest . . . and does not place" the interest of the broker-dealer ahead of the interest of the retail customer, will continue to require an analysis that is comparable to the notion of "prudence" as described in other regulatory frameworks,[582] but does so using the terms "diligence, skill, and care"—terminology with which broker-dealers are familiar and that is well understood under the federal securities laws.[583] As such, we believe that the revised language will minimize the potential confusion and legal uncertainty created by using a term that is predominantly interpreted in other legal regimes,[584] and will aid broker-dealers in achieving compliance with Regulation Best Interest as well as permit broker-dealers to utilize existing compliance and supervisory systems that already rely on this language.

Moreover, we note that certain commenters' support for the term "prudence" was based on our interpretation of the Care Obligation in the Proposing Release.[585] As noted above, the removal of the term "prudence" does not change the obligations or our interpretation of the Care Obligation, which we believe are addressed by the "diligence, care, and skill" language and through Regulation Best Interest more broadly. In light of concerns regarding legal uncertainty associated with the term "prudence," and our view that its inclusion or removal would not change the requirements or expectations of Regulation Best Interest, we have determined to remove it from the rule text.

Finally, in response to comments, we are retaining the facts-and-circumstances determination for the reasons set forth in the Proposing Release,[586] and providing additional guidance on the application of the components of the Care Obligation with respect to certain securities and under certain scenarios. As we noted in the Proposing Release, such an approach is consistent with how broker-dealers are currently regulated with respect to the suitability of their recommendations and would allow broker-dealers to utilize and incorporate pre-existing compliance systems. In addition, this approach is generally consistent with the principles-based approach applicable to the duty of care of investment advisers.[587]

b. Understand Potential Risks, Rewards, and Costs Associated With Recommendation, and Have a Reasonable Basis To Believe That the Recommendation Could Be in the Best Interest of at Least Some Retail Customers

Under the proposed "reasonable basis" component of the Care Obligation, broker-dealers would be required to understand the potential risks and rewards of the recommendation and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers. Although potential costs were not specifically included in the proposed rule text as a factor to be considered as part of a recommendation, the Proposing Release identified potential costs associated with a recommendation as an important factor to understand and consider as part of making a recommendation, and likewise as a key factor to consider when evaluating whether or not a broker-dealer had a reasonable basis to believe it was acting in the best interest of the retail customer when making the recommendation.[588]

After careful consideration of comments, the Commission is adopting, for the reasons set forth in the Proposing Release, Paragraph (a)(2)(ii)(A) of the Care Obligation substantially as proposed. However, as discussed above, in addition to requiring broker-dealers to understand the potential risks and rewards associated with the recommendation, we are also expressly requiring them to understand and consider the *potential costs* associated with a recommendation. Elevating costs to the rule text is consistent with a number of commenters' recommendations and, importantly, stresses that cost will always be a salient factor to be considered when making a recommendation.[589] Additionally, this requirement that the broker-dealer understands and considers costs is a distinct enhancement over existing reasonable basis suitability obligations, which do not expressly require this consideration.[590] Nevertheless, we recognize—and emphasize—that cost is one important factor among many factors, and thus provide additional guidance below regarding the importance of weighing and considering costs in light of other relevant factors and the retail customer's investment profile.

Paragraph (a)(2)(ii)(A) of Regulation Best Interest is intended to incorporate and build upon broker-dealer's existing "reasonable-basis suitability" obligations and would relate to the broker-dealer's understanding of the particular security or investment strategy recommended, rather than to any particular retail customer. Without establishing such a threshold understanding of its particular

[579] *See supra* footnote 577.

[580] Proposing Release at 21609.

[581] *See, e.g.,* LPL August 2018 Letter (noting that the component obligations of Regulation Best Interest generally rest on "prudence" concepts); Fein Letter.

[582] *See* Fein Letter (stating that the "duty of care—also called 'prudence'—requires a fiduciary to act with care, skill and diligence in fulfilling his designated functions") (citing Restatement 3d of Agency, § 8.08 Duties of Care, Competence, and Diligence ("[s]ubject to any agreement with the principal, an agent has a duty to the principal to act with care, competence, and diligence normally exercised by agents in similar circumstances. . . .")). The DOL interpreted "prudence" to represent "an objective standard of care that requires investment advice fiduciaries to investigate and evaluate investments, make recommendations, and exercise sound judgment in the same way that knowledgeable and impartial professionals would." BIC Exemption Release, 81 FR 21208 at 21028–21029.

[583] *See, e.g.,* Proposing Release at 21595, 21609–21613. The discussion that follows addresses what it means to "exercise reasonable diligence, care, and skill" in the context of each aspect of the Care Obligation.

[584] *See supra* footnote 577.

[585] *See, e.g.,* NAIFA Letter.

[586] Proposing Release at 21587 ("[W]e preliminarily believe that whether a broker-dealer acted in the best interest of the retail customer when making a recommendation will turn on the facts and circumstances of the particular recommendation and the particular retail customer, along with the facts and circumstances of how the four specific components of Regulation Best Interest are satisfied.").

[587] *See* Fiduciary Interpretation.

[588] *See* Proposing Release at 21609–21612. *See also supra* footnote 572.

[589] *See, e.g.,* AFL–CIO April 2019 Letter; NASAA August 2018 Letter; U. of Miami Letter.

[590] *See supra* footnote 572.

recommended security or investment strategy involving securities, we do not believe that a broker-dealer could, as required by Regulation Best Interest, have a reasonable basis to believe that it is acting in the best interest of a retail customer when making a recommendation.[591]

In order to meet the requirement under Paragraph (a)(2)(ii)(A), a broker-dealer would need to undertake reasonable diligence, care, and skill to understand the nature of the recommended security or investment strategy involving a security or securities, as well as the potential risks, rewards—and now costs—of the recommended security or investment strategy, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers based on that understanding. A broker-dealer must adhere to both components of Paragraph (a)(2)(ii)(A). For example, a broker-dealer could violate the obligation by not understanding the potential risks, rewards, or costs of the recommended security or investment strategy, even if the security or investment strategy could have been in the best interest of at least some retail customers. Conversely, even if a broker-dealer understands the recommended security or investment strategy, the broker-dealer must still have a reasonable basis to believe that the security or investment strategy could be in the best interest of at least some retail customers.

What would constitute reasonable diligence, care, and skill under Paragraph (a)(2)(ii)(A) will vary depending on, among other things, the complexity of and risks associated with the recommended security or investment strategy and the broker-dealer's familiarity with the recommended security or investment strategy.[592] While every inquiry will be specific to the particular broker-dealer and the recommended security or investment strategy, broker-dealers generally should consider important factors such as the security's or investment strategy's investment objectives, characteristics (including any special or unusual features), liquidity, volatility, and likely performance in a variety of market and economic conditions; the expected return of the security or investment strategy; as well as any financial incentives to recommend the security or investment strategy. Together, this inquiry should allow the broker-dealer to develop a sufficient understanding of the security or investment strategy and to be able to reasonably believe that it could be in the best interest of at least some retail customers.

This "reasonable-basis" component of the Care Obligation is especially important when broker-dealers recommend securities and investment strategies that are complex or risky.[593] For example, in recent years, the Commission staff and FINRA have addressed broker-dealer sales practice obligations under existing law relating to complex products, such as inverse or leveraged exchange-traded products.[594] These products, which may be useful for some sophisticated trading strategies, are highly complex financial instruments and are typically designed to achieve their stated objectives on a daily basis.[595] However, because of the effects of compounding, the performance of these products over longer periods of time can differ significantly from their stated daily objectives. Thus, broker-dealers recommending such products should understand that inverse and leveraged exchange-traded products that are reset daily may not be suitable for, and as a consequence also not in the best interest of, retail customers who plan to hold them for longer than one trading session, particularly in volatile markets.[596] Without understanding the terms, features, and risks of inverse and leveraged exchange-traded products—as with the potential risks, rewards, and costs of any security or investment strategy—a broker-dealer could not establish a reasonable basis to recommend these products to retail customers.[597] Further, these products may not be in the best interest of a retail customer absent an identified, short-term, customer-specific trading objective. Similarly, when a broker-dealer recommends a potentially high risk product to a retail customer—such as penny stocks or other thinly-traded securities—the broker-dealer should generally apply heightened scrutiny to whether such investments are in a retail customer's best interest.[598]

Finally, several commenters expressed concern about the applicability of Regulation Best Interest to variable annuities and variable life insurance products.[599] Variable annuities and variable life insurance products have generated special attention from regulators and their staff, such as statements regarding sales practice obligations and specific FINRA rules relating to the recommendation of variable annuities.[600] These variable insurance products are often unique and have different features depending on the company providing the product, as well as depending on the chosen investment options, benefits, fees and expenses, liquidity restrictions, and other considerations.[601] Consistent with

[591] *See* Proposing Release at 21609–21610 (for further discussion regarding this requirement).

[592] *See* FINRA Rule 2111.05(a).

[593] *See* FINRA Rule 2111 (Suitability) FAQ at Q5.1 ("The reasonable-basis obligation is critically important because, in recent years, securities and investment strategies that brokers recommend to customers, including retail investors, have become increasingly complex and, in some cases, risky.). *See also SEC* v. *Hallas*, No. 17–cv–02999 (S.D.N.Y. filed Apr. 25, 2017).

[594] *See* FINRA Regulatory Notice 09–31, Non-Traditional ETFs—FINRA Reminds Firms of Sales Practice Obligations Relating to Leveraged and Inverse Exchange-Traded Funds (June 2009); SEC staff and FINRA, Investor Alert, Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors (Aug. 1, 2009); SEC Office of Investor Education and Advocacy, Investor Bulletin: Exchange-Traded Funds (ETFs) (Aug. 2012).

[595] *See id. See also* Exchange-Traded Funds, Securities Act Release No. 10515 (Jun. 28, 2018); Use of Derivatives by Registered Investment Companies and Business Development Companies, Investment Company Act Release No. 31933 (Dec. 11, 2015) [80 FR 80883 (Dec. 28, 2015)] ("Derivatives Proposing Release"); Direxion Letter (recognizing that leveraged ETFs are not appropriate for all customers, and thus the importance for broker-dealers to perform sufficient diligence to adequately "understand the terms and features of such funds, including how they are designed to perform, how they achieve that objective, and the impact that market volatility, the ETF's use of leverage, and the customer's intended holding period will have on their performance").

[596] *See supra* footnotes 593–595.

[597] *See id.*

[598] *See, e.g.*, FINRA Regulatory Notice 17–32, Volatility-Linked Exchange Traded Products—FINRA Reminds Firms of Sales Practice Obligations for Volatility-Linked Exchange-Traded Products (Oct. 2017) (explaining that "The level of reasonable diligence that is required will rise with the complexity and risks associated with the security or strategy. With regard to a complex product such as a volatility-linked ETP, an associated person should be capable of explaining, at a minimum, the product's main features and associated risks."); FINRA Regulatory Notice 12–03, Complex Products—Heightened Supervision of Complex Products (Jan. 2012) (stating that "Reasonable diligence must provide the firm or registered representative 'with an understanding of the potential risks and rewards associated with the recommended security or strategy.' This understanding should be informed by an analysis of likely product performance in a wide range of normal and extreme market actions. The lack of such an understanding when making the recommendation could violate the suitability rule.") (internal citations omitted).

[599] *See* related discussion in Section II.C.2.c, Retail Customer Investment Profile.

[600] *See, e.g.*, FINRA Rule 2330, Members Responsibilities Regarding Deferred Variable Annuities; FINRA Rule 2320, Variable Contracts of Insurance Companies; FINRA Regulatory Notice 10–05, Deferred Variable Annuities—FINRA Reminds Firms of Their Responsibilities Under FINRA Rule 2330 for Recommended Purchases or Exchange of Deferred Variable Annuities (Jan. 2010); SEC Updated Investor Bulletin: Variable Annuities (Oct. 30, 2018); SEC Investor Bulletin: Variable Life Insurance (Oct. 30, 2018).

[601] *See id. See also* Updated Disclosure Requirements and Summary Prospectus for Variable

existing FINRA rules and existing suitability obligations under the federal securities laws and SRO rules, regulators and their staffs have stated that recommendations of these products would require careful attention and a specific understanding of certain factors, such as whether the product provides tax-deferred growth, or a death or living benefit, before a broker-dealer could establish an understanding of the product, and apply that understanding to a retail customer's investment profile in making a recommendation.

While we stress the importance of understanding the potential risks, rewards, and costs associated with a recommended security or investment strategy, as well as other factors depending on the facts and circumstances of each recommendation, we do not intend to limit or foreclose broker-dealers from recommending complex or more costly products or investment strategies where the broker-dealer has a reasonable basis to believe that a recommendation could be in the best interest of at least some retail customers and the broker-dealer has developed a proper understanding of the recommended product or investment strategy. As discussed below, once a broker-dealer develops an appropriate understanding of a securities product or investment strategy, including its potential costs, and believes it could be in the best interest of at least some retail customers, the broker-dealer will then need to apply that understanding to reasonably determine that the recommended product or investment strategy is in the particular retail customer's best interest at the time of the recommendation.

c. Have a Reasonable Basis To Believe the Recommendation Is in the Best Interest of a Particular Retail Customer Based on That Retail Customer's Investment Profile and the Potential Risks, Rewards, and Costs Associated With the Recommendation and Does Not Place the Interest of the Broker-Dealer Ahead of the Interest of the Retail Customer

In the Proposing Release, we stated that beyond establishing an understanding of the recommended securities transaction or investment strategy, in order to act in the best interest of the retail customer, a broker-dealer would be required to have a reasonable basis to believe that a specific recommendation is in the best interest of the particular retail customer based on its understanding of the investment or investment strategy under Paragraph (a)(2)(ii)(A), and in light of the retail customer's investment objectives, financial situation, and needs. Accordingly, under proposed paragraph (a)(2)(ii)(A), the second sub-component of the Care Obligation would require a broker-dealer to "exercise reasonable diligence, care, skill, and prudence to . . . have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks and rewards associated with the recommendation." In the Proposing Release, the Commission further articulated that under this standard, a broker-dealer could not have a reasonable basis to believe that the recommendation is in the "best interest" of the retail customer, if the broker-dealer put its interest ahead of the retail customer's interest. This was intended to incorporate a broker-dealer's existing well-established obligations under "customer-specific suitability," but also to enhance these obligations by requiring that the broker-dealer have a reasonable basis to believe that the recommendation is in the "best interest" of (rather than "suitable for") the retail customer.

Commenters largely supported the Commission's proposed approach, but several commenters requested clarifying guidance regarding the importance of costs and other specific factors in a "best interest" evaluation, as well as more broadly how "best interest" was to be determined.[602] For example, several commenters requested additional guidance on the role of costs and other "relevant factors," including subjective and qualitative factors such as shareholder support services, redemption procedures, or qualifications of the investment adviser.[603] Similarly, several commenters asked for clarification that "best interest" does not necessarily mean the lowest cost option or require the broker-dealer to look at every single possible security.[604] Commenters also requested further direction regarding guidance in the Proposing Release related to the consideration of "reasonably available alternatives" and "otherwise identical securities," and requested certain modifications to the definition of "Retail Customer Investment Profile."[605]

After careful consideration of these comments, for the reasons set forth in the Proposing Release, the Commission is adopting the "customer specific" component of the Care Obligation substantially as set forth in the Proposing Release. However, as included under the reasonable basis component of the Care Obligation and for the reasons discussed above, the Commission is expressly incorporating "costs" into the rule text to emphasize that broker-dealers must consider the potential costs associated with a recommendation to a particular retail customer.

As noted above, the Commission is also incorporating into the rule text that broker-dealers must have a reasonable basis to believe that the recommendation "does not place the financial or other interest of the broker-dealer ahead of the interest of the retail customer."[606] This addition is intended to make clear that while a broker-dealer typically will have some interest in a recommendation, the broker-dealer cannot put that interest ahead of the retail customer's interest when making the recommendation.

To address feedback from commenters, the Commission is also providing further interpretations and guidance regarding the application of the Care Obligation, and in particular, what it means to make a recommendation in a retail customer's best interest and not place the broker-dealer's interest ahead of the retail customer's interest. Specifically, recognizing that a facts and circumstances evaluation of a recommendation makes it difficult to draw bright lines around whether a particular recommendation would meet the Care Obligation, the Commission is providing further interpretations and guidance on how a broker-dealer could have a "reasonable basis to believe" that a recommendation is in the best interest of its retail customer and does not place the broker-dealer's interest ahead of the retail customer's interest, as well as circumstances when we believe that a broker-dealer could not have such a reasonable belief.

Annuity and Variable Life Insurance Contracts, Investment Advisers Act Release No. 10569 (Oct. 30, 2018) [83 FR 61730 (Nov. 30, 2018)] ("VA Summary Prospectus Proposal").

[602] *See, e.g.,* Wells Fargo Letter; Primerica Letter; Great-West Letter; NASAA August 2018 Letter; Cambridge Letter; BlackRock Letter.

[603] *See* Chapman Letter; BlackRock Letter; Vanguard Letter; ICI Letter; Morgan Stanley Letter.

[604] *See* Great-West Letter; SIFMA August 2018 Letter.

[605] *See, e.g.,* Committee of Annuity Insurers Letter; Guardian August 2018 Letter; IPA Letter; Morgan Stanley Letter; Invesco Letter; CFA August 2018 Letter.

[606] *See* related discussion in Section II.A.2; *see also* Fiduciary Interpretation.

Factors To Consider Regarding a Recommendation to a Particular Retail Customer and Relevance of Cost

Consistent with paragraph (a)(2)(ii)(A) of the Care Obligation, we are incorporating "costs" in the rule text of paragraph (a)(2)(ii)(B) of Regulation Best Interest as a relevant factor that, in addition to risks and rewards, must always be understood and considered by the broker-dealer prior to recommending a particular securities transaction or investment strategy involving securities to a particular retail customer. As discussed above, under paragraph (a)(2)(ii)(A) of the Care Obligation, a broker-dealer will be required to exercise reasonable diligence, care, and skill to understand the potential risks, rewards, and costs of a recommended security or investment strategy and have a reasonable basis to believe that it *could be* in the best interest of *at least some* retail customers.[607] Paragraph (a)(2)(ii)(B) of the Care Obligation builds on this obligation and will require a broker-dealer to have a reasonable basis to believe, based on its understanding of the potential risks, rewards, and costs of the recommendation, and in light of the retail customer's investment profile, that the recommendation is in the best interest of a *particular* retail customer and does not place the broker-dealer's interest ahead of the retail customer's interest. Accordingly, when making a recommendation to a particular retail customer, broker-dealers must weigh the potential risks, rewards, and costs of a particular security or investment strategy, in light of the particular retail customer's investment profile. As discussed above,[608] a broker-dealer's diligence, care, and skill to understand the potential risks, rewards, and costs of a security or investment strategy should generally involve a consideration of factors, depending on the facts and circumstances of the particular recommendation and the particular retail customer's investment profile, as discussed below.

While the factors noted above are examples of important factors to consider based on the particular security or investment strategy, this list is not exhaustive and additional factors, including those raised by commenters, could be relevant depending on the particular security or investment strategy being recommended and depending on the particular retail customer's investment profile. For example, prior to recommending a variable annuity to a particular retail customer, broker-dealers should generally develop a reasonable basis to believe that the retail customer will benefit from certain features of deferred variable annuities, such as tax-deferred growth, annuitization, or a death or living benefit.[609]

As stated in the Proposing Release, the importance of each factor in determining the customer-specific component of the Care Obligation will depend on the facts and circumstances of each recommendation. Thus, one or more factors may have more or less relevance—or may not be obtained or analyzed at all—if the broker-dealer has a reasonable basis for determining that the factors are not relevant. Regardless of which factors are evaluated—and equally important, which factors are not evaluated—a broker-dealer must have a reasonable basis to believe that the particular recommendation is in the best interest of the particular retail customer and does not place the broker-dealer's interest ahead of the retail customer's interest, consistent with the interpretations and guidance provided. For example, recommendations of the "lowest cost" security or investment strategy, without consideration of other factors, could violate Regulation Best Interest. In the same vein, it is important to consider that a recommendation may be considered to be in a retail customer's best interest when viewed in the context of the retail customer's portfolio even if seemingly not in a retail customer's best interest when viewed in isolation (*e.g.*, inclusion of what otherwise might be seen as a risky investment in the portfolio of a risk-adverse customer, such as including hedging instruments in a conservative portfolio).

The customer-specific component of the Care Obligation will rest on whether a broker-dealer had a reasonable basis to believe that the recommendation was in the best interest of the particular retail customer at the time of the recommendation, based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation, and did not place the financial or other interest of the broker, dealer, or such natural person ahead of the interest of the retail customer. Thus, as discussed further below, the importance of each factor, and which factors to consider, will depend on the facts and circumstances of each recommendation, as well as the specific security or investment strategy.

While the Care Obligation does not require broker-dealers to document the basis for a recommendation, broker-dealers may choose to take a risk based approach when deciding whether or not to document certain recommendations. For example, broker-dealers may wish to document an evaluation of a recommendation and the basis for the particular recommendation in certain contexts, such as the recommendation of a complex product, or where a recommendation may seem inconsistent with a retail customer's investment objectives on its face.[610] Similarly, broker-dealers may consider using existing compliance measures, such as generating and reviewing exception reports that identify transactions that fall outside of firm-specified parameters to help evaluate and review for compliance with the Care Obligation. These measures are not meant to be exhaustive, but rather are examples of the sorts of compliance tools and methods broker-dealers should generally consider using in evaluating whether recommendations are consistent with a retail customer's best interests.

Retail Customer Investment Profile

The Proposing Release would have required a "Retail Customer Investment Profile" to include, but not be limited to, "the retail customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the retail customer may disclose to the broker, dealer, or a natural person who is an associated person of a broker or dealer in connection with a recommendation." [611] The Proposing Release also explained that broker-dealers would be required to exercise "reasonable diligence" to ascertain the

[607] *See* Proposing Release at 21610–21611.

[608] *See* related discussion in Section II.C.2.a and Section II.C.2.b.

[609] *Cf. also* FINRA Rule 2330, Members' Responsibilities Regarding Deferred Variable Annuities. *See* Transamerica November 2018 Letter.

[610] *See* FINRA Regulatory Notice 11–25 at FAQ 2 (explaining that FINRA Rule 2111 (Suitability) permits firms to take a risk-based approach with respect to documenting suitability determinations). Regulation Best Interest similarly does not require documentation; however, as noted above, we encourage broker-dealers to take a risk-based approach when deciding whether or not to document certain recommendations.

[611] Proposing Release at 21611 (noting the proposed definition of Retail Customer Investment Profile was consistent with FINRA Rule 2111(a) (Suitability), which provides that "A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation").

retail customer's investment profile as part of satisfying proposed paragraph (a)(2)(i)(B), and that when retail customer information is unavailable despite a broker-dealer's reasonable diligence to obtain such information, a broker-dealer should consider whether it has sufficient understanding of the retail customer to properly evaluate whether the recommendation is in the retail customer's best interest.[612] Furthermore, under the proposed rule, a broker-dealer would not meet its Care Obligation if it made a recommendation to a retail customer for whom it lacks sufficient information to have a reasonable basis to believe that the recommendation is in the best interest of that retail customer based on such customer's investment profile.

In response to this definition and the related discussion, commenters identified several additional factors that they believed should be included or discussed as part of a retail customer's investment profile. For example, several commenters suggested adding "longevity risk," "retirement income needs," or "lifetime income needs" as factors that should be included as part of an investor's investment profile.[613] Other commenters suggested additional factors, such as, for trust accounts, considering the profile of trust beneficiaries and not the trustee, or adding a retail customer's "income profile."[614]

While we agree that many of these factors will likely be relevant to a broker-dealer's recommendation of various securities or investment strategies involving securities, we are adopting the definition of "retail customer investment profile" as proposed. We believe that the list of factors under "retail customer investment profile" is widely understood and importantly, offers broker-dealers the flexibility to consider additional factors as deemed necessary.[615] Although many of the additional factors cited by commenters may be relevant to securities or investment strategy recommendations under certain facts and circumstances, we are not persuaded that we should add any specific factor or factors to the existing list of profile factors, particularly given that the list of factors is non-exhaustive and broker-dealers can consider additional factors as appropriate under the unique facts and circumstances of each recommendation. Thus, for example, where a broker-dealer making a variable annuity recommendation believes that longevity risk is an important factor for a particular retail customer and that such factor is necessary to develop a reasonable basis to believe that the product is in the best interest of that retail customer, that broker-dealer should consider and utilize that factor.[616] We believe that this approach appropriately provides broker-dealers with a well-understood starting framework, but also gives broker-dealers the ability to consider additional factors based on the unique nature of its particular securities products, investment strategies, and retail customers.

Broker-dealers must obtain and analyze enough customer information to have a reasonable basis to believe that the recommendation is in the best interest of the particular retail customer. The significance of specific types of customer information generally will depend on the facts and circumstances of the particular case, including the nature and characteristics of the product or strategy at issue. Where retail customer information is unavailable despite a broker-dealer's reasonable diligence, the broker-dealer should carefully consider whether it has a sufficient understanding of the retail customer to properly evaluate whether the recommendation is in the best interest of that retail customer.[617] In addition, a broker-dealer generally should make a reasonable effort to ascertain information regarding an existing customer's investment profile prior to the making of a recommendation on an "as needed" basis—that is, where a broker-dealer knows or has reason to believe that the customer's investment profile has changed.[618] The reasonableness of a broker-dealer's efforts to collect information regarding a customer's investment profile information depends on the facts and circumstances of a given situation, and the importance of each factor may vary depending on the facts and circumstances of the particular case.[619] Under Regulation Best Interest, as with the approach under FINRA's suitability rule, broker-dealers may generally rely on a retail customer's responses absent "red flags" indicating that the information is inaccurate.[620]

Moreover, as noted in the Proposing Release, one or more factors may have more or less relevance, or may not be obtained or analyzed at all if the broker-dealer has a reasonable basis for determining that the factor is irrelevant to that particular best interest determination. However, consistent with existing obligations, where a broker-dealer determines not to obtain or analyze one or more of the factors specifically identified in the definition of "Retail Customer Investment Profile," the broker-dealer should document its determination that the factor(s) are not relevant components of a retail customer's investment profile in light of the facts and circumstances of the particular recommendation.[621]

Regulation Best Interest, as noted above, does not require documentation of the basis for believing a particular recommendation was in a particular retail customer's best interest.[622] Nevertheless, broker-dealers may wish to consider documenting the basis for determining that the recommendation is in the best interest of the retail customer when it is not evident from the recommendation itself.[623] Documentation by itself will not cure a recommendation in circumstances in which a broker-dealer could not have reasonably believed the recommendation was in the best interest of the retail customer at the time the recommendation was made.[624]

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[612] *Id.* This is similar to the approach articulated below, as well as in FINRA Regulatory Notice 12–25, which outlines what constitutes "reasonable diligence" under FINRA's suitability rule in attempting to obtain customer-specific information and that the reasonableness of the effort also will depend on the facts and circumstances. *See* FINRA Regulatory Notice 12–25 at Q16. Moreover, under Regulation Best Interest, as with the approach under FINRA's suitability rule, broker-dealers may generally rely on a retail customer's responses absent "red flags" indicating that the information is inaccurate. *Id.*

[613] *See, e.g.,* IRI Letter, The Committee of Annuity Insurers Letter, CCMC Letters, Jackson National Letter, Pacific Life August 2018 Letter, Lincoln Financial Letter, AXA Letter, Principal Letter; Transamerica November 2018 Letter; Letter from Mark F. Halloran, VP Managing Director, Business Development, Transamerica (Dec. 14, 2018) ("Transamerica December 2018 Letter").

[614] *See, e.g.,* Jackson National Letter, Lincoln Financial Letter; Transamerica December 2018 Letter.

[615] *See, e.g.,* CCMC Letters; Jackson National Letter; Pacific Life August 2018 Letter; Committee of Annuity Insurers Letter; AXA Letter.

[616] *See, e.g.,* AXA Letter; Committee of Annuity Insurers Letter; Pacific Life August 2018 Letter.

[617] *See supra* footnotes 611–612 and accompanying text.

[618] *See id.; see also* Proposing Release at 21611–21612.

[619] *See id.; see also* FINRA Regulatory Notice 12–25 at Q16.

[620] *See supra* footnote 612.

[621] FINRA Rule 2111.04.

[622] As discussed in Section II.C.1, we believe that the basis for and risks associated with a broker-dealer's recommendations in standardized terms (as opposed to individualized disclosure of the basis for *each* recommendation made) is a material fact relating to the scope and terms of the relationship that is required to be disclosed under the Disclosure Obligation.

[623] *See supra* footnote 610 and accompanying text.

[624] *See* FINRA Rule 2111 (Suitability) FAQ.

Application of the Care Obligation—Reasonably Available Alternatives and Otherwise Identical Securities

In the Proposing Release, we provided guidance on what types of recommendations would or would not be in the best interest of a particular retail customer. In particular, the Proposing Release stated that where a broker-dealer is choosing among identical securities available to the broker-dealer, it would be inconsistent with the Care Obligation to recommend the more expensive alternative for the customer.[625] Similarly, in the Proposing Release, we noted our belief that it would be inconsistent with the Care Obligation if the broker-dealer made a recommendation to a retail customer in order to: Maximize the broker-dealer's compensation, further the broker-dealer's business relationships, satisfy firm sales quotas or other targets, or win a firm-sponsored sales contest.[626]

We also stated that under the Care Obligation a broker-dealer generally should consider reasonable alternatives, if any, offered by the broker-dealer in determining whether it has a reasonable basis for making the recommendation.[627] The Proposing Release explained that this approach would not require a broker-dealer to analyze all possible securities, all other products, or all investment strategies to recommend the single "best" security or investment strategy for the retail customer, nor necessarily require a broker-dealer to recommend the least expensive or least remunerative security or investment strategy. Further, the Proposing Release indicated that under the Care Obligation, when a broker-dealer recommends a *more expensive* security or investment strategy over another reasonably available alternative offered by the broker-dealer, the broker dealer would need to have a reasonable basis to believe that the higher cost is justified (and thus nevertheless is in the retail customer's best interest) based on other factors (*e.g.*, the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions), in light of the retail customer's investment profile.[628] Relatedly, we stated that a broker-dealer could not meet the Care Obligation through disclosure alone.[629]

The Commission received numerous comments relating to the Proposing Release's discussion of "reasonably available alternatives" and regarding recommendations of "otherwise identical securities." [630] For example, commenters sought clarification regarding what factors need to be considered in the evaluation, and also how the evaluation could be performed in certain contexts, such as where a broker-dealer operates with an open architecture framework, recommends only a limited menu of products, or recommends only proprietary products.[631] A majority of the IAC recommended that Regulation Best Interest should be clarified to require recommendations of "the investments, investment strategies, accounts, or services, from among those that [the broker-dealers, investment advisers, and their associated persons] have reasonably available to recommend, that they reasonably believe represent the best available options for the investor" and that a "determination regarding the best reasonably available options should be based on a careful review of the investor's needs and goals, as well as the full range of the reasonably available products', strategies', accounts', or services' features, including, but by no means limited to cost." [632] Several other commenters recommended that the Commission confirm that Regulation Best Interest will not require broker-dealers to offer an unlimited number of securities or investment strategies.[633] Commenters also expressed concern over whether the consideration of "reasonably available alternatives" would effectively require a broker-dealer to document the basis of any recommendation, as well as concerns about disclosure's role in satisfying the Care Obligation.[634] Finally, a majority of the IAC and other commenters sought clarification on whether broker-dealers were required to recommend only the single "best" product.[635]

The Care Obligation will require a broker-dealer to have a reasonable basis to believe, based on its understanding of the potential risks, rewards, and costs of the recommended security or investment strategy involving securities, and in light of the retail customer's investment profile, that the recommendation is in the best interest of a *particular* retail customer and does not place the broker-dealer's interest ahead of the retail customer's interest. As noted above, determining what is in a retail customer's best interest is an objective evaluation turning on the facts and circumstances of the particular recommendation and the particular retail customer at the time the recommendation is made.[636]

Accordingly, as noted above, a broker-dealer would not satisfy the Care Obligation by simply recommending the least expensive or least remunerative

[625] Proposing Release at 21612.

[626] *Id.*

[627] Proposing Release at 21608–21610.

[628] Proposing Release at 21612 (emphasis in original). We similarly noted that "when a broker-dealer recommends a *more remunerative* security or investment strategy over another reasonably available alternative offered by the broker-dealer, the broker-dealer would need to have a reasonable basis to believe that—putting aside the broker-dealer's financial incentives—the recommendation was in the best interest of the retail customer based on the factors noted [therein], in light of the retail customer's investment profile. Nevertheless, this does not mean that a broker-dealer could not recommend the more remunerative of two reasonably available alternatives, if the broker-dealer determines the products are otherwise both in the best interest of—and there is no material difference between them from the perspective of—the retail customer, in light of the retail customer's investment profile." *Id.* (emphasis in original).

[629] *Id.* at 21612–21613 (further explaining that "where a broker-dealer is choosing among identical securities with different cost structures, we believe it would be inconsistent with the best interest obligation for the broker-dealer to recommend the more expensive alternative for the customer, even if the broker-dealer had disclosed that the product was higher cost and had policies and procedures reasonably designed to mitigate the conflict under the Conflict of Interest Obligation, as the broker-dealer would not have complied with the Care Obligation. Such a recommendation, disclosure aside, would still need to be in the best interest of a retail customer, and we do not believe it would be in the best interest of a retail customer to recommend a higher-cost product if all other factors are equal.") (internal citations omitted).

[630] *See, e.g.*, Fidelity Letter; Vanguard Letter; MMI Letter; BlackRock Letter.

[631] *See, e.g.*, CFA August 2018 Letter; Wells Fargo Letter; Fidelity Letter; Morgan Stanley Letter. *See also* LPL August 2018 Letter (suggesting that its representatives could not conduct a meaningful comparison across "all similar available securities" and that, such recommendations would be subject to legal challenges in hindsight).

[632] IAC 2018 Recommendation (emphasis in original).

[633] *See* LPL August 2018 Letter (recommending that the Commission clarify that a financial professional can satisfy his or her obligations under Regulation Best Interest, even if he or she limits recommendations to a smaller number of product sponsors because financial professionals participating on large platforms may, in practice, be discouraged from conducting focused analysis of product offerings, instead opting for a more cursory review of a few high-level cost, risk, and performance metrics across all available products). *See also* Fidelity Letter; Cetera August 2018 Letter; SIFMA August 2018 Letter; Guardian August 2018 Letter; Prudential Letter.

[634] *See, e.g.*, Fidelity Letter; Wells Fargo Letter.

[635] *See* 2018 IAC Recommendation ("The Commission should recognize that there will often not be a *single* best option and that more than one of the available options may satisfy this standard," and that "compliance should be measured based on whether the broker or adviser had a reasonable basis for the recommendation *at the time it was made*, and not on how the recommendation ultimately performed for the investor. . . ."); *see also* SIFMA August 2018 Letter.

[636] As noted and further reiterated below, a broker-dealer will not be required to recommend the single "best" of all possible alternatives that might exist, in part because many different options may in fact be in the retail customer's best interest. *See infra* footnote 640 and accompanying text.

security without any further analysis of these other factors and the retail customer's investment profile. A broker-dealer could recommend a more expensive security or investment strategy if there are other factors about the product that reasonably allow the broker-dealer to believe it is in the best interest of the retail customer, based on that retail customer's investment profile. Similarly, a broker-dealer could recommend a more remunerative security or investment strategy if the broker-dealer has a reasonable basis to believe that there are other factors about the security or investment strategy that make it in the best interest of the retail customer, in light of the retail customer's investment profile.

We also continue to have the view that, as part of determining whether a broker-dealer has a reasonable basis to believe that a recommendation is in the best interest of the retail customer, a broker-dealer generally should consider reasonably available alternatives offered by the broker-dealer. It is our view that such a consideration is an inherent aspect of making a "best interest" recommendation, and is a key enhancement over existing broker-dealer suitability obligations, which do not necessarily require a comparative assessment among such alternatives.[637] Similarly, this concept has been applied in the context of guidance regarding suitability and heightened supervision of complex products, stating that when broker-dealers are recommending complex or costly products, they should first consider whether less complex or costly products could achieve the same objectives for their retail customers.[638]

In terms of conducting such an evaluation, a broker-dealer does not have to conduct an evaluation of every possible alternative, either offered outside of the firm (such as where the firm offers only proprietary or other limited range of products) or available on the firm's platform. We appreciate commenter concerns about the impracticality and potential impossibility of such a comparative evaluation, particularly where the firm offers numerous different products, many of which may have similar strategies but with other varying characteristics, including cost structures, that may apply differently based on the particular retail customer.[639] We also recognize that different products are rarely perfectly equal, and that differences will be both quantitative and qualitative in nature. A broker-dealer will not be required to recommend the single "best" of all possible alternatives that might exist, in part because many different options may in fact be in the retail customer's best interest.[640] We are sensitive to commenters' concern that this determination, to the extent it can be made at all, may be judged in hindsight even though Regulation Best Interest applies at the time of the recommendation.[641]

In particular, we are not requiring a natural person who is an associated person of the broker-dealer to be familiar with *every* product on a broker-dealer's platform, particularly where a broker-dealer operates in an open architecture framework or otherwise operates a platform with a large number of products or options.[642] Such a requirement might not allow an associated person of a broker-dealer to develop a proper understanding of every security or investment strategy's potential risks, rewards, or costs, and thus it might not be possible to fulfill the obligation set forth in paragraph (a)(2)(ii)(A). Furthermore, such a requirement could encourage broker-dealers to limit their product menus or otherwise restrict access to products and services currently available to retail customers, which is contrary to the purpose and goals of Regulation Best Interest.[643]

As discussed above, the determination of whether a recommendation is in the "best interest" of the retail customer and does not place the interests of the broker-dealer ahead of the retail customer's interest must be based on information reasonably known to the associated person (based on her reasonable diligence, care, and skill) at the time the recommendation is made. Accordingly, in fulfilling the Care Obligation, the associated person should exercise reasonable diligence, care, and skill to consider reasonably available alternatives offered by the broker-dealer. This exercise would require the associated person to conduct a review of such reasonably available alternatives that is reasonable under the circumstances. Consistent with the Compliance Obligation discussed below, a broker-dealer should have a reasonable process for establishing and understanding the scope of such "reasonably available alternatives" that would be considered by particular associated persons or groups of associated persons (*e.g.*, groups that specialize in particular product lines) in fulfilling the reasonable diligence, care, and skill requirements under the Care Obligation.

What will be a reasonable determination of the scope of alternatives considered will depend on the facts and circumstances, at the time of the recommendation, including both the nature of the retail customer and the retail customer's investment profile, and the particular associated persons or groups of associated persons that are providing the recommendations. With respect to broker-dealers that materially limit the range of products or services that they recommend to retail customers (*e.g.*, limits its product offerings to only proprietary or other limited menus of products), the Conflict of Interest

[637] While enforcement actions and related guidance may be construed as interpreting the suitability obligation to include a consideration of available alternatives, it is generally limited to certain circumstances, such as recommendations of mutual funds with different share classes or recommendations of complex or costly products. *See In re Application of Raghavan Sathianathan*, Exchange Act Release No. 54722 at 21 (Nov. 8, 2006); *In the Matter of Wendell D. Belden*, 56 S.E.C. 496 (2003); FINRA Regulatory Notice 12–03. *See also* FINRA 2018 Letter; MSRB Rule G–42 (requiring a municipal advisor to inform its municipal entity or obligated person client whether it has investigated or considered other reasonably feasible alternatives to the recommended municipal securities transaction).

Thus, although certain enforcement actions and guidance contemplate a consideration of available alternatives under certain situations, it is not a general expectation. Nevertheless, such statements serve as an example and evidence that the concept is not unfamiliar to broker-dealers.

[638] *See* FINRA Regulatory Notice 12–03 ("For example, registered representatives should compare a structured product with embedded options to the same strategy through multiple financial instruments on the open market, even with any possible advantages of purchasing a single product."). *See also supra* footnote 635.

[639] *See, e.g.*, Morgan Stanley Letter ("Large firms with an open architecture like Morgan Stanley offer an enormous range of products to their clients. To take but one example, Morgan Stanley offers approximately 300 large capitalization equity mutual funds to its retail customers."); *see also* Morningstar Letter; Primerica Letter; ICI Letter; Chapman Letter (stating that "identical" is too stringent because they believe all securities have distinctions).

[640] Commenters suggesting different approaches acknowledged this concern. *See, e.g.*, IAC 2018 Recommendation ("[T]he Commission should recognize there will often not be a single best option and that more than one of the available options may satisfy this standard.").

[641] *See* LPL August 2018 Letter.

[642] Conversely, where a broker-dealer only has a few products, an associated person of the broker-dealer may be expected to understand and consider all of these options when recommending a security or investment strategy. We recognize that this facts-and-circumstances approach does not provide a clear bright-line rule; however, we are providing further guidance below on a broker-dealer's process for evaluating reasonably available alternatives and the scope herein. Furthermore, nothing in this discussion excuses a broker-dealer from satisfying the Care Obligation. An associated person of the broker-dealer cannot use a large platform as an excuse for not developing a proper understanding of a recommended security or investment strategy's potential risks, rewards, or costs.

[643] *See* LPL August 2018 Letter.

Obligation provision requires broker-dealers to have reasonably designed policies and procedures to identify and disclose the material limitations and any conflicts of interest associated with such limitations, and to prevent such limitations and associated conflicts of interest from causing the broker-dealer or associated person to make recommendations that place the interest of the broker-dealer or associated person ahead of the interest of the retail customer.[644] Similarly, where a broker-dealer offers numerous products on its platform, a broker-dealer or an associated person could reasonably limit the universe of "reasonably available alternatives" if there is a reasonable process or methodology for limiting the scope of alternatives or the universe considered for a particular retail customer, particular category of retail customers, or the retail customer base more generally.[645]

In addition to the particular retail customer's investment profile, we believe the scope of reasonably available alternatives considered could depend upon a variety of factors, including but not limited to, the associated person's customer base (including the general investment objectives and needs of the customer base), the investments and services available to the associated person to recommend (including limitations due to licensing of the associated person), and other factors such as specific limitations on the available investments and services with respect to certain retail customers (*e.g.,* product or service income thresholds; product geographic limitations; or product limitations based on account type, such as those only eligible for IRA accounts). A reasonable process would not need to consider every alternative that may exist (either outside the broker-dealer or on the broker-dealer's platform) or to consider a greater number of alternatives than is necessary in order for the associated person to exercise reasonable diligence, care, and skill in providing a recommendation that complies with the Care Obligation.

Importantly, where all reasonably available alternatives considered would be inconsistent with a retail customer's investment profile, a broker-dealer would not be able to form a reasonable belief that the best of these options is in the best interest of that retail customer. All recommendations to retail customers of securities or investment strategies are required to satisfy the Care Obligation, and broker-dealers cannot use a limited product menu or a process to determine the scope of reasonably available alternatives considered to justify a recommendation that is not in the best interest of the retail customer.

We recognize that the process by which a broker-dealer and its associated persons develop and make recommendations to retail customers, including the scope of reasonably available alternatives considered, will depend upon a variety factors, including the nature of the broker-dealer's business.[646] The disclosure of this process pursuant to the Disclosure Obligation will provide critical information to retail customers and underscores our acknowledgment that we do not expect every broker-dealer or associated person to follow the same process. Instead, consistent with the Compliance Obligation, broker-dealers and their associated persons must have a reasonable process for developing and making recommendations to retail customers in compliance with the Care Obligation, including the consideration of reasonably available alternatives, which will depend on the facts and circumstances.

We emphasize that what is in the "best interest" of a retail customer depends on the facts and circumstances of a recommendation at the time it is made, including matching the recommended security or investment strategy to the retail customer's investment profile at the time of the recommendation, and the process for coming to that conclusion. Whether a broker-dealer has complied with the Care Obligation will be evaluated based on the facts and circumstances at the time of the recommendation (and not in hindsight) and will focus on whether the broker-dealer had a *reasonable basis to believe* that the recommendation is in best interest of the retail customer.

Finally, broker-dealers or their associated persons are not required to prepare and maintain documentation regarding the basis for each specific recommendation, including an evaluation of a recommended securities transaction or investment strategy against similar available alternatives. In circumstances where the "match" between the retail customer profile and the recommendation appears less reasonable on its face (for example, where a retail customer's account objective is preservation of income and the recommendation involves higher risk, or where there are more significant conflicts of interest present), the more important the process will likely be for a broker-dealer to establish that it had a reasonable belief that the recommendation was in the best interest of the retail customer and did not place the broker-dealer's interest ahead of the retail customer. This could include reasonably designed policies and procedures to establish compliance with the Care Obligation, as required by the new Compliance Obligation, and could include maintaining supporting documentation for certain recommendations.[647]

Application of Care Obligation to Account Type Recommendations

As discussed above, Regulation Best Interest will apply to recommendations by a broker-dealer of a securities account type. Thus, the Care Obligation will require a broker-dealer to have a reasonable basis to believe that a recommendation of a securities account type (*e.g.,* brokerage or advisory, or among the types of accounts offered by the firm) is in the retail customer's best interest at the time of the recommendation and does not place the financial or other interest of the broker-dealer ahead of the interest of the retail customer.[648]

We believe broker-dealers would need to consider various factors in determining whether a particular account is in a particular retail customer's best interest. For example, broker-dealers generally should consider: (1) The services and products provided in the account (ancillary

[644] *See* Section II.C.3. Broker-dealers would be required to disclose the conflict of interest, as well as the material facts associated with such a conflict pursuant to the Disclosure Obligation provision as described in Section II.C.1.

[645] We note that where a broker-dealer (or an associated person) limits the securities or investment strategies that are considered as "reasonably available alternatives" from the universe of securities or investment strategies involving securities offered by the broker-dealer, this limitation may constitute a material limitation placed on the securities or investment strategies involving securities that may be recommended, which the broker-dealer (or an associated person) would need to disclose and address as provided in the Disclosure and Conflict of Interest Obligations.

[646] Accordingly, we believe that disclosure of this process is of fundamental importance to a retail customer's understanding of what services are being provided, and in deciding whether those services are appropriate to the retail customer's needs and goals, and have thus clarified that the basis for a broker-dealer's or an associated person's recommendations as a general matter (*i.e.,* what might commonly be described as the firm's or associated person's investment approach, philosophy or strategy) is a material fact relating to the scope and terms of the relationship that must be disclosed pursuant to the Disclosure Obligation. *See* Section II.C.1.

[647] *See supra* footnote 610 and accompanying text.

[648] As discussed in Section II.B.2, whether and how Regulation Best Interest applies will depend on whether the financial professional making the recommendation is dually registered.

In the section that follows we discuss how the Care Obligation will apply to recommendations to open an IRA or to roll over assets into an IRA.

services provided in conjunction with an account type, account monitoring services, etc.); (2) the projected cost to the retail customer of the account; (3) alternative account types available; (4) the services requested by the retail customer; and (5) the retail customer's investment profile. Moreover, retail customer-specific factors, such as those identified in the definition of "Retail Customer Investment Profile," may not be applicable or available in every context, and would depend on the facts and circumstances at the time of account type recommendation. For example, one or more factors may have more or less relevance, or information about those factors may not be obtained or analyzed at all where the broker-dealer has a reasonable basis for believing that a particular factor is or is not relevant.[649] In addition, as discussed above, we recognize that factors other than cost may properly be considered when determining whether an account is in a retail customer's best interest.[650]

Where the financial professional making the recommendation is dually registered (*i.e.*, an associated person of a broker-dealer and a supervised person of an investment adviser (regardless of whether the professional works for a dual-registrant, affiliated firms, or unaffiliated firms)) the financial professional would need to make this evaluation taking into consideration the spectrum of accounts offered by the financial professional (*i.e.*, both brokerage and advisory taking into account any eligibility requirements such as account minimums), and not just brokerage accounts. For example, all other things being equal, it may be in the retail customer's best interest to recommend a brokerage account to the retail customer who intends to buy and hold a long-term investment (*e.g.*, maintain an account primarily composed of bonds or mutual funds and has a stated buy-and-hold strategy), as opposed to an advisory account (*i.e.*, it may not be in the retail customer's best interest in this context to pay an ongoing fee for a security that he or she plans to hold to maturity).[651] On the other hand, it may not be in the retail customer's best interest to recommend a brokerage account where the retail customer plans to engage in at least a moderate level of trading and prefers to pay for advice in connection with such trading on the basis of a consistent recurring monthly or annual charge.[652] Furthermore, where a retail customer holds a variety of investments, or prefers differing levels of services (*e.g.*, both episodic recommendations from a broker-dealer and continuous advisory services including discretionary asset management from an investment adviser), it may be in the retail customer's best interest to recommend both a brokerage and an advisory account.

Similarly, where the financial professional is only registered as an associated person of a broker-dealer (regardless of whether that broker-dealer entity is a dual-registrant or affiliated with an investment adviser), he or she would need to take into consideration only the brokerage accounts available.[653] However, even if a broker-dealer only offered brokerage accounts, the associated person would nevertheless need to have a reasonable basis to believe that the recommended account was in the best interest of the retail customer. For example, if the retail customer were seeking a relationship where the financial professional would have unlimited investment discretion (*i.e.*, having responsibility for a customer's trading decisions),[654] the associated person would not have a reasonable basis to believe that a brokerage account was in the best interest of the retail customer. Thus, as with limited product menus, a limited selection of account types would not excuse a broker-dealer from making a recommendation not in the best interest of the retail customer.

Application of Care Obligation to IRA Rollovers and Related Recommendations

Regulation Best Interest also applies to recommendations to open an IRA or to roll over assets into an IRA. Thus, the Care Obligation will require a broker-dealer to have a reasonable basis to believe that the IRA or IRA rollover is in the best interest of the retail customer at the time of the recommendation and does not place the financial or other interest of the broker-dealer ahead of the interest of the retail customer, taking into consideration the retail customer's investment profile and other relevant factors, as well as the potential risks, rewards, and costs of the IRA or IRA rollover compared to the investor's existing 401(k) account or other circumstances.[655]

When making a recommendation to open an IRA, or to roll over workplace retirement plan assets into an IRA rather than keeping assets in a previous employer's workplace retirement plan (or rolling over assets to a new employer's workplace retirement plan), broker-dealers should consider a variety of factors, the importance of which will depend on the particular retail customer's needs and circumstances. In addition to the *Factors to Consider Regarding a Recommendation to a Particular Retail Customer* discussed above, as well as the Retail Customer's Investment Profile, broker-dealers should consider a variety of additional factors specifically salient to IRAs and workplace retirement plans, in order to compare the retail customer's existing account to the IRA offered by the broker-dealer. These factors should generally include, among other relevant factors: Fees and expenses; level of service available; available investment options; ability to take penalty-free withdrawals; application of required minimum distributions; protection from creditors and legal judgments; holdings of employer stock; and any special features of the existing account.[656] With respect to available investment options, we caution broker-dealers not to rely on, for example, an IRA having "more investment options" as the basis for recommending a rollover. Rather, as with other factors, broker-dealers should consider available investment options in an IRA, among other relevant factors, in light of the retail customer's current situation and needs in order to develop a reasonable basis to believe that the rollover is in the retail customer's best interest.

While these examples may be relevant to an analysis of available options, this list is not meant to be exhaustive. Furthermore, each factor generally should be analyzed with respect to a particular retail customer in order for a broker-dealer to form a reasonable belief that the recommendation is in the best

[649] As discussed above, where a broker-dealer determines not to obtain or analyze one or more of the factors specifically identified in the definition of "Retail Customer Investment Profile," the broker-dealer generally should document its determination that the factor(s) are not relevant components of a retail customer's investment profile in light of the facts and circumstances of the particular recommendation.

[650] *See id.*

[651] *See id.*

[652] *See id.* We reiterate that this is a facts and circumstances determination, and that these examples are not meant to provide a bright line rule, but rather to illustrate certain considerations that a broker-dealer could consider when determining whether a recommended account type is in the best interest of the retail customer.

[653] For example, if the natural person that is an associated person of the broker-dealer is not registered as an investment adviser representative, but is associated with a broker-dealer that is a dual-registrant, that associated person would only need to consider the brokerage accounts offered by the firm, and not the firm's advisory accounts in making the recommendation.

[654] *See* Solely Incidental Interpretation.

[655] *See infra* Section II.C.2; *see also* FINRA Regulatory Notice 13–45 (outlining several considerations regarding IRA rollovers).

[656] *See id.*

interest of that retail customer and does not place the financial or other interest of the broker-dealer ahead of the interest of the retail customer. Finally, as described above, certain factors may have more or less relevance, or not be relevant at all, depending on the particular facts and circumstances of each recommendation.

d. Have a Reasonable Basis To Believe That a Series of Recommended Transactions, Even if in the Retail Customer's Best Interest When Viewed in Isolation, Is Not Excessive and Is the Retail Customer's Best Interest When Taken Together in Light of the Retail Customer's Investment Profile and Does Not Place the Interest of the Broker-Dealer Ahead of the Interest of the Retail Customer

As proposed, the third component of the Care Obligation would require a broker-dealer to exercise reasonable diligence, care, skill, and prudence to have a reasonable basis to believe that a series of recommended transactions, even if in the retail customer's best interest when viewed in isolation, is not excessive and is in the retail customer's best interest when taken together in light of the retail customer's investment profile.[657] The Proposing Release noted that this requirement is intended to incorporate and enhance a broker-dealer's existing "quantitative suitability" obligation by applying the requirement irrespective of whether a broker-dealer exercises actual or *de facto* control over a customer's account, thereby making the obligation consistent with the current requirements for "reasonable basis suitability" and "customer specific suitability." [658]

We received a few comments suggesting modifications to this component of the obligation. For example, one commenter recommended the Commission clarify the meaning of "series of transactions," while a second commenter requested a carve-out for "active traders" who are "interested in trading individual stocks . . . with a great degree of regularity." [659] Another commenter maintained that the quantitative suitability obligations should only apply to those accounts over which the member firm has "control," and that if the Commission does not include the control element of FINRA Rule 2111 as part of the Care Obligation, that the Commission "should at a minimum confirm that this requirement applies only to recommendations by a single associated person, not across multiple associated persons at the firm who act independently." [660]

After considering these comments, the Commission is adopting the proposed "quantitative care" component of the Care Obligation as proposed. As noted in the Proposing Release, we believe that imposing the quantitative care obligation without a "control" element would provide consistency in the investor protections provided to retail customers by requiring a broker-dealer to always form a reasonable basis as to the recommended frequency of trading in a retail customer's account—irrespective of whether the broker-dealer "controls" or exercises "*de facto* control" over the retail customer's account.[661] This would also be consistent with the other components of the Care Obligation, which apply regardless of whether a broker-dealer "controls" or exercises "*de facto* control" over the retail customers' account.

While the Commission appreciates the concern raised about "active traders" and the concern relating to a retail customer that could maintain several accounts at the same firm, we nevertheless believe that retail customers could, and should, benefit from the protections of this requirement, namely the protection from a broker-dealer recommending a level of trading that is so excessive that the resulting cost-to-equity ratio or turnover rate makes a positive return virtually impossible.[662] As we indicated in the Proposing Release, the fact that a customer may have *some* knowledge of financial markets or *some* "control" should not absolve the broker-dealer of the ultimate responsibility to have a reasonable basis to believe that any *recommendations it makes* are in the best interest of the retail customer.[663] Where a retail customer expresses a desire for "active trading," [664] a broker-dealer may take this factor into consideration when evaluating a recommendation; however, the broker-dealer will nevertheless need to reasonably believe that a series of recommended transactions is in the best interest of the retail customer. We further note that Regulation Best Interest does not require a broker-dealer to refuse to accept a customer's order that is contrary to the broker-dealer's recommendation. Nor does Regulation Best Interest apply to self-directed or otherwise unsolicited transactions by a retail customer, whether or not he or she also receives separate recommendations from the broker-dealer.

With respect to the concern about applying the requirement "only to recommendations by a single associated person, not across multiple associated persons at the firm who act independently," [665] we note that both the firm and their associated persons have to comply with the Care Obligation. If we took this commenter's suggestion, we are concerned we would potentially create a loophole and a perverse outcome that would allow for avoidance of the Care Obligation, and permit potentially excessive trading, by encouraging recommendations across a number of associated persons. We reiterate our position that, consistent with the other components of the Care Obligation under the Care Obligation, when a series of transactions is recommended to a retail customer, a broker-dealer must evaluate whether the series of recommended transactions places the broker-dealer's interest ahead of the retail customer's—this is true for both the associated person making the recommendation, as well as for the firm.[666] This will necessarily depend on the facts and circumstances of each particular recommendation, and of each particular series of transactions; however, we note that, as part of developing a retail customer's investment profile, a broker-dealer is required to exercise reasonable diligence to ascertain the retail customer's investment profile, which would include seeking to obtain and analyze a retail customer's other investments.[667]

Finally, with respect to the meaning of series of recommended transactions, what would constitute a "series" of recommended transactions would depend on the facts and circumstances, and would need to be evaluated with respect to a particular retail customer. In other words, a broker-dealer would need to reasonably believe that the level of trading (series of recommended transactions) is appropriate for a particular retail customer, and thus a bright line definition across all retail

[657] Proposing Release at 21613.

[658] Proposing Release at 21613–21614.

[659] *See* Letter from Keith Lampi, President, Alternative and Direct Investment Securities Association ("ADISA") (Aug. 7, 2018) ("ADISA Letter") (recommending the Commission clarify the meaning of "series of transactions"); Letter from Joseph C. Cascarelli, Corporate Counsel, Network 1 Financial Securities (Aug. 7, 2018) ("Network 1 Letter") (suggesting a "carve-out exemption formula" from Regulation Best Interest to accommodate investors and their stockbrokers who specialize in "active trading").

[660] SIFMA August 2018 Letter.

[661] *See* Proposing Release at 21613–21614.

[662] *See id.*

[663] *See id.*

[664] *See* Network 1 Letter.

[665] *See* SIFMA 2018 Letter.

[666] *See* Proposing Release at 21613–21614.

[667] *See supra* Section II.C.2.c.

customers would be unworkable. Moreover, providing a bright line definition could encourage firms to focus on a particular number of transactions rather than focusing on ensuring that a series of recommendations, taken together, are in the best interest of the retail customer. Finally, a "series" of recommended transactions is an established term under the federal securities laws and SRO rules that is evaluated in concert with existing guideposts, such as turnover rate,[668] cost-to-equity ratio,[669] and use of in-and-out trading,[670] which have been developed over time and which serve as indicators of excessive trading.

3. Conflict of Interest Obligation

We proposed the Conflict of Interest Obligation to require a broker-dealer entity[671] to: (1) Establish, maintain, and enforce written policies and procedures reasonably designed to identify, and disclose, or eliminate all material conflicts of interest associated with recommendations covered by Regulation Best Interest; and (2) establish, maintain and enforce written policies and procedures reasonably designed to identify and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with such recommendations. This proposed approach reflected our view that establishing reasonably designed policies and procedures is critical to identifying and addressing conflicts of interest. In addition, the proposed approach would serve the Commission's goal of addressing conflicts of interest that may harm investors while providing flexibility to establish systems tailored to broker-dealers' business models.

The Commission solicited comment on the Conflict of Interest Obligation, including the specific requirements to create policies and procedures with respect to disclosure, mitigation, and elimination of conflicts of interest. Commenters requested changes to several aspects of the Conflict of Interest Obligation, including providing more clarity and guidance surrounding when specific conflicts need to be disclosed, mitigated or eliminated.[672]

In consideration of these comments, we are adopting the Conflict of Interest Obligation with revisions to: (1) Create an overarching obligation to establish written policies and procedures to identify and at a minimum disclose, pursuant to the Disclosure Obligation, or eliminate all conflicts of interest associated with the recommendation; and (2) require broker-dealers to establish policies and procedures to be reasonably designed to mitigate or eliminate certain identified conflicts of interest.

In addition to the overarching obligation, we specifically require broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to: (i) Identify and mitigate any conflicts of interest associated with recommendations that create an incentive for a natural person who is an associated person of a broker or dealer to place the interest of the broker or dealer, or such natural person making the recommendation, ahead of the interest of the retail customer; (ii)(A) identify and disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended (*i.e.*, only make recommendations of proprietary or other limited range of products) to a retail customer and any conflicts of interest associated with such limitations, in accordance with the Disclosure Obligation, and (B) prevent such limitations and associated conflicts of interest from causing the broker, dealer, or a natural person who is an associated person of the broker or dealer to make recommendations that place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; and (iii) identify and eliminate any conflicts of interest associated with sales contests, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.[673]

Each of these changes and the requirements pursuant to the Conflict of Interest Obligation is discussed in more detail below.

a. Reasonably Designed Policies and Procedures

We proposed to require broker-dealers to establish reasonably designed policies and procedures as we believe they are critical to identifying and addressing conflicts of interest[674] and helping ensure compliance with the requirements to disclose conflicts of interest pursuant to the Disclosure Obligation.[675] In addition, policies and procedures may minimize compliance costs that may be passed on to retail customers.[676] As discussed in the Proposing Release, it would be reasonable for broker-dealers to use a risk-based compliance and supervisory system rather than requiring a detailed review of each recommendation and to have flexibility to tailor policies and procedures to their specific business models. The Commission also provided guidance on components a broker-dealer should consider including in its program with regard to the Conflict of Interest Obligation.[677]

In response to the proposed policies and procedures requirement, some

[668] *See, e.g., Carras* v. *Burns*, 516 F.2d 251, 258 (4th Cir. 1975); *Shearson Lehman Hutton Inc.*, 49 S.E.C. 1119, 1122 at footnote 10 (1989); *Laurie Jones Canady*, 54 S.E.C. 65, 74 (1999), Exchange Act Release No. 41250 (Apr. 5, 1999) (using the turnover rate for relevant period), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000).

[669] *See, e.g., Shearson Lehman*, 49 S.E.C. at 1121 (stating that "[o]ne test for excessive trading is the relationship between the account opening balance and the amounts of markups, commissions, and margin charges"); *Michael E. Tennenbaum*, 47 S.E.C. 703 (Jan.19, 1982).

[670] *See, e.g., Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 435–36 (N.D. Cal. 1968), *modified in part and aff'd*, 430 F.2d 1202 (9th Cir. 1970); *R.H. Johnson & Co.*, 36 S.E.C. 467 (1955); *Behel, Johnson & Co.*, 26 S.E.C. 163 (1947). *Cody* v. *S.E.C.*, 693 F.3d 251, 260 (1st Cir. 2012).

[671] Unlike the Disclosure and Care Obligations, which apply to a broker or dealer and to natural persons who are associated persons of a broker or dealer, the Conflict of Interest Obligation (and the Compliance Obligation discussed in Section II.C.4 below) applies solely to the broker or dealer entity, and not to the natural persons who are associated persons of a broker or dealer. For purposes of discussing the Conflict of Interest Obligation and the Compliance Obligation, the term "broker-dealer" refers only to the broker-dealer entity, and not to such individuals. While the Conflict of Interest Obligation applies only to the broker-dealer entity, the conflicts of interest that the broker-dealer entity must analyze are conflicts (as defined in paragraph (c)(3) of the rule) between: (i) The broker-dealer entity and the retail customer, (ii) the natural persons who are associated persons and the retail customer, and (iii) the broker-dealer entity and the natural persons who are associated persons.

[672] *See, e.g.*, SIFMA August 2018 Letter; Primerica Letter; BISA Letter; CCMC Letters; Wells Fargo Letter.

[673] Rule 15*l*–1 under the Exchange Act.

[674] *See* FSI August 2018 Letter ("Experience shows that investors already ignore much of the enormous volume of regulatory disclosures they are being provided. Instead, a more realistic approach is to require broker-dealers to adopt written supervisory procedures to detect and manage conflicts of interest, to avoid those they can and take steps to mitigate the impact of those conflicts that can't be avoided.").

[675] *See* Proposing Release at Section II.D.3.b. *See also* CCMC Letters (policies and procedures requirement should assist broker-dealers in managing the potential impact of conflicts of interest); FPC Letter (acknowledging the importance of firms' policies and procedures when providing financial planning to act in the client's best interest).

[676] *See* Proposing Release at Section II.D.3.b. *See also* Cambridge Letter ("Cambridge believes the SEC's goals of facilitating disclosure and mitigating material conflicts of interest, while minimizing additional compliance costs that may be passed on to the retail customers can best be accomplished by requiring broker-dealers to adopt written supervisory procedures to detect and manage conflicts of interest, to avoid those they can and take steps to mitigate the impact of those conflicts that can't be avoided.").

[677] Proposing Release at Section II.D.3.b.

commenters asserted that it was an effective means of addressing conflicts [678] while others were concerned that the Commission was providing too much flexibility in addressing conflicts of interest.[679] A few commenters expressed agreement with allowing a flexible risk-based approach tailored to a broker-dealer's business model as opposed to a detailed review of each recommendation.[680] A few commenters expressed concern with the Commission's assertion that policies and procedures may minimize compliance costs that may be passed on to retail customers, noting the uncertainty surrounding how conflicts of interest should be addressed by policies and procedures.[681] One commenter suggested that the Commission should adopt a safe harbor for the Conflicts of Interest Obligation by demonstrating compliance with certain existing FINRA rules.[682] As discussed below under the new Compliance Obligation, some commenters suggested that the policies and procedures requirement should apply to aspects of the entire rule.[683]

In consideration of the comments received, we are adopting the approach with respect to reasonably designed policies and procedures to identify and address conflicts of interest set forth in the proposal substantially as proposed. As stated in the Proposing Release, we believe that broker-dealers should have flexibility to tailor their policies and procedures to their particular business model, focusing on specific areas of their business that pose the greatest risk of noncompliance and greatest risk of potential harm to retail customers as opposed to a detailed review of each recommendation.[684]

While we recognize a commenter's statement [685] that policies and procedures should be "actually designed" to address conflicts of interest, we do not believe that the design of policies and procedures should be measured against a standard of strict liability, but should instead be measured against a standard of reasonableness. In addition, we believe that policies and procedures are an effective tool to identify and address conflicts of interest, and would allow the Commission to identify and address potential compliance deficiencies or failures (such as inadequate or inaccurate policies and procedures, or failure to follow the policies and procedures) early on, reducing the chance of retail customer harm.[686] We also believe that there is no one-size-fits all framework, and, as such, broker-dealers should have flexibility to reasonably design their policies and procedures to tailor them to account for their business model, given the structure and characteristics of their relationships with retail customers, including the varying levels and frequency of recommendations provided and the types of conflicts that may be presented. This requirement of "reasonably designed" policies and procedures is also consistent with Commission rules and regulations in other contexts, including under the Advisers Act.[687] Further, the Commission continues to believe that while not required components, as an effective practice, broker-dealers should consider including in their supervisory and compliance programs the components listed in the Proposing Release, which may be relevant in considering whether policies and procedures are reasonably designed.[688]

The Commission is not providing a safe harbor to Regulation Best Interest for broker-dealers who demonstrate compliance with FINRA rules [689] because, while FINRA rules may address specific conflicts of interest, Regulation Best Interest establishes a broader obligation to address conflicts both at the firm level and at the associated person level.[690] As to commenters' concerns that the policies and procedures requirement provides too much flexibility and as discussed in more detail below, the Commission has changed the specific requirements to be addressed by the policies and procedures pursuant to the Conflict of Interest Obligation to provide more certainty to firms on which conflicts of interest should be addressed through disclosure, mitigation or elimination. While the Commission also understands concerns related to compliance costs, we believe that the revisions to the Conflict of Interest Obligation, including the greater specificity in the rule text, as well as the guidance provided below, will ease the adjustment of broker-dealers' existing supervisory and compliance systems and streamline compliance with Regulation Best Interest.

b. Conflicts of Interest

The Proposing Release distinguished between material conflicts of interest in general and material conflicts of interest arising from financial incentives. Under the Proposing Release, broker-dealers would be required to establish, maintain, and enforce policies and procedures to identify and, in the case of material conflicts of interest, disclose or eliminate, and in the case of financial incentives, disclose and mitigate, or eliminate material conflicts of interest arising from financial incentives.[691]

The Commission proposed to interpret a material conflict of interest as a conflict of interest that a reasonable person would expect might incline a broker—consciously or unconsciously—to make a recommendation that is not disinterested.[692] For material conflicts of interest arising from financial incentives associated with a recommendation, the Proposing Release discussed compensation practices established by the broker-dealer, including fees and other charges for the services provided and products sold; employee compensation or employment incentives (*e.g.*, quotas, bonuses, sales contests, special awards, differential or variable compensation, incentives tied to appraisals or performance reviews); compensation practices involving third-parties, including both sales

[678] *See* Fidelity Letter; SIFMA August 2018 Letter; Morgan Stanley Letter.

[679] *See, e.g.*, NASAA August 2018 Letter; CFA Institute Letter; Galvin Letter; Better Markets August 2018 Letter (policies and procedures should be "actually designed" to achieve those ends, not just "reasonably designed" to do so). *But see* IRI Letter ("The Conflict of Interest Obligation should be simplified and streamlined to give BDs the flexibility to determine appropriate steps to manage material conflicts.").

[680] *See* Cambridge Letter; CCMC Letters. *But see* NASAA August 2018 Letter (suggesting the Commission reconsider the risk-based approach to comply with its duties).

[681] *See, e.g.*, Better Markets August 2018 Letter; CFA Institute Letter.

[682] *See* AXA Letter.

[683] *See, e.g.*, NASAA August 2018 Letter (suggesting that, at a minimum, a firm's policies and procedures should require an analysis of the costs and risks of a product as well as the client's financial goals).

[684] *See* Proposing Release at II.D.3.b.

[685] *See* Better Markets August 2018 Letter.

[686] *See infra* footnote 809.

[687] *See* Rule 206(4)–7 under the Advisers Act. *See also* Section 15(g) of the Exchange Act; 15E(g) of the Exchange Act.

[688] These components could include, among other things: policies and procedures outlining how the firm identifies conflicts, identifying such conflicts and specifying how the broker-dealer intends to address each conflict; robust compliance and monitoring systems; processes to escalate identified instances of noncompliance for remediation; procedures that designate responsibility to business line personnel for supervision of functions and persons, including determination of compensation; processes for escalating conflicts of interest; processes for periodic review and testing of the adequacy and effectiveness of policies and procedures; and training on policies and procedures. Proposing Release at Section II.D.3.b.

[689] *See supra* footnote 682.

[690] "While FINRA has repeatedly emphasized the importance of identifying and managing conflicts and has a number of rules that address discrete conflicts of interest, there is currently no similarly broad conflicts provision in FINRA rules, including the suitability rule." *See* FINRA 2018 Letter.

[691] *See* Proposing Release at Section II.D.3.

[692] Proposing Release at 21602.

compensation and compensation that does not result from sales activity, such as compensation for services provided to third-parties (*e.g.*, sub-accounting or administrative services provided to a mutual fund); receipt of commissions or sales charges, or other fees or financial incentives, or differential or variable compensation, whether paid by the retail customer or a third-party; sales of proprietary products or services, or products of affiliates; and transactions that would be effected by the broker-dealer (or an affiliate thereof) in a principal capacity.[693]

In addition, the Commission proposed to limit conflicts of interest to those associated with recommendations as broker-dealers may provide a range of services not involving a recommendation, and such services are subject to general antifraud liability and specific requirements to address associated conflicts of interest.[694]

Recognizing the phrase "financial incentives" could be interpreted broadly, the Commission solicited comment on the proposed requirement and the distinction between the different requirements under the Conflict of Interest Obligation. In response, many commenters suggested that the scope of the description of financial incentives be narrowed as it was too broad and requested guidance or examples of material conflicts of interest that would not fall within the description of financial incentives.[695] Specifically, a number of commenters suggested that the mitigation obligation should focus on financial incentives at the registered representative level as opposed to the firm level.[696] A number of commenters suggested that the distinction between material conflicts and financial incentives should be removed altogether.[697] Commenters also stated that the mitigation requirement is a higher standard of conduct than the investment adviser fiduciary duty which allows for conflicts to be addressed through disclosure sufficient for informed consent.[698]

In consideration of comments and as discussed in more detail below, the Commission has restructured the Conflict of Interest Obligation to: (1) Create an overarching obligation to establish, maintain and enforce written policies and procedures that are reasonably designed to identify and at a minimum disclose (pursuant to the Disclosure Obligation), or eliminate, all conflicts of interest associated with the recommendation; and (2) adopt specific requirements with respect to such policies and procedures for the mitigation and elimination of identified conflicts of interest.

In particular, we have revised the proposed policies and procedures requirement for mitigation to focus on conflicts of interest that create an incentive for an associated person to place his or her interests ahead of the interest of the retail customer as described below, by eliminating the distinction between material conflicts of interest and material conflicts of interest arising from financial incentives, and removing the affirmative mitigation requirement at the firm level. However, in light of this change, we are adding a new provision requiring broker-dealers to establish, maintain, and enforce written policies and procedures to specifically require broker-dealers to identify and disclose material limitations, and any associated conflicts of interest a broker-dealer places on the securities or investment strategies involving securities that may be recommended to the retail customer, such as recommendations being based on limited product menus (*i.e.*, only make recommendations of proprietary or other limited range of products) and prevent such limitations and associated conflicts of interest from causing the broker-dealer to make recommendations that place its interest ahead of the retail customer. We believe the policies and procedures need to address those certain conflicts of interest inherent in the broker-dealer business model by heightened measures in order to prevent recommendations that are not in the best interest of the retail customer. Therefore, we are adding a provision requiring broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to identify and to eliminate any conflicts of interest associated with sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sale of specific securities or specific types of securities within a limited period of time.

For purposes of Regulation Best Interest, and for the reasons described in more detail in the context of the Disclosure Obligation, we have also amended the rule text by eliminating "material" from "conflict of interest" and codified the definition of a conflict of interest[699] to mean an interest that might incline a broker-dealer—consciously or unconsciously—to make a recommendation that is not disinterested.[700] While "material" has been eliminated, pursuant to the Disclosure Obligation, broker-dealers are required to disclose all material facts relating to conflicts of interest associated with recommendations, consistent with the Proposing Release's intent of facilitating disclosure to assist retail customers in making informed investment decisions.[701]

Regarding the application of the Conflict of Interest Obligation only to those conflicts of interest associated with recommendations, one commenter stated that given the lack of detail in the Proposing Release, broker-dealers may have difficulty determining whether material conflicts are associated with a recommendation and how to adequately address such conflicts, which could create inconsistent application of Regulation Best Interest.[702] We continue to believe this approach is appropriate, for the reasons discussed in the Proposing Release[703] and also believe

[693] *Id.*

[694] *See* Proposing Release at 21617. In including this limitation, the Commission explained that it was not intending to change the disclosure obligations associated with these services under the general antifraud provisions of the federal securities laws.

[695] *See, e.g.*, SIFMA August 2018 Letter; Primerica Letter; BISA Letter; Committee of Annuity Insurers Letter; IPA Letter; CFA Institute Letter.

[696] *See, e.g.*, Primerica Letter; TIAA Letter; ICI Letter; Invesco Letter; Money Management Institute Letter; Committee of Annuity Insurers Letter.

[697] *See, e.g.*, CFA August 2018 Letter; CFA Institute Letter; Morgan Stanley Letter; SIFMA August 2018 Letter; CCMC Letters.

[698] *See* Franklin Templeton Letter (stating that by including this heightened requirement for financial conflicts of interest, Regulation Best Interest would impose a higher standard on broker-dealers than is required of investment advisers with respect to such conflicts); Primerica Letter (stating that by requiring broker-dealers to disclose and mitigate or eliminate conflicts resulting from financial incentives, the standard is actually higher than the standard that applies under the Advisers Act); CCMC Letters (stating that the requirement to mitigate or eliminate material conflicts of interest arising from financial incentives effectively subjects broker-dealers to a higher standard than investment advisers, who are generally able to disclose conflicts of interest). *See also* UBS Letter; ASA Letter. Some commenters also suggested that the obligation to address conflicts of interest should be harmonized between broker-dealers and investment advisers. *See, e.g.*, Schwab Letter.

[699] *See* Section II.D.1. To provide clarity that the interpretation of "conflict of interest" is limited to Regulation Best Interest, the Commission has revised the rule text to include a definition of the term.

[700] *See id.*

[701] *Id.*

[702] *See* State Attorneys General Letter. ("Given the lack of detail in the Proposed Rule, broker-dealers may have difficulty determining whether material conflicts are (1) "associated with recommendations" and therefore subject to disclosure or elimination; or (2) "arising from financial incentives associated with such recommendations" and therefore subject to disclosure and mitigation, or elimination. This ambiguity, while designed to give maximum flexibility to broker-dealers, may in fact result in inconsistent application of the Proposed Rule nationwide and further add to the existing confusion.")

[703] *See* Proposing Release at 21618.

that our revised Conflict of Interest Obligation provides more specificity about how to address specific conflicts of interest, in conjunction with our Disclosure Obligation, which should address commenters' concerns.

c. Identifying Conflicts of Interest

In the Proposing Release, the Commission stated that having a process to identify and appropriately categorize conflicts of interest is a critical first step to ensure that broker-dealers have reasonably designed policies and procedures to address conflicts of interest in order to comply with the Conflict of Interest Obligation. As stated in the Proposing Release, reasonably designed policies and procedures to identify conflicts of interest generally should do the following: (i) Define such conflicts in a manner that is relevant to a broker-dealer's business (*i.e.,* conflicts of both the broker-dealer entity and the associated persons of the broker-dealer), and in a way that enables employees to understand and identify conflicts of interest; (ii) establish a structure for identifying the types of conflicts that the broker-dealer (and associated persons of the broker-dealer) may face; (iii) establish a structure to identify conflicts in the broker-dealer's business as it evolves; (iv) provide for an ongoing (*e.g.,* based on changes in the broker-dealer's business or organizational structure, changes in compensation incentive structures, and introduction of new products or services) and regular, periodic (*e.g.,* annual) review for the identification of conflicts associated with the broker-dealer's business; and (v) establish training procedures regarding the broker-dealer's conflicts of interest, including conflicts of natural persons who are associated persons of the broker-dealer, how to identify such conflicts of interest, as well as defining employees' roles and responsibilities with respect to identifying such conflicts of interest.[704] Most commenters did not express a view on such guidance relating to the process of identifying conflicts of interest. Therefore, for the reasons discussed in the Proposing Release, we are reiterating this guidance here.

d. Overarching Obligation Related to Conflicts of Interest

As proposed, the first component of the Conflict of Interest Obligation would have required a broker-dealer to establish, maintain, and enforce written policies and procedures reasonably designed to identify, and disclose, or eliminate, all material conflicts of interest that are associated with recommendations covered by Regulation Best Interest. In guidance, the Commission stated that reasonably designed policies and procedures should establish a clearly defined and articulated structure for: determining how to effectively address material conflicts of interest identified (*i.e.,* whether to eliminate or disclose (and mitigate, as required) the material conflict); and setting forth a process to help ensure that material conflicts are effectively addressed as required by the policies and procedures.

As such, the requirement was intended to provide flexibility to broker-dealers regarding how to address conflicts of interest, whether through disclosure pursuant to the Disclosure Obligation, or elimination. The Commission also indicated that there may be situations in which disclosure alone is not sufficient, and broker-dealers may need to establish policies and procedures designed to eliminate the conflict or both disclose and mitigate it.[705] The Commission also provided examples of how a broker-dealer could eliminate a conflict.[706]

As discussed above, we received many comments generally on the Conflict of Interest Obligation, requesting clarification on which conflicts needed to be disclosed, versus those that should be mitigated or eliminated.[707] Some commenters suggested that disclosure and informed consent should be considered to effectively address conflicts, similar to the approach taken under the Advisers Act.[708] Some commenters suggested that disclosure alone was sufficient to address conflicts arising from financial incentives.[709] For example, a few commenters identified specific types of conflicts they believed could be addressed by appropriate disclosure, such as third-party payments.[710] A few commenters requested that the examples of how to eliminate conflicts of interest in the Proposing Release be removed.[711]

After carefully considering comments, we are adopting, similar to the Proposing Release, an overarching requirement to establish, maintain, and enforce reasonably designed policies and procedures to identify and, at a minimum, disclose, in accordance with the Disclosure Obligation, or eliminate all conflicts of interest associated with the recommendation. However, as discussed in the following sections, we are otherwise revising the Conflict of Interest Obligation in response to these comments. Subparagraphs (a)(2)(iii)(B)–(D) of the rule text will now require policies and procedures that are reasonably designed to address specific conflicts of interest in areas that we believe create greater incentives for, and increased risk that, the broker-dealer or associated person may place its or his or her own interest ahead of the retail customer's interest, specifically conflicts of interest that: (1) Create certain incentives to associated persons; (2) conflicts of interest associated with material limitations on the securities or investment strategies involving securities, such as, limited product menus; and (3) sales contests, sales quotas, bonuses, and non-cash compensation based on the sales of specific securities or type of security within a limited period of time.

In adopting this overarching requirement, we are reaffirming guidance in the Proposing Release on establishing a process to identify and determine how to address a conflict, as discussed above.[712] Further, similar to the Proposing Release, while we are not requiring broker-dealers to develop policies and procedures to disclose and mitigate *all* conflicts of interest, we are requiring that broker-dealers develop policies and procedures reasonably designed to "*at a minimum disclose,* or eliminate" all conflicts.[713] We continue to believe that where a broker-dealer cannot fully and fairly disclose a conflict of interest in accordance with the Disclosure Obligation, the broker-dealer should eliminate the conflict or adequately mitigate (*i.e.,* reduce) the

[704] *Id.*

[705] *See* Proposing Release at 21619–21620.

[706] *Id.*

[707] *See supra* footnote 672.

[708] *See* IPA Letter; Morgan Stanley Letter; ASA Letter.

[709] *See, e.g.,* Committee of Annuity Insurers Letter; Stifel Letter; Mass Mutual Letter; SIFMA August 2018 Letter; HD Vest Letter; Primerica Letter.

[710] *See, e.g.,* Invesco Letter; Transamerica August 2018 Letter; Primerica Letter.

[711] *See, e.g.,* ICI Letter ("This example suggests a firm that offers proprietary funds should consider relinquishing the advisory fees the firm or its affiliate receives for managing those funds as a means to address conflicts that selling such funds creates. This example is inconsistent with the SEC's explicit statements elsewhere in the Best Interest Proposal that Regulation Best Interest would not preclude a firm from offering proprietary products. . . .The SEC should clarify in any adopting release that firms selling proprietary funds are not obligated to credit fund advisory fees against other broker-dealer charges. The ability to charge fees to manage proprietary funds is critical to preserve the ability of firms to offer both proprietary and third-party funds."); Committee of Annuity Insurers Letter ("This suggested method for elimination of material conflicts of interest relating to affiliated mutual funds presents a number of problematic issues. . . .This example is exacerbated in the context of variable annuities.").

[712] *See* Section II.C.3.c.

[713] Proposing Release at 21620.

conflict such that full and fair disclosure in accordance with the Disclosure Obligation is possible. In some cases, conflicts of interest may be of a nature and extent that it would be difficult to provide disclosure that adequately conveys to a retail customer the material facts or the nature, magnitude and potential effect of the conflict for informed decision-making or where disclosure may not be sufficiently specific or comprehensible for the retail customer to understand whether and how the conflict will affect the recommendations he or she receives.[714] Also, in certain situations, a broker-dealer, even if not required, may determine that in addition to addressing a conflict through disclosure, to take additional steps beyond disclosure to also mitigate the conflict of interest.

The Commission acknowledges commenters' concerns regarding the examples of how to eliminate conflicts of interest that were provided in the Proposing Release. The Commission's intent was not to prevent firms from offering certain products to the extent that they are in a retail customer's best interest. In order to avoid confusion and to respond to commenters, we are not including these examples as final guidance here as we have instead decided to focus the rule text on specific conflicts of interest associated with certain sales practices based on the sale of specific securities that we require to be eliminated and thus such examples are not necessary. In discussing the separate mitigation and elimination requirements below, we provide guidance on the specific conflicts for which we are requiring these heightened measures beyond disclosure. However, while we have removed the examples of potential conflicts of interest that may be more appropriately avoided, we emphasize that pursuant to the overarching obligation, elimination of conflicts of interest is one method of addressing the conflict, in lieu of disclosure, which broker-dealers may find appropriate in certain circumstances even when not required by Regulation Best Interest.

e. Mitigation of Certain Incentives to Associated Persons

We proposed to require firms to establish, maintain, and enforce written policies and procedures reasonably designed to identify and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives with such recommendations. In proposing this requirement, we recognized the importance of the brokerage model as a potentially cost-effective option for investors, acknowledging that the compensation structures and arrangements within the business model create inherent conflicts[715] but that such compensation may be appropriate in light of the time and experience necessary to understand investments. As such, we aimed to promote investor choice and access to products and instead of requiring broker-dealers to establish policies and procedures to eliminate compensation structures and arrangements,[716] required policies and procedures to mitigate those conflicts of interest.

We proposed a principles-based approach to provide flexibility to firms to develop and tailor policies and procedures that included conflict mitigation measures based on each firm's circumstances, for example, the size, retail customer base, nature and significance of the conflict, and complexity of the product.[717] We stated that, depending on the conflict and the firm's assessment, more or less demanding measures may be appropriate.[718] We provided examples of situations in which heightened mitigation measures may be appropriate and also suggested that broker-dealers assess their policies and procedures as they may be reasonably designed at the outset but may later cease to be reasonably designed based on subsequent events or information.[719] Finally, we provided a non-exhaustive list of potential practices that we believe broker-dealers should consider including in their policies and procedures, and as discussed above, suggested that some practices may be more appropriately avoided as they may be difficult to mitigate.[720]

As discussed above, many commenters expressed concern with the breadth of the mitigation requirement and requested that mitigation be limited to certain types of compensation[721] or solely to financial incentives to the individual registered representative.[722] Many commenters were also concerned about what they described as ambiguities in the Proposing Release, including the lack of a definition of the term "mitigate"[723] and requested further guidance surrounding conflicts that needed to be mitigated versus those that can be disclosed.[724] Some commenters suggested that supervision should be adequate mitigation and requested clarification on whether their existing supervisory practices, if compliant, were sufficient.[725] As discussed above under Section II.C.3.b, a number of commenters expressed concern that the mitigation requirement is a higher standard of conduct than the investment adviser fiduciary duty and requested that it be aligned with the fiduciary duty.[726]

Many commenters expressed concern over some of the examples, and in particular neutral compensation factors, described as a potential mitigation measure.[727] Similarly, some

[714] *See id.; see also* Fiduciary Interpretation (stating that where an investment adviser cannot fully and fairly disclose a conflict such that the client can provide informed consent, the adviser should *eliminate* the conflict or adequately *mitigate* (*i.e.*, modify practices to reduce) the conflict such that full and fair disclosure and informed consent are possible).

[715] *See* Proposing Release at II.D.3.e. *See also* Tully Report.

[716] While the Commission's goal is to promote access and choice to investors, as discussed in more detail in Section II.C.3.g, Elimination of Certain Conflicts of Interest, the Commission believes it is in the public interest and will enhance investor protection to require broker-dealers to reasonably design policies and procedures to eliminate certain conflicts of interest as we believe such conflicts create too strong of an incentive for a broker-dealer to make a recommendation that places the broker-dealer's interest ahead of the retail customer's interest.

[717] Proposing Release at II.D.3.e.

[718] *Id.*

[719] *Id.*

[720] *Id.*

[721] *See, e.g.*, Cetera August 2018 Letter; SIFMA August 2018 Letter. *But see* CFA August 2018 Letter (stating that the Commission has proposed an appropriately broad definition of material conflicts that arise out of financial incentives and that it should not be narrowed but a cleaner approach would be to eliminate the artificial distinction between those material conflicts of interest that arise from financial incentives and those that do not, and to apply the same obligation to disclose and mitigate all material conflicts, whatever the source).

[722] *See, e.g.*, Primerica Letter; Committee of Annuity Insurers Letter; Cetera August 2018 Letter. *See also* Wells Fargo Letter (stating that receipt of fees and other revenue that does not otherwise result in a direct financial incentive at the registered representative level should be disclosed); ICI Letter (recommending revisions to the proposed conflict of interest obligation to focus the mitigation obligation on the fees, revenue, or other financial incentives that may influence the recommendation of a broker-dealer representative—the individual making the recommendation); Invesco Letter.

[723] *See, e.g.*, UVA Letter.

[724] *See, e.g.*, CFA August 2018 Letter; Wells Fargo Letter; Committee of Annuity Insurers Letter; NASAA August 2018 Letter; Cetera August 2018 Letter; Morningstar Letter.

[725] *See, e.g.*, BISA Letter; AALU Letter; Primerica Letter; Committee of Annuity Insurers Letter.

[726] *Supra* footnote 698.

[727] *See, e.g.*, SIFMA August 2018 Letter; ICI Letter; Edward Jones Letter; Morgan Stanley Letter; Transamerica August 2018 Letter; Ameriprise Letter; Capital Group Letter; Cetera August 2018 Letter; CCMC Letters; Letter from Michelle Bryan Oroschakoff, Chief Legal Officer, LPL Financial (Dec. 18, 2018) ("LPL December 2018 Letter") (requesting confirmation that the non-exhaustive list of potential practices was intended merely as a list of examples and are not required mitigation practices); Mass Mutual February 2019 Letter. But *see* NASAA August 2018 Letter (stating that neutral compensation across products could constitute

Continued

commenters suggested that the Commission should take more of a principles-based approach as they viewed the Proposing Release as too prescriptive because it incorporated examples from the DOL Fiduciary Rule.[728] One commenter expressed concern over the suggestion that heightened mitigation may be appropriate if a retail customer has a less sophisticated understanding, stating that it is unclear how mitigation would be measured and could create heightened costs and risks for firms.[729] Finally, some commenters requested confirmation that certain practices are permissible such as use of compensation grids,[730] receipt of revenue sharing,[731] differential compensation,[732] recommendations based on a limited range of products and proprietary products,[733] and use of employment benefits.[734]

In response to commenters, we have revised the Proposing Release's requirement with respect to mitigation to require broker-dealers to establish policies and procedures reasonably designed to identify and mitigate any conflicts of interest associated with such recommendations that create an incentive for a natural person who is an associated person of a broker- dealer to place the interest of the broker-dealer, or such natural person ahead of the interest of the retail customer.

We agree with commenters that it is appropriate to focus on the incentives that directly affect the associated person making a recommendation, because we believe those conflicts are most likely to undermine the associated person's ability to make a recommendation that is in the best interest of the retail customer, and thus present heightened risk of recommendations that are not in a retail customer's best interest and that place the associated person's or firm's interests ahead of the retail customer's interest.

While disclosure can be an effective tool for retail customers to increase awareness of a conflict of interest,[735] in certain cases, we do not believe that disclosure alone sufficiently reduces the potential effect that these conflicts of interest may have on recommendations made to retail customers.[736] Instead, we believe that broker-dealers are most capable of identifying and addressing the conflicts that may affect the obligations of their associated persons with respect to the recommendations they make, and therefore are in the best position, to affirmatively reduce the potential effect of these conflicts of interest such that they do not taint the recommendation.

We are persuaded by commenters[737] that expressed concern that requiring broker-dealers to establish policies and procedures reasonably designed to mitigate all financial incentives, including any compensation, may result in broker-dealers narrowing their product shelf and compensation practices which would be inconsistent with the Commission's stated goal.[738] As stated in the Proposing Release, while the Commission's goal in adopting Regulation Best Interest is to enhance investor protection by reducing the potential harm to retail customers from conflicts of interest that may affect broker-dealer recommendations, we want to do so while preserving, to the extent possible, access and choice for investors who prefer to pay for investment recommendations on a transaction-by-transaction basis, which is the "pay as you go" model that broker-dealers generally provide, as well as preserving retail customer choice of the level and types of advice provided and the products available.[739] As such, transaction based-compensation need not be eliminated pursuant to Regulation Best Interest.

Accordingly, rather than requiring mitigation of all firm-level financial incentives, we have determined to refine our approach by generally allowing firm-level conflicts to be generally addressed through disclosure.[740] At the same time, we are persuaded by commenters[741] that there are some conflicts that should be addressed through mitigation at the firm level due to the potential impact that we believe certain conflicts of interest (either at the associated person or firm level) may have on recommendations to retail customers; therefore we are requiring policies and procedures for mitigation or elimination of those conflicts (as identified in the rule text) and are not leaving it to the broker-dealer to determine whether disclosure alone is sufficient.[742] We believe that this approach appropriately balances our goal of reducing the potential harm conflicts of interest may have on broker-dealers' recommendations to retail customers and preserving retail access (in terms of choice and cost) to brokerage products and services.

i. Guidance on Covered Incentives

The Commission interprets this requirement to establish, maintain, and enforce reasonably designed policies and procedures to identify and mitigate

appropriate mitigation), State Attorneys General Letter (suggesting differential compensation be permitted based solely on neutral factors).

[728] *See, e.g.,* LPL August 2018 Letter; Cetera August 2018 Letter; Davis Harman Letter.

[729] *See* Primerica Letter.

[730] *See, e.g.,* SIFMA August 2018 Letter; Committee of Annuity Insurers Letter; Primerica Letter.

[731] *See, e.g.,* SIFMA August 2018 Letter; Cetera August 2018 Letter.

[732] *See, e.g.,* Cetera August 2018 Letter; Transamerica August 2018 Letter; Ameriprise Letter.

[733] *See, e.g.,* NY Life Letter; Fidelity Letter; ICI Letter; T.Rowe Letter. These commenters suggested that disclosure would be an appropriate way to address conflicts of interest associated with limited product menus and proprietary products.

[734] *See, e.g.,* AALU Letter.

[735] *See* Section II.C.1, Disclosure Obligation; Relationship Summary Adopting Release.

[736] *See, e.g.,* Tully Report; CFA August 2018 Letter; AARP August 2018 Letter; Warren Letter ("the [Commission] should not rely on disclosure alone to protect consumers."). *See also* DOL Fiduciary Rule Release at 20950. "Disclosure alone has proven ineffective to mitigate conflicts in advice."

[737] *See, e.g.,* Primerica Letter ("The SEC's current formulation of the conflicts obligation thus inappropriately, and we believe unintentionally, preferences advisory models over brokerage models."); Transamerica August 2018 Letter (expressing concern that the proposed interpretation of financial incentives is overbroad and may result in broker-dealers narrowing their product shelf, which seems inconsistent with the SEC's stated goal of preserving the broker-dealer model to protect an investor's right to choose between brokerage and advisory accounts).

[738] The Commission recognizes that a broker-dealer's financial or other interest can and will inevitably exist.

[739] We are persuaded by commenters regarding the competitive issues for broker-dealers that could arise if we require mitigation of firm-level financial incentives, which is not required by an investment adviser's fiduciary duty, and could further encourage migration from the broker-dealer to investment adviser model and result in a loss of choice for retail customers. *See* Section I; CCMC Letters ("Imposing a standard on broker-dealers with respect to managing conflicts of interest that is greater than that imposed on investment advisers, on top of the additional regulatory obligations to which broker-dealers are subject that are not imposed on investment advisers, threatens to undermine the SEC's objective of preserving retail customer choice and access to the brokerage advice model and may introduce a new source of confusion when it comes to investors' understanding of the duties they are owed."); AALU Letter ("Overly-rigid mitigation requirements could limit consumer choice of products and access to professional financial advice"). *See also* 913 Study; Proposing Release at 21575.

[740] As discussed above in the section about the Disclosure Obligation, the Commission believes that compliance with the Disclosure Obligation, including disclosure of the material facts relating to the scope and terms of the relationship with the retail customer and all conflicts of interest, should give sufficient information to enable a retail customer to make an informed decision with regard to the recommendation. *See* II.D.1.

Nevertheless, as noted, there may be situations in which disclosure alone may not be sufficient to provide "full and fair" disclosure in accordance with the Disclosure Obligation discussed above, and the broker-dealer may need to take additional steps to mitigate or eliminate the conflict, consistent with an investment adviser's fiduciary duty. *See* Section II.C.3.d.

[741] *See, e.g.,* CFA August 2018 Letter.

[742] *See* Section II.C.3.f and g.

any conflicts of interest that create an incentive for the associated person to place the interest of the broker-dealer or such associated person ahead of the interest of the retail customer, to only apply to incentives *provided to* the associated person, whether by the firm or third-parties that are within the control of or associated with the broker-dealer's business.[743] It would not cover external interests of the associated person not within the control of or associated with the broker-dealer's business.[744] In the case of a dually registered individual, this requirement would generally only apply to incentives provided to the associated person when making a recommendation in a brokerage capacity and not when making a recommendation in an investment advisory capacity as the investment adviser fiduciary duty would apply to the advice given in that instance.[745]

The Commission generally considers the following as examples of incentives to an associated person that would need to be addressed under this revised provision: (i) Compensation from the broker-dealer or from third-parties, including fees and other charges for the services provided and products sold; (ii) employee compensation or employment incentives (*e.g.,* incentives tied to asset accumulation and not prohibited under (a)(2)(iii)(D), as discussed below, special awards, differential or variable compensation, incentives tied to appraisals or performance reviews); and (iii) commissions or sales charges, or other fees or financial incentives, or differential or variable compensation, whether paid by the retail customer, the broker-dealer or a third-party. These examples focus on compensation that varies based on the advice given, such as commissions, markups/markdowns, loads, revenue sharing, and Rule 12b–1 fees.

ii. Guidance on Mitigation Methods

By requiring that a broker-dealer establish policies and procedures reasonably designed to "mitigate" these conflicts of interest, we mean the policies and procedures must be reasonably designed to reduce the potential effect such conflicts may have on a recommendation given to a retail customer. Thus, whether or not a broker-dealer's policies and procedures are reasonably designed to mitigate such conflicts will be based on whether they are reasonably designed to reduce the incentive for the associated person to make a recommendation that places the associated person's or firm's interests ahead of the retail customer's interest.

As noted in the Proposing Release, in lieu of mandating specific mitigation measures or a "one-size fits all" approach, we are providing broker-dealers with flexibility to develop and tailor reasonably designed policies and procedures that include conflict mitigation measures, based on each firm's circumstances.[746] Reasonably designed policies and procedures should include mitigation measures that depend on the nature and significance of the incentives provided to the associated person and a variety of factors related to a broker-dealer's business model (such as the size of the broker-dealer, retail customer base (*e.g.,* diversity of investment experience and financial needs), and the complexity of the security or investment strategy involving securities that is being recommended), some of which may be weighed more heavily than others. For example, more stringent mitigation measures may be appropriate in situations where the characteristics of the retail customer base in general displays less understanding of the incentives associated with particular securities or investment strategies;[747] where the compensation is less transparent (for example, an incentive from a third-party or charge built into the price of the product or a transaction versus a straight commission); or in a situation involving a complex security or investment strategy.[748] A broker-dealer could reasonably determine through its policies and procedures that the same mitigation measures could apply to a particular type of retail customer, type of security or investment strategy, or type of incentive across the board; or in some instances a broker-dealer may reasonably determine that some conflicts create incentives that may be more difficult to mitigate, and are more appropriately avoided in their entirety or for certain categories of retail customers.[749]

As noted in the Proposing Release, policies and procedures may be reasonably designed at the outset, but may later cease to be reasonably designed based on subsequent events or information obtained (for example, such as through supervision (*e.g.,* exception testing) of associated person recommendations), and the actual experience of a broker-dealer should be used to revise the broker-dealer's measures as appropriate.[750] Further, what are considered reasonable mitigation measures may vary based on the size of the firm.[751] While many broker-dealers have programs currently in place to manage conflicts of interest, each broker-dealer will need to carefully consider whether its existing framework complies with this provision.[752]

In response to commenters' concerns regarding the potential mitigation

[743] The ability to control the compensation of associated person, including incentives, is an important mechanism by which broker-dealers exercise supervisory control over sales practices.

[744] For example, if an associated person of a broker-dealer participates in a securities transaction outside of the broker-dealer and receives compensation, although the broker-dealer would need to approve the transactions and record it in its books and records under FINRA Rule 3280 (Private Securities Transaction of an Associated Person), as described in more detail above, this requirement to mitigate certain incentives to an associated person would not apply to compensation that is not an incentive provided by or in the control of the broker-dealer.

Nevertheless, additional registration, disclosure or other obligations, and antifraud liabilities may apply to any other firm through which an associated person may have such external interests under federal or state law (for example, as a state-registered adviser). We also note that an associated person of a broker-dealer who receives transaction-based compensation and participates in a private securities transactions that is not in accordance with FINRA Rule 3280 should be mindful of the broker-dealer registration requirements under Section 15 of the Exchange Act.

[745] *See* Fiduciary Interpretation; Section II.B.3.

[746] *See* Proposing Release at 21618. *See also* Letter from Steven W. Stone, Morgan, Lewis & Bockius LLP (May 3, 2019) ("Morgan Lewis Letter") ("The Commission should recognize that firms may appropriately employ only some—or various combinations—of these approaches depending on their businesses and business models, compensation structures, and related conflicts of interest, and should not prescribe a one-size-fits-all approach to mitigating compensation-related conflicts.").

[747] FINRA's heightened suitability requirements for options trading accounts require that a registered representative have "a reasonable basis for believing, at the time of making the recommendation, that the customer has such knowledge and experience in financial matters that he may reasonably be expected to be capable of evaluating the risks of the recommended transaction, and is financially able to bear the risks of the recommended position in the complex product." FINRA Rule 2360(b)(19).

[748] *See* Proposing Release at 21620–21621.

[749] *Id.*

[750] *Id.*

[751] In the FINRA Conflicts Report, FINRA identified certain mitigation measures firms implemented that we believe highlight differences in conflict management frameworks, based on the size of the firm. For example, large firms may address conflicts of interest through enterprise management or operational risk frameworks, and components of such programs, for example, risk and control self-assessments, may provide an opportunity to identify and evaluate possible impacts. By contrast, small firms selling basic products may have a conflicts management framework that relies largely on the tone set by the firm owner coupled with required supervisory controls, particularly related to suitability, and the firm's compensation structure. *See* FINRA Conflicts Report. An effective practice FINRA observed at a number of firms is implementation of a comprehensive framework to identify and manage conflicts of interest across and within firms' business lines that is scaled to the size and complexity of their business. *See* FINRA Conflicts Report at 5.

[752] *See* Proposing Release at 21621.

methods described in the Proposing Release, and, in particular, the references to neutral factors,[753] we would like to emphasize that this non-exhaustive list of factors is purely illustrative and the factors are not required elements.[754] In providing these examples, we did not intend to take a prescriptive approach, as suggested by some commenters, but a principles-based approach designed to provide flexibility to broker-dealers, depending on their business model, level of conflicts, and the retail customers they serve.[755]

Among other things, firms may adopt a range of reasonable alternatives to meet the mitigation requirement of the Conflict of Interest Obligation. As noted above, we recognize that there are a number of different kinds of incentives and that, depending on the specific characteristics of an incentive, different levels and types of mitigation measures may be necessary. For example, incentives tied to asset accumulation generally would present a different risk and require a different level or kind of mitigation, than variable compensation for similar securities, which in turn may present a different level or kind of risk and may require different mitigation methods than differential or variable compensation or financial incentives tied to firm revenues. In certain instances, we believe that compliance with existing supervisory requirements and disclosure may be sufficient, for example, where a firm may develop a surveillance program to monitor sales activity near compensation thresholds.[756]

As discussed above, while not *required* elements, the Commission believes the following non-exhaustive list of practices could be used as potential mitigation methods for firms to comply with (a)(2)(iii)(B) of Regulation Best Interest:

- Avoiding compensation thresholds that disproportionately increase compensation through incremental increases in sales;
- minimizing compensation incentives for employees to favor one type of account over another; or to favor one type of product over another, proprietary or preferred provider products, or comparable products sold on a principal basis, for example, by establishing differential compensation based on neutral factors;[757]
- eliminating compensation incentives within comparable product lines by, for example, capping the credit that an associated person may receive across mutual funds or other comparable products across providers;
- implementing supervisory procedures to monitor recommendations that are: Near compensation thresholds; near thresholds for firm recognition; involve higher compensating products,[758] proprietary products or transactions in a principal capacity; or, involve the roll over or transfer of assets from one type of account to another (such as recommendations to roll over or transfer assets in an ERISA account to an IRA) or from one product class to another;[759]
- adjusting compensation for associated persons who fail to adequately manage conflicts of interest; and
- limiting the types of retail customer to whom a product, transaction or strategy may be recommended.[760]

While the Commission is providing flexibility so that broker-dealers can determine the nature and extent of mitigation, whether a broker-dealer has developed policies and procedures reasonably designed to mitigate a conflict is not measured against industry practice (although such practice could be a useful point of reference). Each firm must look at the facts and circumstances surrounding the mitigation methods, the particular broker-dealer's business model, and whether or not the policies and procedures were reasonably designed for the particular firm to reduce the impact of the incentive in a manner to prevent the incentive from causing the associated person to place the broker-dealer's or the associated person's interest ahead of the retail customer's interest.

In response to a commenter's concern that we suggested in the Proposing Release that some compensation conflicts may be more appropriately avoided for certain categories of retail customers,[761] we would like to clarify that such a suggestion is an example and not a requirement. Nevertheless, we are adopting a requirement to establish, maintain, and enforce written policies and procedures reasonably designed to eliminate the incentives that we believe create the most problematic conflicts, namely incentives to associated persons that are tied to recommendations of specific securities or specific types of securities within a limited period of time as we believe these incentives cannot be adequately mitigated, and are likely to result in recommendations that place the interest of the broker-dealer or associated person ahead of the interests of the retail customer. Furthermore, in accordance with the Care Obligation, a broker-dealer, when making a recommendation, is required to, among other things, have a reasonable basis to believe that the recommendation is in the best interest of the particular retail customer.[762] In particular, and consistent with existing suitability obligations, a broker-dealer is required to exercise "reasonable diligence" to ascertain (and consider) the retail customer's investment profile which, among other things, includes the retail customer's investment experience and risk tolerance.[763] A broker-dealer that has established reasonably designed policies and procedures to mitigate the conflicts associated with the incentives provided to the associated person would nevertheless violate Regulation Best Interest if the recommendation does not comply with the Care Obligation.

Finally, in response to commenters' questions regarding the permissibility of specific practices, the Commission believes the revised, explicit requirements related to: Mitigation of incentives to associated persons as discussed herein; mitigation of any material limitations placed on the securities or investment strategies that may be recommended to retail customers; and elimination of certain

[753] *See, e.g.*, Mass Mutual February 2019 Letter; Edward Jones Letter; IRI Letter; Capital Group Letter; SIFMA August 2018 Letter; Committee of Annuity Insurers Letter.

[754] *See* Proposing Release at 21621.

[755] *See* Proposing Release at 21622.

[756] FINRA Conflicts Report at 30–31.

[757] As noted above, we are not requiring firms to establish differential compensation based on neutral factors but do believe firms could choose to do so as potential practice to promote compliance with the requirement to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate any conflicts of interest that create an incentive for an associated person to place its interest ahead of the interest of the retail customer.

[758] *See* Morgan Lewis Letter (suggesting, among other things, that firms can conduct surveillance (whether transactions, periodic, or forensic) to identify activity that appears to be driven by compensation considerations—whether at the representative, team, or business level—rather than a customer's interest).

[759] *See* FINRA Exam Report 2017. FINRA observed a variety of effective practices in recommending the purchase and sale of UITs, including tailoring supervisory systems to products' features and sources of risk to customers.

[760] *See, e.g., supra* footnote 747; FINRA Regulatory Notice 12–03, Heightened Supervision of Complex Products (Jan. 2012).

[761] *See* Primerica Letter ("The SEC's statements in the Proposals regarding the additional protections broker-dealers should afford 'less sophisticated' retail customers could create a sub-class of retail customers that broker-dealers would have to identify based on subjective and poorly defined criteria, and potentially further restrict access to help with saving and investing for customers who need it most.").

[762] *See* Section II.C.2.

[763] *Id.*

practices, as discussed below, sufficiently address these comments. To the extent the Commission has not identified a practice that needs to be eliminated, it would be permitted, subject to compliance with the requirements of Regulation Best Interest.

f. Mitigation of Material Limitations on Recommendations to Retail Customers

As part of the proposed requirement to manage conflicts of interest arising from financial incentives through mitigation, firms would have been required to establish policies and procedures reasonably designed to mitigate the conflicts of interest associated with offering a limited range of products and proprietary products.

We also solicited comment on information related to the magnitude of conflicts of interest when broker-dealers recommend, among other things, proprietary products and a limited range of products. In response, several commenters requested that the Commission confirm that a product menu limited to appropriate alternative investments offered by the broker-dealer would not violate Regulation Best Interest.[764] Some commenters requested we clarify that, for certain customers, a firm can limit its offerings to proprietary products or products for which the firm receives revenue sharing payments if the limitation is properly disclosed and appropriate to meet the retail customer's needs.[765]

In consideration of these comments, and our revisions to remove firm-level conflicts from the proposed mitigation provision discussed above, we are adopting a new requirement to specifically address the conflicts of interest presented when broker-dealers place any material limitations on the securities or investment strategies that may be recommended to a retail customer (*i.e.,* only make recommendations of proprietary or other limited ranges of products). While we generally believe that most firm-level conflicts of interest can be addressed through appropriate disclosure, this new provision focuses on the specific firm-level conflicts—namely, the conflicts associated with the establishment of a product menu—which we believe are most likely to affect recommendations made to retail customers and have the greatest potential to result in recommendations that place the interest of the broker-dealer or associated person ahead of the interest of the retail customer.[766] Given the potential impact on recommendations to retail customer, we believe these conflicts should not be left to the broker-dealer to determine whether disclosure alone is sufficient, and are requiring broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to (1) identify and disclose any material limitations broker-dealers place on their securities offerings or investment strategies involving securities and any associated conflicts of interest and (2) prevent such limitations and associated conflicts of interest from causing the broker-dealer to make recommendations that place the broker-dealer's interest ahead of the interest of the retail customer.

While we believe broker-dealers should be permitted to limit their product offerings from which they make recommendations to retail customers, provided that they comply with Regulation Best Interest,[767] we are also concerned that without requiring a broker-dealer to have a process in place to disclose and address negative effects of such limitations, retail customers may be unaware that a broker-dealer offers only a limited set of products and therefore would be unable to make an informed investment decision.[768] We are also concerned that retail customers may be harmed by such limitations if they are more likely to result in recommendations that are not in the best interest of the retail customer.[769]

Broker-dealers will be required to establish, maintain and enforce written policies and procedures reasonably designed to: (i) Identify and disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended to a retail customer and any conflicts of interest associated with such limitations, in accordance with the Disclosure Obligation, and (ii) prevent such limitations and associated conflicts of interest from causing the broker, dealer, or a natural person who is an associated person of the broker or dealer to make recommendations that place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer.

As discussed in the context of the Disclosure Obligation and the Relationship Summary, for purposes of this requirement, a "material limitation"[770] placed on the securities or investment strategies involving securities would include, for example, recommending only proprietary products (*i.e.,* any product that is managed, issued, or sponsored by the financial institution or any of its affiliates), a specific asset class, or products with third-party arrangements (*i.e.,* revenue sharing).[771] In addition, the fact that the broker-dealer recommends only products from a select

[764] *See, e.g.,* SIFMA August 2018 Letter (requesting clarification on how a broker-dealer could satisfy the Conflict of Interest Obligation if the platform is limited to certain bond offerings); Fidelity Letter (stating that given the vast array of readily available investment options and the breadth of securities typically available to customers through broker-dealers, some limitation of the universe of investment options must be undertaken in order for a broker-dealer to adequately understand, compare and formulate a recommendation); Prudential Letter ("It is unclear what 'significantly limits' means for firms that offer predominantly, but not exclusively, proprietary products. It is also unclear what constitutes a 'small choice of investments.' Additional examples or more prescriptive instructions regarding when firms must disclose such limitations would be helpful."). *See also* Guardian August 2018 Letter; LPL August 2018 Letter; LPL December 2018 Letter.

[765] *See, e.g.,* SIFMA August 2018 letter; CFA Institute Letter; Letter from Emanuel Alves, Senior Vice President and General Counsel, John Hancock Life Insurance Company (Aug. 3, 2018) ("John Hancock Letter"); Ameriprise Letter. *See also* NY Life Letter (recommending the Commission require disclosure of the limits on the universe of available products, while allowing further context so that firms describe the full scope and impact of those limits); SPARK Letter (recognizing that the SEC did not want to mandate specific mitigation procedures or a "one-size-fits" all" approach but requesting further guidance in the case of, among other things, broker-dealers who only offer proprietary products or only offer limited investment menus). *But see* CFA August 2018 Letter (suggesting that simply stating that a firm offers a limited selection of investments may not be enough for an investor to understand the limitations).

[766] *See* CFA August 2018 Letter ("[M]any broker-dealers currently restrict choice by only recommending from a limited menu of proprietary funds or by only recommending products from companies that make revenue sharing payments. If limits on investor choice are of concern to the Commission, surely such limits deserve equal scrutiny. After all, evidence suggests that the limited menus offered by some firms consist entirely of low quality products that impose excessive costs, deliver inferior returns, and expose investors to excessive risk.")

[767] *See* Section II.C.2 for a related discussion of the application of the Care Obligation to such limitations. *See also* AFL-CIO April 2019 Letter (recommending that the Commission make clear that it will hold firms accountable for developing a product menu that complies with the first prong of the proposed best interest standard and that under such approach, firms would periodically assess their product offerings against other products available in the marketplace in order to ensure that their offerings are competitive).

[768] *See* Disclosure Obligation at Section II.C.1.

[769] We believe that by including this requirement to address material limitations to product menus, which does not rely on disclosure alone, coupled with the requirements under the Care Obligation, we are addressing a commenter's concern that product limitations can limit investor choice which in turn harms investors. *See* CFA August 2018 Letter.

[770] As discussed in Section II.C.1, Disclosure Obligation, a limitation is "material" if there is "a substantial likelihood that a reasonable shareholder would consider it important." *Basic, Inc.* v. *Levinson,* 485 U.S. 224, 224 (1988). In the context of this Regulation Best Interest, this standard would apply in the context of retail customers, as defined.

[771] *See* II.C.1.; Relationship Summary Adopting Release.

group of issuers could also be a material limitation.

We recognize, however, that, as a practical matter, almost all broker-dealers limit their offerings of securities and investment strategies to some degree. We do not believe that disclosing the fact that a broker-dealer does not offer the *entire* possible range of securities and investment strategies would convey useful information to a retail customer, and therefore we would not consider this fact, standing alone, to constitute a material limitation.[772] Rather, consistent with the examples of a "material limitation" provided above, whether the limitation is material will depend on the facts and circumstances of the extent of the limitation.

Adopting this revised requirement is critical to ensuring that retail customers are aware of any material limitations associated with a broker-dealer's recommendation and associated conflicts of interest and that broker-dealers, through their policies and procedures, establish processes to evaluate whether or not such a limited range of products is consistent with making recommendations that are in the retail customer's best interest and that do not place the interests of the broker-dealer or associated person ahead of the retail customer's interest, consistent with Care Obligation.[773] Broker-dealers would be able to satisfy paragraph (a)(2)(iii)(C)(*1*) by identifying any material limitations and complying with the Disclosure Obligation which, as discussed above, requires disclosure of "the type and scope of services provided to the retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer." [774]

Similar to the requirement to establish, maintain, and enforce written policies and procedures reasonably designed to mitigate certain incentives to associated persons, firms will have flexibility to develop and tailor reasonably designed policies and procedures to prevent such limitations and the associated conflicts from causing the broker-dealer or associated person from placing their interest ahead of the retail customer's interest. In developing such policies and procedures, the Commission believes that firms should, for example, consider establishing product review processes for products that may be recommended, including establishing procedures for identifying and mitigating the conflicts of interests associated with the product, or declining to recommend a product where the firm cannot effectively mitigate the conflict, and identifying which retail customers would qualify for recommendations from this product menu.[775] As part of this process, firms may consider evaluating the use of "preferred lists," [776] restricting the retail customers to whom a product may be sold, prescribing minimum knowledge requirements for associated persons who may recommend certain products,[777] and conducting periodic product reviews to identify potential conflicts of interest, whether the measures addressing conflicts are working as intended, and to modify the mitigation measures or product selection accordingly.[778] The Commission's intent is not to prevent firms from offering proprietary products or other limited range of products so long as firms comply with the Disclosure, Care,[779] and Conflict of Interest Obligations. In fact, we believe that these limitations can be beneficial, such as by helping ensure that a broker-dealer and its associated persons understand the securities they are recommending, as required by the Care Obligation.[780] This requirement is designed to allow firms to determine whether and how to restrict their menu of investment options based, among other things, on their retail customer base and area of expertise, while protecting the interests of retail customers when recommendations are made from such limited menus by requiring firms have a reasonably designed process to identify, disclose, and prevent the conflicts of interest associated with such limitations from resulting in recommendations that place the broker-dealer's interests ahead of the retail customer's interest.

We also note that the risk that limited product menus result in recommendations that are not in the retail customer's best interest is also addressed through the Care Obligation [781] and required disclosure pursuant to the Disclosure Obligation.[782]

g. Elimination of Certain Conflicts of Interest

Under Section 15(l)(2) of the Exchange Act, the Commission may examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and protection of investors. As discussed below, the Commission finds that it is in the public interest and consistent with the protection of investors to require that broker-dealers establish, maintain, and enforce written policies and procedures reasonably designed to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.

[772] *See Basic, Inc.* v. *Levinson*, 485 U.S. 224, 224 (1988).

[773] *See* Section II.C.2 and *infra* footnote 779.

[774] Section II.C.1.

[775] For example, in its Conflicts Report, FINRA identified the following as effective practices to identify and manage conflicts of interest for new products: (i) A product review process to identify and mitigate conflicts of interest that may be associated with a product; (ii) evaluation of whether to decline to offer products to customers when the conflicts associated are too significant to be mitigated effectively; (iii) differentiation of product eligibility between institutional and retail clients; (iv) post-launch reviews of products to identify potential problems; (v) evaluation of registered representatives' ability to understand a product, provide training where necessary, and limit access to products for which they cannot demonstrate sufficient understanding to perform a suitability analysis and effectively explain a product and its risks to customers; and (vi) disclosure of product conflicts and risks. *See* FINRA Conflicts Report at 3, 18–25.

[776] *See* FINRA Conflicts Report at 24.

[777] *Cf.* FINRA Conflicts Report at 19 (stating that as an effective practice in evaluating new products, a product review committee may engage in these activities to address conflicts of interest).

[778] *Cf., e.g.,* NASD Notice to Members 03–71, Non-Conventional Investments—NASD Reminds Members of Obligations When Selling Non-Conventional Investments (Nov. 2003). Similarly, under the Compliance Obligation, we suggest that compliance policies and procedures' adequacy and effectiveness should be reviewed as frequently as necessary in connection with changes in business activities, affiliations, or regulatory and legislative developments. *See* Section II.D.4, Compliance Obligation.

[779] In particular, consistent with the Care Obligation and as discussed further in Section II.C.2, Care Obligation, as part of determining whether a broker-dealer has a reasonable basis to believe that a recommendation is in the best interest of the retail customer, broker-dealers generally need to evaluate reasonably available alternatives offered by the broker-dealer. When a broker-dealer materially limits is product offerings or offers only a limited menu of products, it must still comply with the Care Obligation, and could not use its limited menu to justify recommending a product that does not satisfy this obligation. *See* Section II.C.2.

[780] *See also supra* footnote 775.

[781] *See id.*

[782] Material limitations are material facts that need to be disclosed pursuant to the Disclosure Obligation. The Commission is concerned about the potential effect that such limitations have on the securities or investment strategies involving securities recommended to a retail customer, and any associated conflicts of interest, could have on the ability of a broker-dealer to make a recommendation in the best interest of the retail customer. *See* Disclosure Obligation at Section II.C.1.

In the Proposing Release, the Conflict of Interest Obligation would have required the establishment of policies and procedures reasonably designed to at a minimum disclose or eliminate all material conflicts of interest related to the recommendation (or to disclose and mitigate or eliminate those material conflicts of interest arising from financial incentives). We did not mandate the absolute elimination of, or policies and procedures reasonably designed to eliminate any particular conflicts.[783] We were concerned that the absolute elimination of specified particular conflicts could mean a broker-dealer may not receive compensation for its services.[784] Our intent, rather, was to identify certain practices that may be more appropriately avoided for certain categories of retail customers, including, for example, sales contests, trips, prizes, and other similar bonuses based on sales of certain securities or accumulation of AUM.[785]

We also provided examples of how a broker-dealer could eliminate conflicts of interest.[786] We requested comment on elimination, including suggestions of whether certain conflicts should be required to be eliminated and how broker-dealers could eliminate conflicts of interest. Specifically, we requested comment on whether the Commission should explicitly prohibit receipt of certain non-cash compensation (*e.g.*, sales contests, trips, prizes, and other bonuses based on sales of certain securities, accumulation of AUM or any other factor).[787]

In response, several commenters requested greater certainty as to whether certain conflicts of interest should be eliminated and if so, which ones.[788] Some commenters generally requested that certain sales contests and financial incentives be prohibited.[789] Of these commenters, many expressed concern that product-based incentives could lead to recommendations that are not in a customer's best interest, with some commenters stating that firms could find ways to mitigate these conflicts [790] and others advocating that they should be prohibited in their entirety.[791] Other commenters requested clarification that incentives not tied to a particular investment product would be permitted and would not need to be eliminated.[792] A number of commenters requested clarification that incentives based on asset growth would be permitted as they do not raise the same types of conflicts present with product-based sales.[793] A number of commenters expressed concern that provisions requiring elimination of certain conflicts could be in conflict with current treatment under the Internal Revenue Code governing certain employee benefits.[794]

After considering comments, we are modifying the rule text of the Conflict of Interest Obligation to include new paragraph (a)(2)(iii)(D), which requires the broker or dealer to establish, maintain, and enforce written policies and procedures reasonably designed to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time. In adopting this new requirement, the Commission believes it will provide certainty to broker-dealers regarding the types of practices where conflicts of interest are so pervasive such that they cannot be reasonably mitigated and must be

[783] *See* Proposing Release at 21619.

[784] *Id.*

[785] *See id.* FINRA rules also establish restrictions on the use of non-cash compensation in connection with the sale and distribution of certain types of products. *See* FINRA Rules 2310, 2320, 3221, and 5110.

[786] Proposing Release at 21621–21622.

[787] *Id.*

[788] *See* TIAA Letter ("If the SEC were to provide more specific direction as to which conflicts are significant enough to warrant complete elimination, broker-dealers would be better able to effectively address material conflicts of interest in a manner consistent with the SEC's goals and preferred approach."); Wells Fargo Letter ("Rather than leaving broker-dealers vulnerable to second-guessing, the SEC should either provide more guidance on how such conflicts may be mitigated or simply identify a set of financial incentives that are prohibited."); AXA Letter ("In the absence of clear guidance from the Commission as to which financial incentives must be eliminated, and not just mitigated and disclosed, broker-dealers may be forced to curtail otherwise legitimate practices and the sale of certain products and services out of an abundance of caution—thereby depriving investors of choice of offerings for which they might otherwise be suited. . . It would also be helpful if the Commission could provide additional examples of the types of conflicts (besides "sales contests, trips, prizes . . . based on sales of certain securities") that likely require elimination."); *see also* Money Management Institute Letter; Northwestern Mutual Letter; AALU Letter.

[789] *See, e.g.*, PIABA Letter (favoring a prohibition on compensation structures that would incentivize a broker to: Recommend a proprietary product or recommend one type of product line over another; and/or which would reward the sale of certain products within a product line"), Americans for Financial Reform (recommending prohibiting brokers from adopting practices, such as sales quotas and contests, that clearly incentivize their representatives to base their recommendations on their own financial interests rather than the customer's best interests); NASAA August 2018 Letter ("[W]e encourage the Commission to proceed further by declaring these two practices—sales contests and preferential treatment of allocations—*per se* impermissible under Regulation Best Interest."); Galvin Letter (identifying the following practices as per se violations of the standard as they are contrary to the requirement to provide advice that is in the true best interest of customers: Sales contests; sales quotas (especially for in-house products); and incentives to sell high-cost and high-risk products); *See also* Warren Letter; Better Markets August 2018 Letter; CFA August 2018 Letter. *But see* Primerica Letter ("The SEC should recognize that sales contests, trips, prizes, awards, and similar bonuses can be used to incentivize positive behavior and clarify there is no per se requirement to eliminate such incentives.").

[790] *See, e.g.*, SIFMA August 2018 Letter ("With respect to product-based sales contests, we agree that instances where a firm cannot adequately mitigate incentives that are misaligned with the customer's best interest, the firm should eliminate such sales contests. A firm, however, may be able to mitigate such conflicts through several methods. . .under a principles-based regime, we ask that the SEC allow firms to decide whether to mitigate or eliminate such conflicts."); Cetera August 2018 Letter ("A commonly-cited example is sales contests or incentives that are focused on sales of a single product. While we agree that such arrangements may be *per se* inappropriate and Cetera does not permit them, this judgment is largely subjective. We suggest that reaching consensus on what other practices fall into this category would be well-nigh impossible. So long as a broker-dealer can demonstrate that it has made a good faith determination regarding identification and management of conflicts, it should not be subject to either regulatory action or private litigation based on those determinations."); CFA Institute Letter ("Our view is that recommendations aimed at winning sales contests and meeting internal quotas are irreconcilable with the concept of a best interest standard and should not be allowed.").

[791] *See, e.g.*, PIABA Letter; CFA August 2018 Letter. *See also* Fidelity Letter ("The SEC has properly pointed out that certain conflicts of interest can be so problematic that it simply may not be possible to mitigate them effectively. For example, we agree that sales contests improperly favoring certain investment products over others involve uniquely troubling conflicts and should generally be impermissible."); NY Life Letter (In this context, the proposal notes that single product sales contests create conflicts that may best be eliminated. We agree that it is inappropriate to use a contest or other non-cash compensation to incentivize the sale of a specific investment or variable insurance product over other available alternatives, irrespective of a consumer's situation and needs.") *But see* AALU Letter (finding that the Commission should not prohibit currently-compliant compensation arrangements and business models, including non-cash compensation).

[792] *See, e.g.*, SIFMA August 2018 Letter; Edward Jones Letter; NY Life Letter; Prudential Letter; LPL August 2018 Letter; Transamerica August 2018 Letter; Northwestern Mutual Letter; Letter from Eric R. Dinallo, Executive Vice President, General Counsel, Guardian Life (Feb. 6, 2019) ("Guardian February 2019 Letter"); Primerica Letter; Cambridge Letter. Some of these commenters stated that FINRA's rules and supervisory practices appropriately cover these incentives. *See* Transamerica August 2018 Letter; NY Life Letter; Northwestern Mutual Letter; Guardian August 2018 Letter; Primerica Letter.

[793] Generally these commenters believed that programs tied to assets under management, total production or revenue growth do not give associated persons an incentive to recommend specific securities that may be inconsistent with a customer's best interest. *See, e.g.*, SIFMA August 2018 Letter; Bank of America Letter; Edward Jones Letter; Transamerica August 2018 Letter; ASA Letter; UBS Letter; Fidelity Letter; NY Life Letter; Money Management Institute Letter; IPA Letter.

[794] *See* AALU Letter; NY Life Letter; Guardian February 2019 Letter; Northwestern Mutual Letter.

eliminated in their entirety, as we believe they create too strong of an incentive for the associated persons to make a recommendation that places their financial or other interest ahead of the interest of retail customers' interests and therefore would be inconsistent with Regulation Best Interest.[795]

The requirement is designed to eliminate sales contests, sales quotas, bonuses and non-cash compensation that are based on the sales of specific securities and specific types of securities within a limited period of time. We believe that these practices, particularly when coupled with a time limitation, create high-pressure situations for associated persons to engage in sales conduct contrary to the best interest of retail customers. For purposes of this requirement, we interpret non-cash compensation to mean any form of compensation received in connection with the sale and distribution of specific securities or specific types of securities that is not cash compensation, including but not limited to merchandise, gifts and prizes, travel expenses, meals and lodging except we do not intend it to cover certain employee benefits, including healthcare and retirement benefits.[796] We recognize that some associated persons may focus their business on certain general categories of securities (*e.g.,* mutual funds, variable annuities, bonds, or equities) and that broker-dealers may provide compensation or other incentives related to such sales. As discussed further herein, this requirement is not designed to prohibit broker-dealers from providing such incentives, provided that they do not create high-pressure situations to sell a specifically identified type of security (*e.g.,* stocks of a particular sector or bonds with a specific credit rating) within a limited period of time, such that the associated person cannot make a recommendation in the retail customer's best interest.

We believe the conflicts created by these practices are in direct opposition to our goal of reducing the effect of conflicts of interest on broker-dealer recommendations to retail customers.[797] We agree with many commenters that broker-dealers cannot reasonably be expected to make recommendations in a particular retail customer's best interest consistent with the requirements of the Care Obligation, if they are motivated to "push" certain securities or types of securities in order to win a contest or reach a target in order to receive a bonus or other non-cash compensation. We are also persuaded that it would be difficult, if not impossible, for a firm to establish reasonably designed policies and procedures to sufficiently mitigate the incentive created to put the broker-dealer's interest ahead of the retail customer's interest, as discussed above, as the point of these practices is simply to increase the sale a particular security or type of security, for example, in the context where a broker-dealer is attempting to reduce its inventory of or exposure to that security. Accordingly, we believe that these practices should be eliminated in order to enhance investor protection[798] and achieve the goals of Regulation Best Interest.

By explicitly requiring broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to eliminate certain practices, we believe we are responding to commenters who requested certainty as to which specific incentives are prohibited.[799] Also in response to commenters requesting clarification as to what practices would be permitted, the requirement to have reasonably designed written policies and procedures to eliminate sales contests, sales quotas, bonuses, and non-cash compensation applies only to those that are based on the sales of specific securities or types of securities, and does not apply to compensation practices based on, for example, total products sold, or asset growth or accumulation,[800] and customer satisfaction. In addition, this elimination requirement would not prevent firms from offering only proprietary products, placing material limitations on the menu of products, or incentivizing the sale of such products through its compensation practices, so long as the incentive is not based on the sale of specific securities or types of securities within a limited period of time.[801] While conflicts of interest are also associated with sales contests, sales quotas, bonuses and non-cash compensation that apply to, among other things, total products sold, or asset accumulation and growth, we agree with commenters[802] these conflicts present less risk that the incentive would compromise compliance with the Care Obligation and Conflict of Interest Obligation such that a recommendation could be made that is in a retail customer's best interest and that does not place the place the interest of the broker-dealer or associated person ahead of the interest of the retail customer.

We also recognize that certain production requirements may exist for other reasons, specifically to maintain a contract of employment.[803] As discussed above, we do not intend to prohibit the receipt of certain employee benefits by statutory employees, and do not believe this provision would apply, as we do not consider these benefits to be non-cash compensation for purposes of Regulation Best Interest. In addition, we do not intend to prohibit training or education meetings, including attendance at company-sponsored meetings such as annual conferences,[804] provided that these meetings are not based on the sale of specific securities

[795] *See* Section I. *See also* AFL–CIO April 2019 Letter ("The Commission must provide greater clarity regarding how the obligation to eliminate or mitigate conflicts would apply to different types of conflicts. In particular, it must make clear that conflicts cannot be addressed through disclosure alone and that firms would be prohibited from artificially creating harmful incentives that undermine compliance with the best interest standard.").

[796] *Infra* footnote 803 and accompanying text.

[797] *See* Section I.

[798] *See* Chairman Jay Clayton, *Statement on Investor Roundtables Regarding Standards of Conduct for Investment Professionals Rulemaking* (Aug. 22, 2018), *available at https://www.sec.gov/news/public-statement/statement-clayton-082218. See also* CFA Institute; CFA.

[799] *See supra* footnote 788 and accompanying text.

[800] *See* CCMC Letters (asserting that increasing assets under management is a natural outgrowth of serving clients well and is fundamentally different from sales contests based on a particular product); UBS Letter (stating that compensation and other rewards based on the growth of overall revenues or assets under management should continue to be permitted as they do not incent sales of one product over another but instead simply reward overall business growth).

[801] Although we are not defining what would constitute a "limited period of time," as noted above, we are concerned about time limitations that create high-pressure situations for associated persons to increase the sales of specific securities or specific types of securities which compromise the best interests of their customers.

[802] *See, e.g.,* Ameriprise Letter ("We believe such concerns around incentives do not exist with respect to programs that reward asset growth or asset flows, or recruitment bonuses tied to assets under management or revenue growth because these programs do not give associated persons an incentive to recommend specific securities that may not be consistent with a customer's best interest."); Empower Letter ("We also believe asset-gathering or account-retention incentives should not be subject to the same level of scrutiny as incentives aimed at increasing sales of particular securities. The potential for a conflict of interest to result in a bad outcome for a retail investor is much higher when a recommendation is related to individual securities rather than the type of account in which such securities should be held.")

[803] *See* Prudential Letter; NY Life Letter; Guardian February 2019 Letter; AALU Letter. Under the Internal Revenue Code, statutory employees are eligible for certain employee benefits such as 401(k) and health insurance. In order to qualify under this definition, full time life insurance sales agents must devote their principal business to the solicitation of life insurance or annuities primarily for one company. *See* Department of Treasury, Internal Revenue Service, Employer's Supplemental Tax Guide, Publication 15–A (2018), *available at https://www.irs.gov/pub/irs-pdf/p15a.pdf.*

[804] *See* Guardian August 2018 Letter; NY Life Letter.

or type of securities within a limited time period.

We emphasize that prohibiting certain incentives does not mean that all other incentives are presumptively compliant with Regulation Best Interest. As discussed above, such other incentives and practices that are not explicitly prohibited are permitted provided that the broker-dealer establishes reasonably designed policies and procedures to disclose and mitigate the incentive created, and the broker-dealer and its associated persons comply with the Care Obligation. Nevertheless, if the firm determines that the conflicts associated with these practice are too difficult to disclose and mitigate, the firm should consider carefully assessing whether it is able to satisfy its best interest obligation in light of the identified conflict and in certain circumstances, may wish to avoid such practice entirely.

4. Compliance Obligation

As proposed, under the Conflict of Interest Obligation, a broker-dealer entity [805] would be required to: (1) Establish, maintain, and enforce written policies and procedures reasonably designed to identify, and disclose, or eliminate all material conflicts of interest associated with recommendations covered by Regulation Best Interest; and (2) establish, maintain and enforce written policies and procedures reasonably designed to identify and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with such recommendations. As discussed above, in response to commenters, we have made modifications to the Conflict of Interest Obligation to more appropriately focus on the conflicts of interest that create an incentive for broker-dealers and their associated persons to place the interest of the broker-dealer or the associated person ahead of the interest of the retail customer.

We solicited comment on the proposed requirement to establish, maintain, and enforce certain policies and procedures as part of the Conflict of Interest Obligation, including whether we should require policies and procedures specifically to assist compliance with Regulation Best Interest. While commenters generally viewed the requirement to adopt policies and procedures as an effective means of addressing conflicts of interest,[806] some commenters suggested broadening this requirement to a general policies and procedures obligation that would be reasonably designed to ensure that recommendations are made in the customer's best interest or reasonably designed to ensure compliance with Regulation Best Interest as a whole.[807]

After considering the comments received, we are adopting the Compliance Obligation, which requires, in addition to the policies and procedures required by the Conflict of Interest Obligation, that broker-dealer entities [808] establish, maintain and enforce written policies procedures reasonably designed to achieve compliance with Regulation Best Interest. The Compliance Obligation creates an affirmative obligation under the Exchange Act with respect to the rule as a whole,[809] while providing sufficient flexibility to allow broker-dealers to establish compliance policies and procedures that accommodate a broad range of business models.[810] The Commission believes that the Compliance Obligation is important to help ensure that broker-dealers have strong systems of controls in place to prevent violations of Regulation Best Interest, including the component Disclosure and Care Obligations, in addition to the policies and procedures required pursuant to the Conflict of Interest Obligation, and to protect the interests of retail customers.[811]

As with the policies and procedures requirement included in the Conflict of Interest Obligation, whether policies and procedures are reasonably designed to comply with Regulation Best Interest will depend on the facts and circumstances of a given situation.[812] As such, the Compliance Obligation does not enumerate specific requirements that broker-dealers must include in their policies and procedures as broker-dealers are too varied in their operations for rules to impose a single set of universally applicable specific required elements. Each broker-dealer when adopting policies and procedures should consider the nature of that firm's operations and how to design such policies and procedures to prevent violations from occurring, detect violations that have occurred, and to correct promptly any violations that have occurred.[813]

A firm's compliance policies and procedures should be reasonably designed to address and be proportionate to the scope, size, and risks associated with the operations of the firm and the types of business in which the firm engages.[814] As such, the Commission is not mandating specific requirements pursuant to the Compliance Obligation. In addition to the required policies and procedures, depending on the size and complexity of the firm, we believe a reasonably designed compliance program generally

[805] *See supra* footnote 671.

[806] *See* CFA August 2018 Letter; Fidelity Letter; Vanguard Letter; FPC Letter.

[807] *See* CFA August 2018 Letter; UBS Letter.

[808] Similar to the Conflict of Interest Obligation, the Compliance Obligation applies solely to the broker or dealer entity, and not to the natural persons who are associated persons of a broker or dealer. For purposes of discussing the Compliance Obligation, the term "broker-dealer" refers only to the broker-dealer entity, and not to such individuals. *See* footnote 671 and accompanying text.

[809] As noted in the Proposing Release, broker-dealers are currently subject to supervisory obligations under Section 15(b)(4)(E) of the Exchange Act and SRO rules, including the establishment of policies and procedures reasonably designed to prevent and detect violations of, and to achieve compliance with, the federal securities laws and regulations, as well as applicable SRO rules. *See* Proposing Release at 21622. Specifically, the Exchange Act authorizes the Commission to sanction a broker-dealer or any associated person that fails to reasonably supervise another person subject to the firm's or the person's supervision that commits a violation of the federal securities laws. Exchange Act Sections 15(b)(4)(E) and (b)(6)(A). The Exchange Act provides an affirmative defense against a charge of failure to supervise where reasonable procedures and systems for applying the procedures have been established and effectively implemented without reason to believe those procedures and systems are not being complied with. *Id.* While the Compliance Obligation creates an explicit requirement, we believe that broker-dealers would likely establish policies and procedures to comply with Regulation Best Interest pursuant to Section 15(b)(4)(E). In order to comply, broker-dealers could adjust their current systems of supervision and compliance, as opposed to creating new systems.

[810] This approach is similar to the one taken under rule 206(4)–7 under the Advisers Act which requires policies and procedures reasonably designed to prevent violations of the Advisers Act, which should be tailored to address compliance considerations relevant to the operations of each adviser. *See* Compliance Programs of Investment Companies and Investment Advisers, Advisers Act Release No. 2204 (Dec. 17, 2003) ("Advisers Act Release 2204"). *See also Questions Advisers Should Ask While Establishing or Reviewing Their Compliance Programs* (May 2006), *available at https://www.sec.gov/info/cco/adviser_compliance_questions.htm* ("No one standard set of policies and procedures will address the requirements established by the Compliance Rule for all advisers because each adviser is different, has different business relationships and affiliations, and therefore, has different conflicts of interest.").

[811] Similar to the discussion included under Section II.C.3.a, we believe that policies and procedures to comply with Regulation Best Interest would allow the Commission to identify and address potential compliance deficiencies or failures (such as inadequate or inaccurate policies and procedures, or failure to follow the policies and procedures) early on, reducing the chance of retail customer harm.

[812] *See* Section II.C.3.

[813] *See* Advisers Act Release 2204.

[814] *See* Section II.C.3.a.

would also include:[815] Controls; remediation of non-compliance;[816] training;[817] and periodic review and testing.[818]

D. Record-Making and Recordkeeping

In connection with proposed Regulation Best Interest, we proposed new record-making and recordkeeping requirements for broker-dealers with respect to certain information collected from or provided to retail customers. Specifically, we proposed amendments to Exchange Act Rules 17a–3 and 17a–4, which specify minimum requirements with respect to the records that broker-dealers must make, and how long those records and other documents must be kept, respectively. We received several comments on the proposed new requirements and are adopting them substantially as proposed with additional clarifications and guidance to address commenters' concerns.

We proposed amending Rule 17a–3[819] to add a new paragraph (a)(25), which would require, for each retail customer to whom a recommendation of any securities transaction or investment strategy involving securities is or will be provided, a record of all information collected from and provided to the retail customer pursuant to Regulation Best Interest, as well as the identity of each natural person who is an associated person of a broker or dealer, if any, responsible for the account. The new paragraph would specify that the neglect, refusal, or inability of a retail customer to provide or update any such information would excuse the broker-dealer from obtaining that information.

We are adopting the provision substantially as proposed but redesignating it as new paragraph (a)(35) of Rule 17a–3.[820] We are also amending the text of paragraph (ii) of the amendment as adopted to refer to "any information described in paragraph (a)(35)(i) of this section" rather than the proposed "any information required under paragraph (a)(25)(i) of this section." This is a non-substantive change reflecting the fact that paragraph (i) of the new provision requires a record of the information collected from a retail customer by the broker-dealer pursuant to Regulation Best Interest; it does not require the information itself directly as implied by the original wording of paragraph (i) of the proposed amendment. It is therefore more accurate to refer in paragraph (ii) to the information "described in," rather than "required under," paragraph (i), as well as to update the reference in paragraph (ii) to "paragraph (a)(35)(i) of this section."

Several commenters expressed concern that the proposed rule amendment would significantly expand recordkeeping requirements.[821] One commenter expressed concern that the record retention requirements of the proposed new paragraph to Rule 17a–3 would apply to each recommendation made by the broker-dealer rather than to each account (as required by existing paragraph (a)(17) of Rule 17a–3, which operates on a per-account basis). Another commenter requested clarification that "the current books and records requirement is sufficient to meet record-keeping requirements to satisfy Reg BI," adding that the Commission should "affirm that Reg BI does not create new record-keeping requirements to prove that an advisor acted in a client's best interest."[822]

The Commission notes that the proposed new requirements of Rule 17a–3 are not designed to create additional, standalone burdens for broker-dealers but instead to provide a means by which they can demonstrate, and Commission examiners can confirm, their compliance with the new substantive requirements of Regulation Best Interest. In response to commenter concerns that the proposed requirements would significantly expand their recordkeeping obligations, we reiterate that, as stated in the Proposing Release, broker-dealers should already be attempting to collect much of the information that would be required under Regulation Best Interest pursuant to the FINRA suitability rule and existing Exchange Act books and records rules. For example, we note that under existing Rule 17a–3(a)(17), broker-dealers that make recommendations for accounts with a natural person as customer or owner are already required to create and periodically update customer account information, although as part of developing a "retail customer's investment profile," Regulation Best Interest may require broker-dealers to seek to obtain certain retail customer information that is currently not required by Rule 17a–3(a)(17).[823] In addition, Regulation Best Interest would require broker-dealers to disclose in writing the material facts relating to the scope and terms of their relationship with the retail customer and the material facts relating to conflicts of interest that are associated with the investment recommendations provided to the retail customer. As such, it would not be accurate to state, as suggested by the commenter, that the Commission's current books and records requirements for broker-dealers are sufficient to meet recordkeeping requirements to satisfy Regulation Best Interest. The additional books and records requirements the Commission is adopting today are designed to allow firms to demonstrate compliance with the substantive requirements of Regulation Best Interest.

We further note that the new record-making requirements would not require the duplication of existing records. Rather, if a broker-dealer relied upon previously existing records to demonstrate its compliance with Regulation Best Interest for a given recommendation, it would not be required to create and preserve duplicate copies but instead could create a new record noting which pre-existing documents were provided to the customer, or what customer information already being preserved by the broker-dealer was relied upon, to meet the obligations of Regulation Best Interest. However, reliance upon previously existing records would only be permissible so long as such records are preserved—a record noting that a document was relied upon would no longer meet the recordkeeping obligations of Regulation Best Interest if such document was no longer preserved by the broker-dealer.

Commenters also requested that the Commission limit new recordkeeping requirements to customer profile information itself, not the "related and

[815] *Cf.* FINRA Conflicts Report at 6 (identifying supporting structures, policies, processes, controls and training as critical to protect customers and the firm).

[816] *Id.* at 10 ("Most firms' policies describe an escalation process for handling those conflicts of interest that cannot be handled through other firm policies. . . .").

[817] "For firms, training is an important vehicle to communicate firm culture, specific requirements of a firm's code of conduct and its conflicts management framework." *Id.* at 15.

[818] *Cf. Questions Advisers Should Ask While Establishing or Reviewing Their Compliance Programs* (May 2006), *available at https://www.sec.gov/info/cco/adviser_compliance_questions.htm*; FINRA Conflicts Report.

[819] *See* Exchange Act Rule 17a–3.

[820] The Commission is also reserving paragraphs (a)(24) through (a)(34) of Rule 17a–3 for use in connection with future rulemakings.

[821] *See* SIFMA August 2018 Letter; Edward Jones Letter; Primerica Letter.

[822] *See* Raymond James Letter.

[823] *See* Exchange Act Rule 17a–3(a)(17). As explained in the Proposing Release, Rule 17a–3(a)(17) applies to each account with a natural person as a customer or owner, while proposed Regulation Best Interest would apply to each recommendation of any securities transaction or investment strategy involving securities to a retail customer. Because of this difference, the Commission believes it would be appropriate to locate the record-making requirements related to Regulation Best Interest in a new paragraph of Rule 17a-3 rather than in an amendment to paragraph (a)(17).

underlying communications." [824] In response to these concerns, the Commission clarifies that new paragraph (a)(35) of Rule 17a–3 as adopted requires a record of all information collected from and provided to the retail customer pursuant to Regulation Best Interest. Regulation Best Interest does not reference, and the Commission does not intend that it require, "related and underlying communications"—rather, it applies only to the information that is actually provided to or obtained from the customer pursuant to Regulation Best Interest. Once again, the purpose of the new record-making provision is to allow broker-dealers to demonstrate their compliance with the substantive requirements of Regulation Best Interest. Complying with those substantive requirements will require broker-dealers to obtain from and provide to customers certain information, and new paragraph (a)(35) of Rule 17a–3 requires a record of such information. In response to comments received requesting clarification as to whether information provided to or obtained from a customer orally would be covered by the new record-making requirements,[825] the Commission clarifies that the requirements of new paragraph (a)(35) of Rule 17a–3 apply to all information collected from or provided to a retail customer pursuant to Regulation Best Interest, whether provided orally or in writing (electronically or otherwise).[826]

Several commenters requested clarification that, except with respect to the specific recordkeeping requirements in the rule text, Regulation Best Interest does not require additional records (*e.g.,* records to evidence best interest determinations on a recommendation-by-recommendation basis).[827] One commenter also stated that, as drafted, there are significant obstacles and costs, including increased privacy and cybersecurity risks, that would result from implementing the proposed new rule, in particular with respect to the "all information collected from . . . . the retail customer" requirement.[828]

In response, the Commission clarifies that while the substantive requirements of Regulation Best Interest apply on a recommendation-by-recommendation basis, consistent with our approach elsewhere, we are not requiring that broker-dealers create and maintain records to evidence best interest determinations on a recommendation-by-recommendation basis. Nor have we determined to require broker-dealers to *provide* information to retail customers relating to the basis for each particular recommendation (*i.e.,* disclose such information), and thus did not envision this information to come within the scope of Rule 17(a)(35).

Rather, in order to demonstrate compliance with Regulation Best Interest, a broker-dealer must be able to demonstrate that it had a reasonable basis to believe that each particular recommendation made to a retail customer was in the best interest of the customer at the time of the recommendation based on the customer's investment profile and the potential risks, rewards, and costs associated with the recommendation. As noted above, the Commission does not intend this to require, in practice, the creation of extensive new and potentially duplicative records for each and every recommendation to a retail customer. Instead, broker-dealers should be able to explain in broad terms the process by which the firm determines what recommendations are in its customers' best interests, and similarly to explain how that process was applied to any particular recommendation to a retail customer. However, we are not mandating that broker-dealers create and maintain a record of each such determination. Nonetheless, as noted above we are providing guidance suggesting that firms may wish to adequately document an evaluation of a recommendation and the basis for that recommendation in particular contexts, such as the recommendation of a complex product, or where a recommendation may seem inconsistent with a retail customer's investment objectives on its face.[829]

In addition, in response to requests from commenters for confirmation that the proposed record-making requirements do not contemplate broker-dealers needing to create and maintain records of why certain products were recommended over others on a recommendation-by-recommendation basis,[830] we confirm that broker-dealers are not expected to maintain records comparing potential investments to one another so long as they are able to demonstrate that each individual recommendation actually made to a customer meets the requirements of Regulation Best Interest on its own. Regulation Best Interest applies to recommendations *made* to a retail customer, rather than to potential recommendations considered by the broker-dealer but not actually made to the customer.

In response to the commenter's privacy and cybersecurity concerns with respect to the proposed requirement to make a record of all information collected from the customer pursuant to Regulation Best Interest, as noted in the Proposing Release [831] and Section II.C above, although a broker-dealer's customer *obligations* under Regulation Best Interest (*e.g.,* the Care Obligation) go beyond those set forth in the FINRA's suitability rule, the concept of the "customer's investment profile" that a broker-dealer would be required to compile—that is, the customer *information* it would be required to obtain—pursuant to Regulation Best Interest is consistent with that under FINRA's suitability rule. As such, we believe that since broker-dealers are already required to seek to obtain identical types of retail customer information pursuant to the FINRA suitability rule, broker-dealers should already have in place policies and procedures, including training programs, to address such privacy and cybersecurity concerns.

We also proposed an amendment to paragraph (e)(5) of Rule 17a–4, which currently requires broker-dealers to maintain and preserve in an easily accessible place all account information required by paragraph (a)(17) of Rule 17a–3 for at least six years after the earlier of the date the account was closed or the date on which the information was replaced or updated.[832] The proposed amendment would require broker-dealers to retain any information that the retail customer provides to the broker-dealer or the broker-dealer provides to the retail customer pursuant to the proposed amendment to Rule 17a–3 being adopted today as Rule 17a–3(a)(35), in addition to the existing requirement to retain information obtained pursuant to Rule 17a–3(a)(17). As a result, broker-dealers would be required to retain all records of the information collected from or provided to each retail customer pursuant to Regulation Best Interest for at least six years after the earlier of the date the account was closed or the date

[824] *See* SIFMA August 2018 Letter; Morgan Stanley Letter.

[825] *See* SIFMA August 2018 Letter; Primerica Letter.

[826] In the case of information provided orally under the circumstances outlined in Section II.C.1, Disclosure Obligation, *Oral Disclosure or Disclosure After a Recommendation,* the broker-dealer must maintain a record of the fact that oral disclosure was provided to the retail customer.

[827] *See* SIFMA August 2018 Letter; Edward Jones Letter; Morgan Stanley Letter; CCMC Letters.

[828] *See* Primerica Letter.

[829] *See supra* footnote 610 and accompanying text.

[830] *See* SIFMA August 2018 Letter; CCMC Letters.

[831] Proposing Release at 21611 (noting that Retail Customer Investment Profile is consistent with FINRA Rule 2111(a) (Suitability)).

[832] *See* Exchange Act Rule 17a–4(e)(5).

on which the information was replaced or updated. The Commission is adopting this amendment to Rule 17a–4(e)(5) substantially as proposed, with the proposed reference to paragraph (a)(25) of Rule 17a–3 replaced with a reference to paragraph (a)(35) to reflect the redesignation of the latter new rule provision as discussed above.

The Commission received several comments regarding the proposed amendment to Rule 17a–4 requesting clarification as to what communications would be required to be retained pursuant to the proposed rule amendment beyond those already required to be retained by existing paragraph (b)(4) of Rule 17a–4.[833] Rule 17a–4(b)(4) requires broker-dealers to retain originals of all communications received and copies of all communications sent by the broker-dealer relating to its business as such for a period of not less than three years, the first two in an easily accessible place.

In response, the Commission notes that while the records that a broker-dealer would be required to make in connection with Regulation Best Interest under new paragraph (a)(35) of Rule 17a–3 may be "business as such" records, the Commission believes it is important, including for examination purposes, that broker-dealers separately retain records that specifically demonstrate compliance with Regulation Best Interest and new paragraph (a)(35) of Rule 17a–3 rather than simply including them in the much broader "business as such" category required to be retained under Rule 17a–4(b)(4). Rule 17a–3(e)(5) currently serves the purpose of allowing broker-dealers to demonstrate compliance with the customer information records required to be made pursuant to Rule 17a–3(a)(17), and the amendment to Rule 17a–3(e)(5) being adopted today will serve the same purpose with respect to records required to be retained by broker-dealers to demonstrate compliance with Regulation Best Interest and new paragraph (a)(35) of Rule 17a–3.

Finally, as noted in the Proposing Release, the written policies and procedures that broker-dealers will be required to create pursuant to Regulation Best Interest are already currently required to be retained pursuant to Exchange Act Rule 17a–4(e)(7),[834] which requires broker-dealers to retain compliance, supervisory, and procedures manuals (and any updates, modifications, and revisions thereto) describing the policies and practices of the broker-dealer with respect to compliance with applicable laws and rules, and supervision of the activities of each natural person associated with the broker-dealer, for a specified period of time. As such, we did not propose, and are not adopting, any additional recordkeeping requirements with respect to the written policies and procedures that broker-dealers will be required to create pursuant to Regulation Best Interest.

E. Compliance Date

We are providing a compliance date of June 30, 2020, consistent with the transition provisions described in the Relationship Summary Adopting Release.[835] In light of the importance of the protections provided by Regulation Best Interest, we believe that this compliance date will provide adequate notice and opportunity for broker-dealers to comply with Regulation Best Interest, including by creating or updating the necessary disclosures and to developing, updating or establishing their policies and procedures and systems, as appropriate, to achieve compliance with Regulation Best Interest. On and after the Compliance Date, broker-dealers that provide recommendations of securities transactions or investment strategies that register with the Commission would be required to comply with Regulation Best Interest as of the date of registration.

While most commenters requested an implementation period of 18–24 months,[836] one commenter requested an implementation period of 12–18 months.[837] We believe the operational capability needed to develop processes to comply with Regulation Best Interest is sufficiently established by firms of all sizes and resources. While we understand commenters' requests for periods longer than 12 months after effectiveness, the Commission has determined, in light of the importance of the protections afforded by Regulation Best Interest to retail customers, that a Compliance Date of one year after effectiveness is an appropriate timeframe for firms to conduct the requisite operational changes to their systems to establish internal processes to comply with Regulation Best Interest.[838]

The Commission also believes that it is important to coordinate the transition dates of the Relationship Summary requirements with those of Regulation Best Interest to ensure that all retail investors receive the full suite of protections and benefits afforded by the amended and new rules. Finally, the Commission staff intends to offer firms significant assistance and support during the transition period and thereafter with the aim of helping to ensure that the investor protections and other benefits of the final rule are implemented in an efficient and effective manner.

III. Economic Analysis

A. Introduction and Primary Goals of the Regulation, Comments on Market Failure and Quantification, and Broad Economic Considerations

1. Introduction and Primary Goals of the Regulation

Regulation Best Interest enhances the broker-dealer standard of conduct beyond existing suitability obligations and aligns the standard of conduct with retail customers' reasonable expectations.

Under Regulation Best Interest, broker-dealers and their associated persons will be required to act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer or an associated person making the recommendation ahead of the interests of the retail customer. They also will be required to address conflicts of interest by establishing, maintaining, and enforcing policies and procedures reasonably designed to identify and fully and fairly disclose material facts about conflicts of interest, and in instances where the Commission has determined that disclosure is insufficient to reasonably address the conflict, to mitigate or, in certain instances, eliminate the conflict. As a result, Regulation Best Interest should enhance the efficiency[839] of recommendations that broker-dealers provide to retail customers, allow retail customers to better evaluate the recommendations received, improve retail customer protection when

[833] *See* Exchange Act Rule 17a–4(b)(4); SIFMA August 2018 Letter; Edward Jones Letter; Prudential Letter.

[834] *See* Exchange Act Rule 17a–4(e)(7).

[835] *See* Relationship Summary Adopting Release.

[836] *See* Cetera August 2018 Letter; SIFMA August 2018 Letter; HD Vest Letter (recommending that the Commission adopt a 24-month implementation period); Northwestern Mutual Letter; IRI Letter (recommending that the Commission adopt an 18-to-24-month implementation period); CCMC Letters; AXA Letter (recommending that the Commission adopt at least an 18-month implementation period); ACLI Letter; TIAA Letter (recommending that the Commission adopt an 18-month implementation period).

[837] *See* Raymond James Letter (recommending that the Commission adopt a 12–18-month implementation period).

[838] *See* footnote 809 and accompanying text.

[839] *See infra* footnote 846 and accompanying text.

receiving recommendations from broker-dealers, and, ultimately, reduce agency costs [840] and other costs. Importantly, Regulation Best Interest is designed to preserve, to the extent possible, (1) access and choice for investors who may prefer the transaction-based model that broker-dealers generally provide, or the fee-based model that investment advisers generally provide, or a combination of both types of arrangements, and (2) retail customer choice of the level and types of services provided and the securities available. For example, retail customers who intend to buy and hold a long-term investment on a non-discretionary basis may find that paying a one-time commission to a broker-dealer who recommends such an investment is more cost effective than paying an ongoing advisory fee to an investment adviser merely to hold the same investment.[841] Retail customers who would prefer advisory accounts but have not yet accumulated sufficient assets to qualify for investment advisory accounts, which may require customers to have a minimum amount of assets, may similarly benefit from recommendations from broker-dealers. Other retail customers who hold a variety of investments, or prefer different levels of services from financial professionals, may benefit from having access to both brokerage and advisory accounts.

The Commission is mindful of the costs imposed by, and the benefits obtained from our rules. Whenever the Commission engages in rulemaking under the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest. Section 3(f) of the Exchange Act also requires the Commission to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.[842] Also, when making rules pursuant to the Exchange Act, S the Commission is required under Section 23(a)(2) to consider, among other matters, the impact any rule would have on competition and is prohibited from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[843] The following analysis considers, in detail, the economic effects that the Commission believes are likely to or may result from Regulation Best Interest. The analysis includes consideration of the benefits and costs to retail investors and broker-dealers, and also takes into account the broader implications of Regulation Best Interest for efficiency, competition, and capital formation.

Where possible, the Commission has sought to quantify the likely economic effects of Regulation Best Interest. The Commission is providing both a qualitative assessment and quantified estimates of the potential effects of Regulation Best Interest, where feasible. The Commission has incorporated data and other information provided by commenters to assist it in the analysis of the economic effects of Regulation Best Interest.[844] However, as explained below in more detail, because the Commission does not have, has not received, and, in certain cases, does not believe it can reasonably obtain data that may inform on certain economic effects, the Commission is unable to quantify certain economic effects. The Commission further notes that even in cases where it has some data or it has received some data regarding certain economic effects, the quantification of these effects is particularly challenging due to the number of assumptions that it would need to make to forecast how broker-dealers will respond to Regulation Best Interest, and how those responses will, in turn, affect the broader market for investment advice and the retail customers' participation in financial markets.

2. Broad Economic Considerations

Investors generally derive utility from consuming goods and services over their lifetime and from bequeathing wealth to others.[845] The amount of goods and services that an investor can consume or the amount of wealth the investor can bequeath is limited by the value of the resources available to the investor over his or her lifetime. These resources generally vary across market and economic conditions and over time. An investor generally seeks to allocate his or her resources across market and economic conditions and over time to achieve the highest expected utility possible over his or her lifetime. For example, an investor may decide to save, and therefore allocate, a proportion of his or her wages to maximize his or her expected utility from bequeathing wealth toward his or her children's future education.

Capital markets facilitate this allocation and reallocation of resources. An investor can allocate available resources across financial assets available to them in the capital markets, such that these resources become available to the investor at the times, and in the market and economic conditions, when he or she needs them. There may be many combinations of financial assets or investment strategies that achieve an investor's allocation goals, but each of these strategies may not necessarily provide the investor with the same benefits or cause the investor to bear the same costs. The expected benefit of allocating resources to an investment strategy depends on the expected utility to the investor from the expected payoff of the strategy and from whether this strategy pays off in the market and economic conditions and at the times that the investor cares about. Importantly, the various costs of allocating resources to any strategy reduce the resources available for consumption and saving.

A rational investor seeks out investment strategies that are *efficient* in the sense that they provide the investor with the highest possible expected net benefit, in light of the investor's investment objective that maximizes expected utility.[846] From the discussion above, an efficient investment strategy may depend on the investor's utility from consumption, including: (1) His or her risk tolerance; (2) time available for the funds to be invested, and not consumed; (3) the resources that the investor has currently available (*e.g.,* current wealth) or anticipates to become available at some point in the future (*e.g.,* future income); and (4) the cost to the investor of implementing the strategy. An investor's efficient investment strategy may change over time because the investor's preferences, as well as market conditions and investment performance, may change over time.

In general, a typical investor may not have the knowledge or the time to identify efficient strategies on his or her own. In addition, investors may be limited in their access to information and their human computational capacity when evaluating choices.[847] As

[840] *See infra* footnote 855 and accompanying text.

[841] *See infra* footnote 1353 and accompanying text.

[842] *See* 15 U.S.C. 77b(b) and 15 U.S.C. 78c(f).

[843] *See* 15 U.S.C. 78w(a)(2).

[844] *See infra* Section III.A.3.

[845] *See, e.g.,* Irving Fisher, Theory of Interest, as Determined by Impatience to Spend Income and Opportunity to Invest it (1930).

[846] *See, e.g.,* Andreu Mas-Colell, Michael D. Whinston, & Jerry R. Green, Microeconomic Theory (1995), specifically Chapter 10: Competitive Markets for a discussion of efficient allocations of resources.

[847] *See, e.g.,* Herbert A. Simon, *A Behavioral Model of Rational Choice,* 69 Q. J. Econ. 99 (1955) for one of the first works on bounded rationality.

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an alternative to attempting to identify efficient strategies on his or her own, an investor may solicit advice from financial professionals.

While there are many types of financial professionals[848] that can provide advice related to a retail customer's finances, we focus here (and in Regulation Best Interest) on a type of professional that retail customers commonly access, namely broker-dealers and their associated persons.

A broker is any person engaged in the business of effecting transactions in securities for the account of others.[849] A dealer is any person engaged in the business of buying and selling securities for its own account, through a broker or otherwise.[850] Within the scope of these definitions, a "broker-dealer" (or, a firm that fits both definitions) may offer a wide variety of services to retail customers. These services include buying and selling securities for the retail customer as well as providing limited personalized investment advice in the form of recommendations of whether or not to engage in securities transactions or investment strategies involving securities.[851]

Federal securities laws and SRO rules govern broker-dealers' conduct of business. Among other things, they require that a broker-dealer or associated person "have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is *suitable* for the customer, based on the information obtained through the reasonable diligence of the [firm] or associated person to ascertain the customer's investment profile." [852] While a suitable recommendation must take into account the elements of a retail customer's investment profile that make securities transactions or an investment strategy efficient for that particular retail customer, this requirement for suitability may not lead to an efficient result for the retail customer.

The efficiency of a recommendation to a retail customer may depend on: (1) The menu of securities transactions and investment strategies the broker-dealer or its associated persons considers and makes available to the retail customer; (2) the return distribution and the costs of these securities transactions and strategies; (3) the associated person's understanding of these investment options and the retail customer's objectives, such as the retail customer's risk tolerance and time preference; and (4) the retail customer's resource constraints.

A recommendation provided by an associated person of the broker-dealer may be influenced by the conflicts of interest that the associated person may have or the conflicts of interest that the broker-dealer may have at the time of the recommendation. These conflicts can arise as a result of how broker-dealers generate revenue from various securities or investment strategies that they make available to retail customers and how broker-dealers compensate their associated persons for providing recommendations to retail customers. In the United States, broker-dealers may earn transaction-based compensation that is commonly paid either directly by the retail customer (*e.g.,* commissions and markups or markdowns) or indirectly through the investment sponsor (*e.g.,* 12b–1 fees or revenue sharing). Broker-dealers may compensate their associated persons that provide recommendations to retail customers with a portion of the commissions and markups or markdowns these persons generate through their recommendations. Such financial incentives can vary depending on the investment product line, account type, or other factors (*e.g.,* amount of customer assets brought into the broker-dealer or revenue generated from customer accounts).

A retail customer generally chooses to accept or reject a recommendation supplied by the associated person of the broker-dealer.[853] Some retail customers may base their decisions on an assessment of whether the recommendations they receive would result in securities transactions or investment strategies that are efficient for them. These customers' assessment may depend on factors such as their perception of the associated person's ability to properly understand and account for the customer's objectives, any information they have about the associated person's or firm's conflicts of interest with respect to that recommendation, and the extent to which these conflicts are expected to result in less than efficient recommendations for the retail customer. However, other retail customers may rely in full or in part on factors less directly related to the recommendation at hand. Instead, they might rely on factors such as their level of trust with the associated person or firm, and in certain circumstances might be inclined to simply accept all of the associated person's recommendations without evaluating for themselves whether the recommendations are efficient.[854]

As noted above, broker-dealers or their associated persons may have conflicts of interest that could influence their recommendations to retail customers at the time when they are provided.

A retail customer's choice to accept a particular recommendation often directly affects the compensation that an associated person or broker-dealer itself receives. For example, an associated person may receive greater compensation from selling certain securities or strategies relative to other securities or strategies. Differences in compensation across the securities or strategies offered by a broker-dealer may add complexity to an associated person's incentives and may create conflict between the interests of the associated person, who desires to maximize his or her compensation, and the interests of the retail customer, who expects the recommended transaction to be efficient for him or her.

In general, this conflict of interest may result in a broker-dealer recommending securities or investment strategies that are less efficient for the retail customer. For instance, the recommended securities or strategies may be enhancing the associated person's compensation at the expense of the retail customer. Put another way, because of the financial incentives, broker-dealers and their associated

See also Richard H. Thaler, *Behavioral Economics: Past, Present, and Future,* 106 Am. Econ. Rev. 1577 (2016) for a discussion of the evolution of bounded rationality in economics.

[848] The list of financial professionals that can provide advice related to a retail customer's finances includes broker-dealers and their associated persons, investment advisers, banks, and insurance agents.

[849] *See* Section 3(a)(4)(A) of the Securities Exchange Act.

[850] *See* Section 3(a)(5)(A) of the Securities Exchange Act.

[851] We focus our discussion on recommendations that are the focus of Regulation Best Interest but note that broker-dealers and their representatives provide a wide variety of "agency services" as described in footnote 1 of the Proposing Release. *See, e.g.,* 913 Study. *See also infra* Section III.B.1.a.

[852] *See* FINRA Rule 2111 (Suitability); *see also infra* Section III.B.2.b.

[853] Note, however, that a retail customer may receive automated advice without involvement of an associated person of the broker-dealer. For example, a broker-dealer may generate recommendations through an asset allocation model. FINRA Regulatory Notice 12–25; *See also* FINRA Report on Digital Investment Advice (Mar. 2016).

[854] *See, e.g.,* the discussion on investor trust in the markets for financial advice in Section III.B.4.a, *infra. See also* Gross Letter. *See also* Roman Inderst & Marco Ottaviani, *How (not) to pay for advice: A framework for consumer financial protection,* 105 the J. Fin. Econ 393 (2012) for a discussion of the economic surplus extracted by broker-dealers that provide recommendations to retail customers, and how this surplus relates to the factors that determine a retail customer's decision to accept or reject a recommendation.

persons may be motivated to recommend certain types or quantities of securities or strategies, and those recommendations may place the interests of the broker-dealer or its associated persons ahead of the interests of the retail customer, which may not result in the retail customer maximizing his or her expected net benefit. An inefficient recommendation may lead to various results for the retail customer, including inferior investment outcomes, such as risk-adjusted expected returns that are lower relative to other similar investments or investment strategies.

A retail customer may accept a recommendation that is less efficient if he or she is unable to assess correctly the efficiency of the recommendation.

The difference between the net benefit to the retail customer from accepting a less than efficient recommendation about a securities transaction or investment strategy, where the associated person or broker-dealer puts its interests ahead of the interests of the retail customer, and the net benefit the retail customer might expect from a similar securities transaction or investment strategy that is efficient for him or her, as defined above, is an *agency cost.*[855] As discussed in the Proposing Release and above, this agency cost arises because of the conflicts of interest of the broker-dealer and its associated persons, and the differences between the information sets available to the broker-dealer and the retail customer at the time of the recommendation.

In certain principal-agent relationships, the principal may be able to reduce the agency costs that he or she is facing in various ways, including by structuring the agent's compensation in a way that better aligns the interest of the agent with that of the principal.[856] A feature of the agency relationship between a retail customer (the principal) and a broker-dealer (the agent) that is common in many principal-agent relationships (including the investment adviser-client relationship) is that the retail customer generally does not have full transparency about the agent's compensation for providing advice and the sources of the agent's compensation. Thus, the retail customer, through the decision to accept or reject a recommendation received, has generally limited understanding of and control over the compensation that the broker-dealer and its associated person obtains from providing the recommendation. These limitations restrict the retail customer's ability to reduce the agency costs that he or she is facing.

We also recognize that even if the retail customer were to have full transparency about the broker-dealer's and its associated person's compensation from providing advice, the retail customer's ability to reduce the agency costs may be constrained in other ways. For example, if the menu of securities from which the associated person of the broker-dealer offers recommendations is limited, the retail customer's and the associated person's ability to identify and select a more efficient investment may be constrained.

Different retail customers may face different agency costs depending on whether they base their decision to act on a recommendation on an assessment of the efficiency of the recommendation. Specifically, as noted above, a retail customer that evaluates and uses a recommendation received based on an assessment about the efficiency of that recommendation may be more successful in identifying and controlling, albeit in a limited fashion, the compensation that the broker-dealer and its associated person receive from the recommendation—such as by being more likely to reject a less than efficient recommendation—compared to a retail customer that makes this decision without forming an assessment of the efficiency of the recommendation. Thus, the agency costs may be higher for those retail customers that make their decision of whether to act on a recommendation received without an assessment of the efficiency of the recommendation.

While the discussion above focuses on the actions that the principal (*i.e.,* the retail customer) can take to reduce the agency costs that he or she is facing, the agent can also take actions to reduce the agency costs to the principal. For example, in the agency paradigm, when the principal may forgo sharing a potentially large surplus with the agent because of the high agency costs, the agent may have an incentive to structure the terms of the relationship in a way that reduces the agency costs to the principal.[857] In the agency relationship between a retail customer and a broker-dealer, given the features of the compensation that the broker-dealer and its associated persons receive for providing recommendations (*e.g.,* this compensation does not depend on the value of the assets in a principal's account), the broker-dealer and its associated persons may not have sufficient incentive to take actions voluntarily that would reduce agency costs to the retail customer, such as voluntarily increasing transparency with respect to compensation.[858]

Although the dynamics of the agency relationship between a retail customer and a broker-dealer may not cause the broker-dealer to take steps to increase transparency, competitive factors in the broker-dealer industry such as steps toward transparency taken by other broker-dealers may cause increased transparency in that relationship. Competitive dynamics are more effective in areas where comparisons can be more easily made. For example, in the market for mutual funds —particularly index funds— comparability and competition, among other factors, have driven down fees significantly.[859]

[855] *See, e.g.,* Michael C. Jensen, and William. H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. Fin. Econ. 305 (1976) for a more general discussion of agency costs.

[856] *See, e.g.,* Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem,* 63 Am. Econ. Rev. (Papers & Proc.) 134 (1973).

[857] *See, e.g.,* Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration,* 94 J. Pol. Econ. 691 (1986) for a discussion of the actions that agents can take to reduce the agency costs to the principal in the context of the relationship between an owner (the principal) and a manager (the agent) when the agent that has a valuable investment opportunity that can only be financed by the principal.

[858] Limited transparency with respect to how broker-dealers and their associated persons are compensated from recommending a security and what constrains their menus of securities may make it difficult for retail customers to grasp the size of the agency costs that they are facing at the time when they receive the recommendation. As a result, this limited transparency may allow broker-dealers and their associated persons to extract informational rents (*i.e.,* in the context of a transaction, compensation in excess of what is competitively feasible that stems solely from the informational advantage of one party over another) from the retail customers when providing recommendations. The adviser business model also has its own set of conflicted incentives to gather assets (based on AUM fees) or maximize the time that it takes to complete a job (if paid an hourly fee). Dual-registrants also have an incentive to recommend the type of account that is most profitable to the firm. *See* AFL–CIO April 2019 Letter. *See also* Morgan Lewis Letter (describing investment adviser compensation and conflicts disclosure in Form ADV); Bruce Ian Carlin & Gustavo Manso, *Obfuscation, Learning, and the Evolution of Investor Sophistication,* 24 Rev. Fin. Stud. 754 (2011) for a discussion about the relationship between informational rents and the opacity of recommended investments (*e.g.,* securities with complex payoff structures).

[859] Comparability among index funds that follow the same market index is facilitated in part by their passive style of investing. Actively managed funds that follow the same investment strategy can show different performance due to, among other things, the "skill" of the manager of outperforming the market (or any other benchmark). This skill is unobservable and generally hard to measure, which makes comparisons across actively managed funds difficult. In contrast, comparisons across index funds that follow the same market index and that have passive investment styles are based more on observable variables, such as fees, rather than unobservable variables, such as managerial skill. In

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While we do not have evidence to establish the degree to which broker-dealers can extract large informational rents from retail customers under the current legal and regulatory regime that governs the broker-dealers' standard of conduct, the existing agency costs of the relationship between the retail customer and the broker-dealer would likely be larger, absent the current legal and regulatory regime.[860] In general, standards and regulation are effective means of reducing agency costs when principals (*e.g.*, retail customers) and agents (*e.g.*, broker-dealers) cannot reduce the agency costs on their own by negotiating to address the market frictions in their relationship through mechanisms available to them, such as bilateral contracting[861] or "side payments." [862]

Regulation Best Interest enhances the current standard of conduct for broker-dealers and codifies it in an Exchange Act rule. Regulation Best Interest is designed to: (1) Enhance the current standard of conduct applicable to broker-dealers and associated persons when they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities; (2) reduce conflicts of interest that currently exist between retail customers and broker-dealers and their associated persons; and (3) reduce information asymmetries that currently limit the ability of retail customers to evaluate the efficiency of recommendations they receive from broker-dealers and their associated persons. In each of these three ways, Regulation Best Interest is designed to reduce the agency costs in the relationship between broker-dealers and their retail customers, including in situations where the existing legal and regulatory regime that governs broker-dealers' standard of conduct has had limited effectiveness.

3. Comments on Market Failure of the Principal-Agent Relationship and Quantification; Comments That the Broker-Dealer, Commission-Based Model Should Be Severely Restricted or Eliminated

The economic analysis in the Proposing Release characterized the relationship between a retail customer and a broker-dealer as one between a principal (the retail customer) and an agent (the broker-dealer).[863] The analysis noted that the potential conflict between interests and the differences between the information sets available to the agent and the principal may result in agency costs. It further noted that the inability of the broker-dealers and retail customers to overcome the market frictions underlying these agency costs may result in inefficient allocations of resources. An inability of the principal and the agent to efficiently negotiate around the frictions that produce agency costs and take actions that would increase the efficiency of their allocations is what economists refer to as a "market failure" of the principal-agent relationship,[864] generally, and of the agency relationship between the retail customer and the broker-dealer, specifically.[865]

The analysis in the Proposing Release recognized that while the Commission cannot provide a quantified estimate of the magnitude of this agency cost, the existence of these costs and their persistence justifies regulatory intervention.[866]

A number of commenters questioned this approach. Certain of these commenters stated that the Commission needs to more fully identify the market failure that needs to be addressed, and certain commenters stated that the Commission did not provide a quantitative assessment of the severity of the market failure that would prompt the need for regulatory intervention.[867] We address these concerns below.

With respect to the issue of appropriately identifying the market failure, one commenter questioned whether the relationship between the retail customer and the broker-dealer is a principal-agent relationship.[868] This commenter stated that in many instances, a broker-dealer's provision of recommendations to a retail customer resembles an arm's length transaction (*e.g.*, purchasing a car) that benefits the more informed broker-dealer at the expense of the less informed retail customer. This commenter disagreed with the Commission's broader view that the market failure stems from the agency costs of the relationship between

this context, disclosure that is more salient with respect to these observable variables may facilitate comparisons across index funds.

[860] *See, e.g.*, Matthew L. Kozora, *Security Recommendations and the Liabilities of Broker-Dealers* (U.S. Sec. & Exch. Comm'n, Working Paper, May 1, 2016), *available at https://www.sec.gov/files/Kozora_BD-Liability_05-2016.pdf*, which provides evidence from investor awards in FINRA arbitrations that the author interprets as indicative of informational rents being nonzero. *See also* our more comprehensive discussion in Section III.B.3.c, *infra*, about potential investor harm associated with investment advice, including from potential informational rents.

[861] *See* Proposing Release at 21643.

[862] Another way principals and agents negotiate around market frictions is through "side payments." In a transaction between two parties, a side payment is a monetary exchange from one party to another that is not part of the transaction. This mechanism is discussed in the literature on bilateral externalities, which focuses on how the actions of one party can affect the well-being of the other party. This mechanism also applies to the relationship between a broker-dealer and a retail customer because the action taken by a broker-dealer, namely providing a recommendation, may affect the well-being of the retail customer receiving that recommendation. In the literature on bilateral externalities, if the party taking these externality actions is unconstrained, the allocation of resources across the two parties may be inefficient. However, in certain circumstances, the parties can avoid this inefficient outcome through side payments that neutralize the effect of the externality on the allocations. *See, e.g.*, Mas-Colell et al. (1995), *supra* footnote 846, specifically Part 3: Market Equilibrium and Market Failure for a discussion of bilateral externalities.

[863] *See* Proposing Release at 21629–21631.

[864] *See, e.g.*, Mas-Colell et al. (1995), *supra* footnote 846.

[865] In general, because frictions such as asymmetric information are ever present, all markets and agency relationships have some degree of market failure.

[866] *See* Proposing Release at 21631.

[867] *See, e.g.*, CFA August 2018 Letter at 105, noting that "[c]orrectly diagnosing the problem requires identifying and analyzing the market failure that has occurred in investment advice securities markets, as well as assessing the significance of that problem"; *See also, e.g.*, Letter from Charles Cox, Former SEC Chief Economist, et al. (Feb. 6, 2019) ("Former SEC Senior Economists Letter") at 2, noting that "the Commission confronts important questions about advisers balancing their own compensation against the effect of that compensation on the customer's expected returns. We wonder if the extreme asymmetry of information and financial sophistication between advisers and many of their clients constitutes a market failure that the April proposals are intended to ameliorate." In addition, the Former SEC Senior Economists Letter raised three main concerns with the economic analysis in the Proposing Release: (1) The discussion of the potential problems in the customer-adviser relationship was incomplete and identified other features of the market for ongoing retail investment advice that might be problematic; (2) there was inadequate discussion and analysis of the existing economic literature on financial advice; and (3) there were questions of whether the disclosure requirements in the Proposing Release would provide meaningful information for customers. The economic analysis addresses these concerns. For instance, with respect to (1), Section III.A.2 provides a more in depth discussion of the potential problems that may arise when a broker-dealer provides recommendations to a retail customer. With respect to (2), Section III.B.3 engages more fully with the economic literature on financial advice. Finally, with respect to (3), Sections III.B.4, III.C.2, and III.C.4 provide discussions on the effectiveness of the disclosure requirements of Regulation Best Interest.

[868] *See* CFA August 2018 Letter at 107, noting that "[t]he Commission's economic analysis gets off to a faulty start by mischaracterizing, or at least over-simplifying, the broker-customer 'advice' relationship, as a principal-agent relationship. While there are certainly instances where a broker and its customer can exhibit features of a bona fide principal-agent relationship—for example when executing a customer's order—it's not clear that, in the context of receiving investment recommendations, those same characteristics are present. Certainly, the brokerage industry expressly refutes this characterization, having argued successfully in the Fifth Circuit that brokers engage in nothing more than an arm's length commercial sales transaction, no different from a car dealer soliciting interest in inventory."

a broker-dealer and a retail customer,[869] and instead stated that the market failure is due to conflicts of interest caused by the way broker-dealers and their associated persons are generally compensated for providing recommendations to retail customers.[870] Similarly, another commenter stated that the Commission failed to discuss how the current compensation practices associated with providing recommendations to retail customers creates incentives for the broker-dealer and its associated persons to favor one securities transaction or investment strategy over another when making recommendations to retail customers.[871] This commenter further questioned whether the information asymmetry and the discrepancy in the level of financial sophistication between broker-dealers and their retail customers constitute a market failure.[872] One commenter noted that the poor performance of actively managed funds that are being recommended by broker-dealers to small retail customers reflects a principal-agent problem that causes an "enormous" wealth transfer from retail customers to the financial industry, including broker-dealers.[873] This commenter stated that this problem arises because of the broker-dealer's commission-based compensation for providing recommendations and because of the information asymmetries between the broker-dealer and the retail customer at the time of the recommendation.[874] This commenter also stated that recommendations subject to conflicts of interest may have no value for retail customers.[875]

As an initial matter, in response to comments regarding the need to discuss fully the existing market failure, it is important to recognize that the Commission has been studying and carefully considering the issues related to the broker-dealer-client relationship and the related standard of conduct for broker-dealers for many years, which led to the development of the Proposing Release and the economic analysis therein.[876] In light of the comments on the Proposing Release, the extensive outreach by the Commission and staff, as well as investor testing, the Commission has more specifically and fully described the relationship between the broker-dealer and the client, the related market failure, and the resulting potential economic effects of Regulation Best Interest in addressing the market failure.[877]

The Commission continues to believe that agency costs are at the root of existing allocative inefficiencies in the market for broker-dealer advice. Moreover, this economic analysis recognizes that a proper understanding of the economic fundamentals of an investor's decision to allocate resources across market and economic conditions and over time is central to identifying the frictions that cause inefficiencies in the agency relationship between a broker-dealer and a retail customer.

In response to the commenter that stated that in a principal-agent relationship agents do not receive compensation from third parties (*e.g.*, investment sponsors), the Commission notes that the compensation that the investment sponsor provides to the agent is ultimately funded by the principal (*i.e.*, the retail customer).[878] In addition, in response to the commenter's concern that a broker-dealer's provision of recommendations to retail customers resembles an arm's length transaction that is "no different from a car dealer soliciting interest in inventory,"[879] the Commission notes that under the current regulatory regime broker-dealers and their associated persons are subject to a suitability standard of conduct that has been interpreted to "be consistent with [the] customer's best interests."[880] In contrast, in an arm's length transaction, the parties involved are generally not subject to a standard of conduct that would constrain the more informed party from acting solely in its own interest.[881] Finally, in response to the commenter's concern with respect to the identification of the market failure,[882] the Commission notes that while conflicts of interest arise in many types of transactions, in certain instances the parties involved can negotiate an arrangement between themselves that would reduce the effect of conflicts of interest on the allocation of resources across the parties and improve the efficiency of this allocation. The Commission further notes that agency costs may deter the parties from engaging in privately negotiated arrangements that would improve the efficiency of the allocation of resources between the parties. From this perspective, the Commission believes that it is the agency costs rather than the conflicts of interest themselves that should be viewed as the source of the market failure.

In response to the commenter that noted that the Commission did not discuss how the compensation received by the broker-dealer and its associated persons creates incentives to favor one security or investment strategy over another when making recommendations to retail customers,[883] the Commission has incorporated into this economic analysis a detailed discussion of the incentives created by the current compensation practices associated with providing recommendations to retail customers.[884] In addition, in response to the commenter's concerns about whether the information asymmetry and the discrepancy in the level of financial sophistication between retail customers and a broker-dealer and its associated persons are the source of market failure, the Commission notes that this economic analysis establishes a more

[869] *See* CFA August 2018 Letter at 108, noting that "[t]ypically, principal-agent relationships don't involve third party payments to the agent, which can adversely affect the level of loyalty the agent provides to the principal."

[870] *See* CFA August 2018 Letter at 107, noting that the Commission "fails to acknowledge that conflicts of interest are a real problem that result in real harm to investors [. . .]" and "[. . .] the Release fails to make clear whether the Commission is truly seeking to address the underlying problem of conflicts' harmful impact on investors."

[871] *See* Former SEC Senior Economists Letter at 3, noting that "[n]owhere does the EA emphasize that an adviser's compensation provides numerous opportunities for her to favor one investment over another on the basis of the compensation it pays to her or to her firm."

[872] *See* Former SEC Senior Economists Letter at 2. *See also supra* footnote 867 that describes in more detail the concerns raised by this commenter.

[873] *See* Letter from Monique Morrissey, Economist and Heidi Shierholz, Senior Economist and Director of Policy, EPI (Aug. 7, 2018) ("EPI Letter") at 6, noting that "[i]n an equilibrium with knowledgeable investors, we would expect returns from active and passive strategies to be equal. The fact that actively-managed funds marketed to small investors tend to perform poorly reflects a market distortion—naiveté—or a 'principal-agent problem' in economics parlance, which results in enormous transfers from investors to the financial industry."

[874] *See* EPI Letter at 2, noting that "[c]onflicts of interest between buyers and sellers are commonplace. Many salesmen, including brokers and car dealers, are paid on commission. However, it has long been recognized that markets for professional advice are different from markets for automobiles because information asymmetries are inherent in these transactions."

[875] *See* EPI Letter at 8, noting that "the SEC never considers that 'advice' offered may not just be of lower quality than expected, but worse than no advice at all" and that "much of the 'advice' provided by broker-dealers not only lacks value, but is actually harmful, steering savers to higher-cost products and costly services that will reduce their future standard of living compared to how they would fare in the absence of this 'advice.' This may be true whether or not, in the absence of conflicted 'advice,' investors would have availed themselves of more paid or free advice from more impartial sources."

[876] *See* Proposing Release at 21579–21583.

[877] *See supra* Section III.A.2.

[878] *See supra* footnote 869.

[879] *See supra* footnote 868.

[880] *See infra* footnote 979 and accompanying text.

[881] However, in certain markets, there may be market mechanisms in place that would prevent the more informed party to a transaction from acting solely in its own interest.

[882] *See supra* footnote 870.

[883] *See supra* footnote 871.

[884] *See infra* Section III.C.4.

clear link between bounded rationality, including access to information and financial literacy of retail customers, and agency costs, and reflects our conclusion that the agency costs are at the root of the market failure.

The Commission further notes that the so-called "informational rent" that a broker-dealer may be incentivized to extract from a retail customer to take advantage of the information asymmetry or the discrepancy in the level of financial sophistication is one component of the agency costs associated with the relationship between a retail customer and a broker-dealer. In addition, the Commission notes that the evidence on the size of the agency costs associated with such informational rents is limited.[885] This evidence is not generally supportive of a commenter's assessment that the wealth transfer from retail customers to broker-dealers is "enormous."[886] The Commission agrees with this commenter, who stated that the way broker-dealers are compensated for providing recommendations and the information asymmetry between retail customers and broker-dealers are important determinants of the agency costs. However, based on the evidence discussed below, the Commission disagrees with this commenter's assessment that the advice provided by the associated persons of the broker-dealer has no value.[887]

With respect to the issue of measuring the severity of the market failure, some commenters stated that the Commission failed to take into account existing academic literature that provides evidence of investor harm caused by accepting advice from the associated persons of the broker-dealer. A subset of these commenters believed that the evidence provided in some of these academic studies is compelling and that the Commission should use it to quantify the severity of the market failure.[888] One commenter also urged the Commission to supplement the academic evidence on investor harm with evidence from data available to the Commission from regulatory oversight.[889]

In response to these comments, the Commission maintains that the existence of misconduct that commenters requested the Commission to document does not render the approach taken in Regulation Best Interest irrational, inappropriate, or unreasonable, nor does it suggest that an alternative approach would be more effective in fulfilling the Commission's mission. The Commission is aware and understands the concerns raised by the commenters with regards to the evidence on investor harm and the extent to which such evidence can inform on our understanding of the severity of the market failure in the market for broker-dealer advice. As discussed in the Proposing Release and reiterated in this economic analysis, the Commission believes that retail investors can be harmed when they accept recommendations from a broker-dealer that places the financial or other interest of the broker-dealer or its associated persons ahead of the interests of the retail customers. In addition, this economic analysis engages more fully with the economic literature on financial advice and considers these studies in analyzing the costs and benefits associated with Regulation Best Interest.[890]

B. Economic Baseline

This section discusses, as it relates to this rulemaking, the current state of the broker-dealer and investment adviser markets; the current regulatory environment and market practices surrounding the provision of recommendations by broker-dealers; evidence on the potential value and harm of investment advice; and how issues related to trust, financial literacy, and disclosure effectiveness affect conflicts between investors and financial professionals. The economic baseline has been revised and expanded relative to the Proposing Release to address comments, discussed more fully below.

1. Providers of Financial Services[891]

a. Broker-Dealers

Regulation Best Interest will affect the market for broker-dealer services, including firms that are dually registered as broker-dealers and investment advisers[892] and broker-dealers affiliated with an investment adviser.[893] The market for broker-dealer services encompasses a small set of large and medium sized broker-dealers and thousands of smaller broker-dealers competing for niche or regional segments of the market.[894] The market for broker-dealer services includes many different markets for a variety of services, including (1) managing orders for customers and routing them to various trading venues; (2) providing advice to customers that is in connection with and reasonably related to their primary business of effecting securities transactions;[895] (3) holding retail customers' funds and securities; (4) handling clearance and settlement of trades; (5) intermediating between retail customers and carrying/clearing brokers; (6) dealing in corporate debt and equities, government bonds, and municipal bonds, among other securities; (7) privately placing securities; and (8) effecting transactions in mutual funds that involve transferring funds directly to the issuer. Some broker-dealers may specialize in just one narrowly defined service, while

[885] *See supra* Section III.A.2 and *infra* Section III.B.3.

[886] *See supra* footnote 873.

[887] *See infra* Section III.B.3.b.

[888] *See, e.g.,* CFA August 2018 Letter; EPI Letter; AARP August 2018 Letter; Better Markets August 2018 Letter; Former SEC Senior Economists Letter.

[889] *See* CFA August 2018 Letter at 112. This commenter suggested that we present additional information about the existence and frequency of the potential harm to investors "that results from conflicted brokerage 'advice'," which may collectively be seen as misconduct by financial professionals.

[890] *See infra* Section III.B.3.c.

[891] In addition to broker-dealers and Commission-registered investment advisers discussed below in the baseline, there are a number of other entities, such as state-registered investment advisers, commercial banks and bank holding companies, and insurance companies, which also provide financial advice services to retail customers; however, because of unavailability of data, the Commission is unable to estimate the number of some of those other entities that are likely to provide financial advice to retail customers as well as their size and the scope of services they provide. A number of broker-dealers (*see infra* footnote 899) have non-securities businesses, such as insurance or tax services. As of December 2018, there were approximately 17,300 state-registered investment advisers. The Department of Labor in its Regulatory Impact Analysis identifies approximately 398 life insurance companies that could provide advice to retirement investors. *See infra* footnote 1002.

[892] Not all firms that are dually registered as an investment adviser and a broker-dealer offer both brokerage and advisory accounts to retail investors. For example, some dually registered firms offer advisory accounts to retail investors but offer only brokerage services, such as underwriting services, to institutional clients. For purposes of the discussion of the baseline in this economic analysis, a dually registered firm is any firm that is dually registered with the Commission as an investment adviser and a broker-dealer.

[893] Some broker-dealers may be affiliated with investment advisers and not dually registered. From Question 10 on Form BD, 2,098 (55.7%) broker-dealers report that, directly or indirectly, they control, are controlled by, or are under common control with an entity that is engaged in the securities or investment advisory business. Comparatively, 2,421 (18.2%) SEC-registered investment advisers report an affiliate that is a broker-dealer in Section 7A of Schedule D of Form ADV, including 1,878 SEC-registered investment advisers that report an affiliate that is a registered broker-dealer. Approximately 77% of total regulatory AUM are managed by the 2,421 SEC-registered investment advisers.

[894] *See* Risk Management Controls for Brokers or Dealers with Market Access, Securities Exchange Act Release No. 63241 (Nov. 3, 2010) [75 FR 69791, 69822 (Nov. 15, 2010)]. For simplification, we present our analysis as if the market for broker-dealer services encompasses one broad market with multiple segments, even though, in terms of competition, it could also be discussed in terms of numerous interrelated markets.

[895] *See* Solely Incidental Interpretation.

others may provide a wide variety of services.

As of December 2018, there were approximately 3,764 registered broker-dealers with over 140 million customer accounts. In total, these broker-dealers have over $4.3 trillion in total assets, which are total broker-dealer assets as reported on Form X–17a–5.[896] More than two-thirds of all brokerage assets and close to one-third of all customer accounts are held by the 17 largest broker-dealers, as shown in Table 1, Panel A.[897] Of the broker-dealers registered with the Commission as of December 2018, 563 broker-dealers were dually registered as investment advisers.[898] These firms hold over 90 million (63%) customer accounts. Approximately 539 broker-dealers (14%) report at least one type of non-securities business, including insurance, retirement planning, mergers and acquisitions, and real estate, among others.[899] Approximately 73.5% of registered broker-dealers report retail customer activity.[900]

Panel B of Table 1 is limited to the broker-dealers that report some retail investor activity. As of December 2018, there were approximately 2,766 broker-dealers that served retail investors, with over $3.8 trillion in total assets (89% of total broker-dealer assets) and almost 139 million (97%) customer accounts.[901] Of those broker-dealers serving retail investors, 452 were dually registered as investment advisers.[902] The number of broker-dealers that serve retail customers (*i.e.*, 2,766) likely overstates the number of broker-dealers that will be subject to Regulation Best Interest, because not all broker-dealers that serve retail investors provide recommendations to retail investors. We do not have reliable data to determine the precise number of broker-dealers that provide recommendations (and the extent to which broker-dealers that provide recommendations do so, as opposed to executing unsolicited trades), and as a result, we have assumed, for purposes of this Section III and Sections IV (Paperwork Reduction Act Analysis) and V (Final Regulatory Flexibility Act Analysis) that 2,766 broker-dealers will be subject to Regulation Best Interest.

TABLE 1—PANEL A: REGISTERED BROKER-DEALERS AS OF DECEMBER 2018 [903]

[Cumulative broker-dealer total assets and customer accounts] [904]

Size of broker-dealer (total assets)	Total number of BDs	Number of dually registered BDs	Cumulative total assets (billion)	Cumulative number of customer accounts [905]
>$50 billion	17	10	$2,879	40,550,200
$1 billion to $50 billion	114	23	1,363	96,037,591
$500 million to $1 billion	35	7	23	397,814
$100 million to $500 million	105	20	23	1,603,818
$10 million to $100 million	490	115	17	4,277,432
$1 million to $10 million	1,021	182	3.6	460,748
<$1 million	1,982	206	0.5	5,675
Total	3,764	563	4,309	143,333,278

[896] Assets are estimated by Total Assets (allowable and non-allowable) from Part II of the FOCUS filings (Form X–17A–5 Part II, *available at https://www.sec.gov/files/formx-17a-5_2.pdf*) and correspond to balance sheet total assets for the broker-dealer. The Commission does not have an estimate of the total amount of customer assets for broker-dealers. We estimate broker-dealer size from the total balance sheet assets as described above.

[897] Approximately $4.24 trillion of total assets of broker-dealers (98%) are at broker-dealers with total assets in excess of $1 billion. Of the 33 dual-registrants in the group of broker-dealers with total assets in excess of $1 billion, total assets for these dual-registrants are $2.32 trillion (54%) of aggregate broker-dealer assets. Of the remaining 99 broker-dealers with total assets in excess of $1 billion that are not dual-registrants, 91 have affiliated investment advisers.

[898] This number includes the number of broker-dealers who are also registered as state investment advisers. For purposes of the discussion of the baseline in this economic analysis, a dual-registrant is any firm that is dually registered with either the Commission or a state as an investment adviser and a broker-dealer. Excluding state registered advisers, there are 359 entities that are dually registered with the Commission as an investment adviser and a broker-dealer.

[899] We examined Form BD filings to identify broker-dealers reporting non-securities business. For the 393 broker-dealers reporting such business, staff analyzed the narrative descriptions of these businesses on Form BD, and identified the most common types of businesses: Insurance (202), management/financial/other consulting (99), advisory/retirement planning (71), mergers and acquisitions (70), foreign exchange/swaps/other derivatives (28), real estate/property management (30), tax services (15), and other (146). Note that a broker-dealer may have more than one line of non-securities business.

[900] The value of customer accounts is not available from FOCUS data for broker-dealers. Therefore, to obtain estimates of firm size for broker-dealers, we rely on the value of broker-dealers' total assets as obtained from FOCUS reports. Retail sales activity is identified from Form BR, which categorizes retail activity broadly (by marking the "sales" box) or narrowly (by marking the "retail" or "institutional" boxes as types of sales activity). We use the broad definition of sales as we preliminarily believe that many firms will just mark "sales" if they have both retail and institutional activity. However, we note that this may capture some broker-dealers that do not have retail activity, although we are unable to estimate that frequency.

[901] Total assets and customer accounts for broker-dealers that serve retail customers also include institutional accounts. Data available from Form BD and FOCUS data is not sufficiently granular to identify the percentage of retail and institutional accounts at firms.

[902] Excluding state registered advisers, there are 359 entities that are dually registered with the Commission as an investment adviser and a broker-dealer. Of the 31 dual-registrants in the group of retail broker-dealers with total assets in excess of $500 million, total assets for these dual-registrants are nearly $2.01 trillion (53%) of aggregate retail broker-dealer assets (Table 1, Panel B). Of the remaining 81 retail broker-dealers with total assets in excess of $500 million that are not dual-registrants, 76 have affiliated investment advisers.

[903] The data is obtained from FOCUS filings as of December 2018. Note that there may be a double-counting of customer accounts among, in particular, the larger broker-dealers as they may report introducing broker-dealer accounts as well in their role as clearing broker-dealers.

[904] In addition to the approximately 143 million individual accounts at broker-dealers, there are approximately 302,000 omnibus accounts (0.2% of total accounts at broker-dealers), with total assets of $32.1 billion, across all 3,764 broker-dealers, of which approximately 99% are held at broker-dealers with greater than $1 billion in total assets. *See also supra* footnote 897. Omnibus accounts reported in FOCUS data are the accounts of non-carrying broker-dealers with carrying broker-dealers. These accounts may have securities of multiple customers (of the non-carrying firm), or securities that are proprietary assets of the non-carrying broker-dealer. We are unable to determine from the data available how many customer accounts non-carrying broker-dealers may have. The data does not allow the Commission to parse the total assets in those accounts to determine to whom such assets belong. Therefore, our estimate may be under inclusive of all customer accounts held at broker-dealers.

[905] Customer Accounts includes both broker-dealer and investment adviser accounts for dual-registrants.

TABLE 1—PANEL B: REGISTERED RETAIL BROKER-DEALERS AS OF DECEMBER 2018

[Cumulative broker-dealer total assets and customer accounts]

Size of broker-dealer (total assets)	Total number of BDs	Number of dually registered BDs	Cumulative total assets (billion)	Cumulative number of customer accounts
>$50 billion	16	8	$2,806	40,545,792
$1 billion to $50 billion	75	18	990	91,991,118
$500 million to $1 billion	21	5	13	365,632
$100 million to $500 million	84	17	18	1,603,818
$10 million to $100 million	378	96	14	3,762,620
$1 million to $10 million	783	153	2.8	450,132
<$1 million	1,409	155	0.4	5,672
Total BDs [906]	2,766	452	3,844	138,724,784

Table 2 reports information on brokerage commissions,[907] fees, and selling concessions from the fourth quarter of 2018 for all broker-dealers, including dual-registrants.[908] We observe significant variation in the sources of revenues for broker-dealers, with large broker-dealers, on average, generating substantially higher levels of aggregate commission and fee revenues (on a nominal basis) than smaller broker-dealers. On average, broker-dealers, including those that are dually registered as investment advisers, earn about $5.1 million per quarter in revenue from commissions and nearly four times that amount in fees,[909] although the Commission notes that fees encompass various types of fees, not just fees for advisory services.[910] The level of revenues earned by broker-dealers (including dually registered firms) for commissions and fees increases with broker-dealer size, but also tends to be more heavily weighted toward commissions for broker-dealers with less than $10 million in assets and is weighted more heavily toward fees for broker-dealers with assets in excess of $10 million. For example, for the 114 broker-dealers with assets between $1 billion and $50 billion, average revenues from commissions are approximately $45 million, while average revenues from fees are approximately $225 million.[911]

In addition to revenue generated from commissions and fees, broker-dealers may also receive revenues from other sources, including margin interest, underwriting, research services, and third-party selling concessions, such as from sales of investment company ("IC") shares. As shown in Table 2, Panel A, these selling concessions are generally a smaller fraction of broker-dealer revenues than either commissions or fees, except for broker-dealers with total assets between $10 million and $100 million. For these broker-dealers, revenue from third-party selling concessions is the largest category of revenues and constitutes approximately 42% of total revenues earned by these firms.

Table 2, Panel B below provides aggregate revenues by revenue type (commissions, fees, or selling concessions from sales of IC shares) for broker-dealers delineated by whether the broker-dealer is also a dual-registrant. Broker-dealers dually registered as investment advisers have a significantly larger fraction of their revenues from fees compared to commissions or selling concessions, whereas broker-dealers that are not dually registered generate approximately 42% of their advice-related revenues as commissions and only 33% of their advice-related revenues from fees, although we lack granularity to determine whether advisory services, in addition to supervision and administrative services, contribute to fees at standalone broker-dealers.

TABLE 2—PANEL A: AVERAGE BROKER-DEALER REVENUES FROM REVENUE GENERATING ACTIVITIES [912]

Size of broker-dealer in total assets	N	Commissions	Fees [913]	Sales of IC shares
>$50 billion	17	$170,336,258	$414,300,268	$23,386,192
$1 billion–$50 billion	114	45,203,225	225,063,257	53,671,602
500 million–1 billion	35	8,768,547	30,141,270	5,481,248
100 million–500 million	105	12,801,889	33,726,336	16,610,013
10 million–100 million	490	3,428,843	8,950,892	9,092,971

[906] Total BDs includes all retail-facing broker-dealers, including those dual-registrants that have retail-facing broker-dealers.

[907] Mark-ups or mark-downs are not included as part of the brokerage commission revenue in FOCUS data; instead, they are included in Net Gains or Losses on Principal Trades, but are not uniquely identified as a separate revenue category.

[908] Source: FOCUS data.

[909] Fees, as detailed in the FOCUS data, include fees for account supervision, investment advisory services, and administrative services. Beyond the broad classifications of fee types included in fee revenue, we are unable to determine whether fees such as Rule 12b–1 fees, sub-accounting, or other such service fees (*e.g.*, payments by an investment company for personal service and/or maintenance of shareholder accounts) are included. The data covers both broker-dealers and dually registered firms. FINRA's Supplemental Statement of Income, Line 13975 (Account Supervision and Investment Advisory Services) denotes that fees earned for account supervision are those fees charged by the firm for providing investment advisory services where there is no fee charged for trade execution. Investment Advisory Services generally encompass investment advisory work and execution of client transactions, such as wrap arrangements. These fees also include fees charged by broker-dealers that are also registered with the Commodity Futures Trading Commission ("CFTC"), but do not include fees earned from affiliated entities (Item A of question 9 under Revenue in the Supplemental Statement of Income).

[910] With respect to the FOCUS data, additional granularity of what services comprise "advisory services" is not available. *See also* Solely Incidental Interpretation.

[911] An estimate of total fees in this size category would be 114 broker-dealers with assets between $1 billion and $50 billion multiplied by the average fee revenue of $225 million, or $25.65 billion in total fees.

[912] The data is obtained from December 2018 FOCUS reports and averaged across size groups.

[913] Fees, as detailed in the FOCUS data, include fees for account supervision, investment advisory services, and administrative services. The data covers both broker-dealers and dually registered firms.

TABLE 2—PANEL A: AVERAGE BROKER-DEALER REVENUES FROM REVENUE GENERATING ACTIVITIES [912]—Continued

Size of broker-dealer in total assets	N	Commissions	Fees [913]	Sales of IC shares
1 million–10 million	1,021	996,130	1,037,825	652,905
<1 million	1,982	197,907	269,459	85,219
Average of All Broker-Dealers	3,764	5,092,808	21,948,551	4,368,823

TABLE 2—PANEL B: AGGREGATE TOTAL REVENUES FROM REVENUE GENERATING ACTIVITIES FOR BROKER-DEALERS BASED ON DUAL-REGISTRANT STATUS

Broker-dealer type	N	Commissions (billion)	Fees [914] (billion)	Sales of IC shares (billion)
Dually Registered as IAs	563	$4.62	$17.56	$2.65
Standalone Registered BDs	3,201	4.07	3.22	2.55
All	3,764	8.69	20.78	5.20

As shown in Table 3, based on responses to Form BD, broker-dealers' most commonly provided business lines include private placements of securities (62.7% of broker-dealers); retail sales of mutual funds (55.4%); acting as a broker or dealer retailing corporate equity securities over the counter (52.0%); acting as a broker or dealer retailing corporate debt securities (47.2%); acting as a broker or dealer selling variable contracts, such as life insurance or annuities (41.0%); acting as a broker of municipal debt/bonds or U.S. government securities (39.8% and 37.4%, respectively); acting as an underwriter or selling group participant of corporate securities (31.2%); and investment advisory services (26.4%), among others.[915]

TABLE 3—LINES OF BUSINESS AT RETAIL BROKER-DEALERS AS OF DECEMBER 2018

Line of business	Total	
	Number of broker-dealers	Percent of broker-dealers
Private Placements of Securities	1,735	62.70
Mutual Fund Retailer	1,533	55.40
Broker or Dealer Retailing:		
Corporate Equity Securities OTC	1,438	51.97
Corporate Debt Securities	1,306	47.20
Variable Contracts	1,132	40.91
Municipal Debt/Bonds Broker	1,101	39.79
U.S. Government Securities Broker	1,035	37.41
Put and Call Broker or Dealer or Options Writer	993	35.89
Underwriter or Selling Group Participant—Corporate Securities	862	31.15
Non-Exchange Member Arranging For Transactions in Listed Securities by Exchange Member	785	28.37
Investment Advisory Services	730	26.38
Broker or Dealer Selling Tax Shelters or Limited Partnerships—Primary Market	619	22.37
Trading Securities for Own Account	614	22.19
Municipal Debt/Bonds Dealer	475	17.17
U.S. Government Securities Dealer	339	12.25
Solicitor of Time Deposits in a Financial Institution	308	11.13
Underwriter—Mutual Funds	237	8.57
Broker or Dealer Selling Interests in Mortgages or Other Receivables	216	7.81
Broker or Dealer Selling Oil and Gas Interests	207	7.48
Broker or Dealer Making Inter-Dealer Markets in Corporate Securities OTC	207	7.48
Broker or Dealer Involved in Networking, Kiosk, or Similar Arrangements (Banks, Savings Banks, Credit Unions)	197	7.12
Internet and Online Trading Accounts	192	6.94
Exchange Member Engaged in Exchange Commission Business Other than Floor Activities	171	6.18
Broker or Dealer Selling Tax Shelters or Limited Partnerships—Secondary Market	164	5.93
Commodities	162	5.85
Executing Broker	107	3.87
Day Trading Accounts	89	3.22
Broker or Dealer Involved in Networking, Kiosk, or Similar Arrangements (Insurance Company or Agency)	88	3.18
Real Estate Syndicator	94	3.40
Broker or Dealer Selling Securities of Non-Profit Organizations	71	2.57

[914] *See id.*

[915] Form BD requires applicants to identify the types of business engaged in (or to be engaged in) that accounts for 1% or more of the applicant's annual revenue from the securities or investment advisory business. Table 3 provides an overview of the types of businesses listed on Form BD, as well as the frequency of participation in those businesses by registered broker-dealers as of December 2018.

TABLE 3—LINES OF BUSINESS AT RETAIL BROKER-DEALERS AS OF DECEMBER 2018—Continued

Line of business	Total	
	Number of broker-dealers	Percent of broker-dealers
Exchange Member Engaged in Floor Activities	61	2.20
Broker or Dealer Selling Securities of Only One Issuer or Associate Issuers	43	1.55
Prime Broker	21	0.76
Crowdfunding FINRA Rule 4518(a)	21	0.76
Clearing Broker in a Prime Broker	14	0.51
Funding Portal	8	0.29
Crowdfunding FINRA Rule 4518(b)	5	0.18
Number of Retail-Facing Broker-Dealers	2,766	

b. Investment Advisers

Other parties that could be affected by Regulation Best Interest are SEC- or state-registered investment advisers, because Regulation Best Interest could affect the competitive landscape in the market for the provision of financial advice.[916] This section first discusses SEC-registered investment advisers, followed by a discussion of state-registered investment advisers.

As of December 2018, there were approximately 13,300 investment advisers registered with the Commission. The majority of SEC-registered investment advisers report that they provide portfolio management services for individuals and small businesses.[917]

Of all SEC-registered investment advisers, 359 identify themselves as dually registered broker-dealers.[918] Further, 2,421 investment advisers (18%) report an affiliate that is a broker-dealer, including 1,878 investment advisers (14%) that report an SEC-registered broker-dealer affiliate.[919] As shown in Panel A of Table 4 below, in aggregate, investment advisers have over $84 trillion in AUM. A substantial percentage of AUM at investment advisers is held by institutional clients, such as investment companies, pooled investment vehicles, and pension or profit sharing plans; therefore, the total number of accounts for investment advisers is only 29% of the number of customer accounts for broker-dealers.

Based on staff analysis of Form ADV data, approximately 62% of registered investment advisers (8,235) have some portion of their business dedicated to retail investors, including both high net worth and non-high net worth individual clients,[920] as shown in Panel B of Table 4.[921] In total, these firms have approximately $41.4 trillion of AUM.[922] Approximately 8,200 registered investment advisers (61%) serve almost 32 million non-high net worth individual clients and have approximately $4.8 trillion in AUM, while approximately 8,000 registered investment advisers (60%) serve approximately 4.8 million high net worth individual clients with $6.15 trillion in AUM.[923]

TABLE 4—PANEL A: REGISTERED INVESTMENT ADVISERS (RIAS) AS OF DECEMBER 2018

[Cumulative RIA AUM and accounts]

Size of investment adviser (AUM)	Number of RIAs	Number of dually registered RIAs	Cumulative AUM (billion)	Cumulative number of accounts
>$50 billion	270	15	$59,264	20,655,756
$1 billion to $50 billion	3,453	121	22,749	13,304,154
$500 million to $1 billion	1,635	47	1,151	1,413,099
$100 million to $500 million	5,927	119	1,397	5,135,070
$10 million to $100 million	1,070	24	59	310,031
$1 million to $10 million	162	3	0.8	69,664
<$1 million	782	30	0.02	13,976
Total	13,299	359	84,621	41,081,750

[916] In addition to SEC-registered investment advisers, which are the focus of this section, Regulation Best Interest could also affect banks, trust companies, insurance companies, and other providers of financial advice.

[917] Of the approximately 13,300 SEC-registered investment advisers, 8,410 (63.24%) report in Item 5.G.(2) of Form ADV that they provide portfolio management services for individuals and/or small businesses. In addition, there are approximately 17,300 state-registered investment advisers, of which 125 are also registered with the Commission. Approximately 13,900 state-registered investment advisers are retail facing (*see* Item 5.D of Form ADV).

[918] *See supra* footnote 892.

[919] Item 7.A.1 of Form ADV.

[920] We note that the data on individual clients obtained from Form ADV may not be exactly the same as who would be a "retail customer" as defined in Regulation Best Interest because the data obtained from Form ADV regarding clients who are individuals does not involve any test of use for personal, family, or household purposes.

[921] We use the responses to Items 5.D.(a)(1), 5.D.(a)(3), 5.D.(b)(1), and 5.D.(b)(3) of Part 1A of Form ADV. If at least one of these responses was filled out as greater than 0, the firm is considered as providing business to retail investors. Part 1A of Form ADV.

[922] The aggregate AUM reported for these investment advisers that have retail investors includes both retail AUM as well as any institutional AUM also held at these advisers.

[923] Estimates are based on IARD system data as of December 31, 2018. The AUM reported here is specifically that of those non-high net worth clients. Of the 8,235 investment advisers serving retail investors, 318 are also dually registered as broker-dealers.

TABLE 4—PANEL B: RETAIL REGISTERED INVESTMENT ADVISERS (RIAS) AS OF DECEMBER 2018

[Cumulative RIA AUM and accounts]

Size of investment adviser (AUM)	Number of RIAs	Number of dually registered RIAs	Cumulative AUM (billion)	Cumulative number of accounts
>$50 billion	119	14	$30,291	20,592,326
$1 billion to $50 billion	1,614	111	9,570	13,224,188
$500 million to $1 billion	1,007	44	700	1,392,842
$100 million to $500 million	4,548	113	1,026	5,287,584
$10 million to $100 million	706	23	40	308,285
$1 million to $10 million	102	3	0.5	69,534
<$1 million	169	10	0.02	13,946
Total IAs [924]	8,235	318	41,434	40,887,325

In addition to SEC-registered investment advisers, other investment advisers are registered with state regulators.[925] As of December 2018, there are 17,268 state-registered investment advisers,[926] of which 125 are also registered with the Commission. Of the state-registered investment advisers, 204 are dually registered as broker-dealers, while approximately 4.6% (786) report a broker-dealer affiliate. In aggregate, state-registered investment advisers have approximately $334 billion in AUM. Eighty-two percent of state-registered investment advisers report that they provide portfolio management services for individuals and small businesses, compared to 63% for Commission-registered investment advisers.

Approximately 81% of state-registered investment advisers (13,927) have some portion of their business dedicated to retail investors,[927] and in aggregate, these firms have approximately $324 billion in AUM.[928] Approximately 13,910 (81%) state-registered advisers serve 14 million non-high net worth retail clients and have approximately $137 billion in AUM, while over 11,497 (67%) state-registered advisers serve approximately 170,000 high net worth retail clients with $169 billion in AUM.[929]

c. Trends in the Relative Numbers of Providers of Financial Services

Over time, the relative number of broker-dealers and investment advisers has changed. Figure 1 presented below shows the time series trend of growth in broker-dealers and SEC-registered investment advisers between 2005 and 2018. Over the last 14 years, the number of broker-dealers has declined from over 6,000 in 2005 to less than 4,000 in 2018, while the number of investment advisers has increased from approximately 9,000 in 2005 to over 13,000 in 2018. This change in the relative numbers of broker-dealers and investment advisers over time likely is a reflection of the market for investment advice, and potentially of the choices available to retail investors regarding how to receive or pay for such advice, the nature of the advice, and the attendant conflicts of interest.

[924] Total IAs includes all retail-facing investment advisers, including those dual-registrants that have retail-facing SEC-registered broker-dealers and SEC-registered investment advisers.

[925] Item 2.A. of Part 1A of Form ADV and Advisers Act rules 203A–1 and 203A–2 require an investment adviser to register with the SEC if it (1) is a large adviser that has $100 million or more of regulatory AUM (or $90 million or more if an adviser is filing its most recent annual updating amendment and is already registered with the SEC); (2) is a mid-sized adviser that does not meet the criteria for state registration or is not subject to examination; (3) meets the requirements for one or more of the revised exemptive rules under section 203A; (4) is an adviser (or subadviser) to a registered investment company; (5) is an adviser to a business development company and has at least $25 million of regulatory AUM; or (6) receives an order permitting the adviser to register with the Commission. Although the statutory threshold is $100 million, the SEC raised the threshold to $110 million to provide a buffer for mid-sized advisers with AUM close to $100 million to determine whether and when to switch between state and Commission registration. Advisers Act rule 203A–1(a).

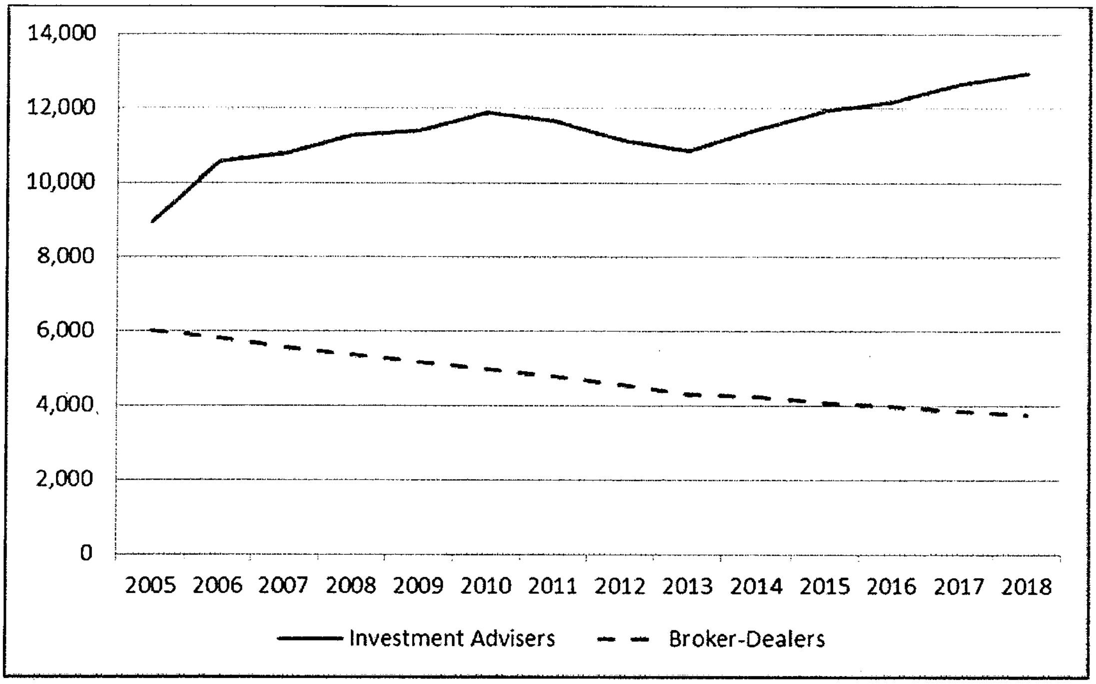
[926] There are 70 investment advisers with latest reported regulatory AUM in excess of $110 million but that are not listed as registered with the SEC. None of these 70 investment advisers has exempted status with the Commission. For the purposes of this rulemaking, these are considered potentially erroneous submissions.

[927] We use the responses to Items 5.D.(a)(1), 5.D.(a)(3), 5.D.(b)(1), and 5.D.(b)(3) of Part 1A. If at least one of these responses was filled out as greater than 0, the firm is considered as providing business to retail investors. Form ADV Part 1A.

[928] The aggregate AUM reported for these investment advisers that have retail investors includes both retail AUM as well as any institutional AUM also held at these advisers.

[929] Estimates are based on IARD system data as of February 10, 2018. The AUM reported here is specifically that of those non-high net worth investors. Of the 13,927 state-registered investment advisers serving retail investors, 134 may also be dually registered as broker-dealers.

Figure 1: Time Series of the Number of SEC-Registered Investment Advisers and Broker-Dealers (2005 – 2018)



Increases in the number of investment advisers and decreases in the number of broker-dealers could have occurred for a number of reasons, including changes in regulation and the enforcement of regulation, anticipation of possible regulatory changes, technological innovation (*e.g.*, the increase in automated advisers, which are often colloquially referred to as "robo-advisors" and online trading platforms), product proliferation (*e.g.*, index mutual funds and exchange-traded products), and industry consolidation driven by economic and market conditions, particularly among broker-dealers.[930] Commission staff has observed the transition by broker-dealers from traditional brokerage services to also providing investment advisory services (often under an investment adviser registration, whether federal or state), and many firms have been more focused on offering fee-based accounts because they provide a more steady source of revenue than accounts that charge commissions and are dependent on transactions.[931] Broker-dealers have indicated that the following factors have contributed to this migration: Provision of revenue stability or increase in profitability,[932] perceived lower regulatory burden, and provisions of more services to retail customers.[933] Some firms have reported record profits as a result of moving clients into fee-based accounts, and cite that it provides "stability and high returns." [934]

[930] *See* Hester Peirce, *Dwindling Numbers in the Financial Industry,* Brookings Center on Markets and Regulation Report (May 15, 2017), *available at https://www.brookings.edu/research/dwindling-numbers-in-the-financial-industry/* ("Brookings Report"), which notes that "SEC restrictions have increased by almost thirty percent [since 2000]," and that regulations post-2010 were driven in large part by the Dodd-Frank Act. Further, the Brookings Report observation of increased regulatory restrictions on broker-dealers only reflects CFTC or SEC regulatory actions, but does not include regulation by FINRA, other SROs, National Futures Association ("NFA"), or the Municipal Securities Rulemaking Board ("MSRB").

[931] Beyond Commission observations, the Brookings Report, *supra* footnote 930, also discusses the shift from broker-dealer to investment advisory business models for retail investors, in part due to the DOL Fiduciary Rule. Declining transaction-based revenue due to declining commission rates and competition from discount brokerage firms has made fee-based securities and services more attractive to providers of such securities and services. Although discount brokerage firms generally provide execution-only services and do not compete directly in the advice market with full service broker-dealers and investment advisers, entry by discount brokers has contributed to lower commission rates throughout the broker-dealer industry. Further, fee-based activity generates a steady stream of revenue regardless of the customer trading activity, unlike commission-based accounts. *See also* Angela A. Hung, et al., *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers,* RAND Institute for Civil Justice Technical Report (2008), *available at https://www.rand.org/content/dam/rand/pubs/technical_reports/2008/RAND_TR556.pdf* ("2008 RAND Study"), which discusses a shift from transaction-based to fee-based brokerage accounts prior to recent regulatory changes.

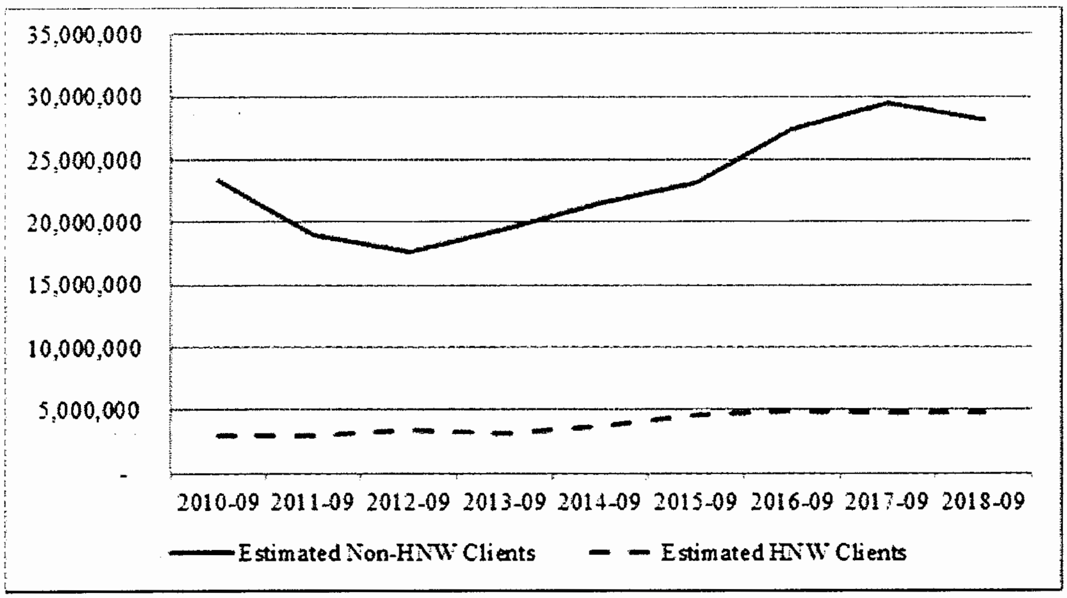
[932] Commission staff examined a sample of recent Form 10–K or Form 10–Q filings of large broker-dealers, many of which are dually registered as investment advisers, that have a large fraction of retail customer accounts to identify relevant broker-dealers. *See, e.g.,* Edward Jones 3/14/2019 Form 10–K *available at https://www.sec.gov/Archives/edgar/data/815917/000156459019007788/ck0000815917-10k_20181231.htm;* Raymond James 11/21/2018 Form 10–K *available at https://www.sec.gov/Archives/edgar/data/720005/000072000518000083/rjf-20180930x10k.htm;* Stifel 2/20/2019 Form 10–K *available at https://www.sec.gov/Archives/edgar/data/720672/000156459019003474/sf-10k_20181231.htm;* Wells Fargo 2/27/2019 10–K *available at https://www.sec.gov/Archives/edgar/data/72971/000007297119000227/wfc-12312018x10k.htm*; and Ameriprise 2/23/2018 Form 10–K *available at https://www.sec.gov/Archives/edgar/data/820027/000082002718000008/amp12312017.htm.* We note that discussions in Form 10–K and 10–Q filings of this sample of broker-dealers here may not be representative of other large broker-dealers or of small to mid-size broker-dealers.

[933] *See infra* Section III.B.2.e.ii, which discusses industry trends, particularly in response to the DOL Fiduciary Rule.

[934] *See* Hugh Son, *Morgan Stanley Wealth-Management Fees Climb to All-Time High,* Bloomberg, Jan. 18, 2018, *https://www.bloomberg.com/news/articles/2018-01-18/morgan-stanley-wealth-management-fees-hit-*

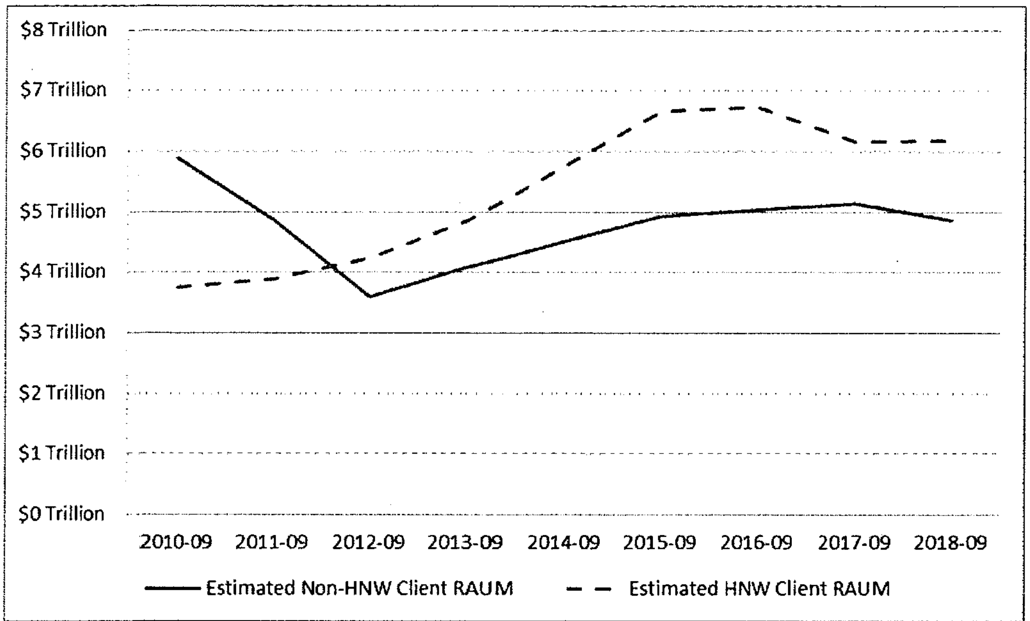
Further, there has been a substantial increase in the number of retail clients at investment advisers, both high net worth clients and non-high net worth clients as shown in Figure 2. Although the number of non-high net worth retail customers of investment advisers dipped between 2010 and 2012, it increased by more than 12 million new non-high net worth retail clients between 2012 and 2017, and has declined since 2017. With respect to AUM, we observe a similar, albeit more pronounced pattern for non-high net worth retail clients as shown in Figure 3. For high net worth retail clients, there has been a pronounced increase in AUM since 2012, although AUM has leveled off since 2015 and there also has been leveling and subsequent reduction in AUM for non-high net worth retail clients over a similar time period.

Figure 2: Time Series of the Number of Retail Clients of Investment Advisers (2010 – 2018)



record-on-stock-rally. Morgan Stanley increased the percentage of client assets in fee-based accounts from 37% in 2013 to 44% in 2017, while decreasing the dependence on transaction-based revenues from 30% to 19% over the same time period. *See* Morgan Stanley Strategic Update (Jan. 18, 2018), *available at https://www.morganstanley.com/about-us-ir/shareholder/4q2017-strategic-update.pdf. See also* Lisa Beilfuss & Brian Hershberg, *WSJ Wealth Adviser Briefing: The Reinvention of Morgan and Merrill, Adviser Profile,* Wall St. J., Jan. 25, 2018, *https://blogs.wsj.com/moneybeat/2018/01/25/wsj-wealth-adviser-briefing-the-reinvention-of-morgan-and-merrill-adviser-profile/.*

Figure 3: Time Series of the Retail Clients of Investment Advisers AUM (2010 – 2018)



d. Registered Representatives of Broker-Dealers, Investment Advisers, and Dually Registered Firms

We estimate the number of associated natural persons of broker-dealers through data obtained from Form U4, which generally is filed for individuals who are engaged in the securities or investment banking business of a broker-dealer that is a member of an SRO ("registered representatives").[935] Similarly, we approximate the number of supervised persons of registered investment advisers through the number of registered investment adviser representatives (or "registered IARs"), who are supervised persons of investment advisers who meet the definition of investment adviser representatives in Advisers Act rule 203A–3 and are registered with one or more state securities authorities to solicit or communicate with clients.[936]

We estimate the number of registered representatives and registered IARs, including dually-registered representatives, (together "registered financial professionals") at broker-dealers, investment advisers, and dual-registrants by considering only the employees of those firms that have Series 6 or Series 7 licenses or are registered with a state as a registered representative or investment adviser representative.[937] We only consider employees at firms who have retail-facing business, as defined previously.[938] We observe in Table 5 that approximately 60% of registered financial professionals are employed by dually registered entities. The percentage varies by the size of the firm. For example, for firms with total assets between $1 billion and $50 billion, 67% of all registered financial professionals in that size category are employed by dually registered firms. Focusing on dually registered firms only, approximately 60.5% of total registered financial professionals at these firms are dually registered representatives; approximately 39.1% are only registered representatives; and less than one percent are only registered investment adviser representatives.

[935] The number of associated natural persons of broker-dealers may be different from the number of registered representatives of broker-dealers because clerical/ministerial employees of broker-dealers are associated persons but are not required to register with FINRA. Therefore, the registered representative number does not include such persons. However, we do not have data on the number of associated natural persons and therefore are not able to provide an estimate of the number of associated natural persons. We believe that the number of registered representatives is an appropriate approximation because they are the individuals at broker-dealers that provide advice and services to customers.

[936] *See* Advisers Act, [17 CFR 275.203A–3 (2019)]. However, we note that the data on numbers of registered IARs may undercount the number of supervised persons of investment advisers who provide investment advice to retail investors because not all supervised persons who provide investment advice to retail investors are required to register as IARs. For example, Commission rules exempt from IAR registration supervised persons who provide advice only to non-individual clients or to individuals that meet the definition of "qualified client." In addition, state securities authorities may impose different criteria for requiring registration as an investment adviser representative.

[937] We calculate these numbers based on Form U4 filings. Representatives of broker-dealers, investment advisers, and issuers of securities must file this form when applying to become registered in appropriate jurisdictions and with SROs. Firms and representatives have an obligation to amend and update information as changes occur. Using the examination information contained in the form, we consider an employee a registered financial professional if he or she has an approved, pending, or temporary registration status for either Series 6 or 7 (registered representative) or is registered as an investment adviser representative in any state or U.S. territory (IAR). We limit the firms to only those that do business with retail investors, and only to licenses specifically required as a registered representative or IAR.

[938] *See supra* footnotes 900 and 927.

TABLE 5—TOTAL REGISTERED REPRESENTATIVES AT BROKER-DEALERS, INVESTMENT ADVISERS, AND DUALLY REGISTERED FIRMS WITH RETAIL INVESTORS[939]

Size of firm (total assets for standalone BDs and dually registered firms; AUM for standalone IAs)	Total number of reps.	% of reps. in dually registered firms	% of reps. in standalone BD w/an IA affiliate	% of reps. in standalone BD w/o an IA affiliate	% of reps. in standalone IA w/a BD affiliate	% reps. in standalone IA w/o a BD affiliate
>$50 billion	84,461	73	7	0	19	1
$1 billion to $50 billion	170,256	67	11	0	15	7
$500 million to $1 billion	29,874	71	5	1	7	16
$100 million to $500 million	66,924	51	27	0	4	18
$10 million to $100 million	106,178	55	42	2	1	1
$1 million to $10 million	33,790	35	54	11	0	0
<$1 million	12,522	8	52	36	3	1
Total Licensed Representatives	504,005	60	23	2	9	6

In Table 6 below, we estimate the number of employees who are registered representatives, registered investment adviser representatives, or dually registered representatives.[940] Similar to Table 5, we calculate these numbers using Form U4 filings. Here, we also limit the sample to employees at firms that have retail-facing businesses as discussed previously.[941]

In Table 6, approximately 25% of registered employees at registered broker-dealers or investment advisers are dually registered representatives. However, this proportion varies significantly across size categories. For example, for firms with total assets between $1 billion and $50 billion,[942] approximately 35% of all registered employees are dually registered representatives. In contrast, for firms with total assets below $1 million, 13% of all employees are dually registered representatives.

TABLE 6—NUMBER OF EMPLOYEES AT RETAIL-FACING FIRMS WHO ARE REGISTERED REPRESENTATIVES, INVESTMENT ADVISER REPRESENTATIVES, OR BOTH[943]

Size of firm (total assets for standalone BDs and dually registered firms; AUM for standalone IAs)	Total number of employees	Percentage of dually registered representatives	Percentage of registered representatives only	Percentages of IARs only
>$50 billion	218,539	19	16	1
$1 billion to $50 billion	328,842	35	12	4
$500 million to $1 billion	43,211	18	40	10
$100 million to $500 million	119,214	23	24	9
$10 million to $100 million	176,559	20	39	1
$1 million to $10 million	56,230	17	39	1
<$1 million	18,334	13	46	3
Total Employees at Retail-Facing Firms	960,929	25	23	4

Approximately 87% of investment adviser representatives are dually registered representatives. This percentage is relatively unchanged from 2010. According to information provided in a FINRA comment letter in connection with the 913 Study, 87.6% of registered investment adviser representatives were dually registered as registered representatives as of mid-October 2010.[944] In contrast, approximately 52% of registered representatives were dually registered as investment adviser representatives at the end of 2018.[945]

e. Investor Account Statistics

Investors seek financial advice and services to achieve a number of different goals, such as saving for retirement or children's college education. Approximately 73% of adults live in a

[939] The classification of firms as dually registered, standalone broker-dealers, and standalone investment advisers comes from Forms BD, FOCUS, and ADV as described earlier. The number of representatives at each firm is obtained from Form U4 filings. Note that all percentages in the table have been rounded to the nearest whole percentage point.

[940] We calculate these numbers based on Form U4 filings.

[941] *See supra* footnotes 900 and 927.

[942] Firm size is defined as total assets from the balance sheet for broker-dealers and dual-registrants (source: FOCUS reports) and as AUM for investment advisers (source: Form ADV). We are unable to obtain customer assets for broker-dealers, and for investment advisers, we can only obtain information from Form ADV as to whether the firm assets exceed $1 billion. We recognize that our approach of using firm assets for broker-dealers and customer assets for investment advisers does not allow for direct comparison; however, our objective is to provide measures of firm size and not to make comparisons between broker-dealers and investment advisers based on firm size. Across both broker-dealers and investment advisers, larger firms, regardless of whether we stratify on firm total assets or AUM, have more customer accounts, are more likely to be dually registered, and have more representatives or employees per firm than smaller broker-dealers or investment advisers.

[943] *See supra* footnotes 899, 920, 940, and 942. Note that all percentages in the table have been rounded to the nearest whole percentage point.

[944] *See* Letter from Angela C. Goelzer, FINRA, to Jennifer B. McHugh, Senior Advisor to the Chairman, U.S. Securities and Exchange Commission, re: File Number 4–606; Obligations of Brokers, Dealers and Investment Advisers (Nov. 3, 2010), at 1, *available at https://www.sec.gov/comments/4-606/4606-2836.pdf.*

[945] In order to obtain the percentage of IARs that are dually registered as registered representatives of broker-dealers, we sum the representatives at dually registered entities and those at investment advisers across size categories to obtain the aggregate number of representatives in each of the two categories. We then divide the aggregate dually registered representatives by the sum of the dually registered representatives and the IARs at investment adviser-only firms. We perform a similar calculation to obtain the percentage of registered representatives of broker-dealers that are dually registered as IARs.

household that invests.[946] The OIAD/RAND survey indicates that non-investors are more likely to be female, to have lower family income and educational attainment, and to be younger than investors.[947] Approximately 35% of households that do invest do so through accounts such as broker-dealer or advisory accounts.[948]

As shown above in Figures 2 and 3, the number of retail investors and their AUM associated with investment advisers has increased significantly, particularly since 2012. As of December 2016, nearly $24.2 trillion is invested in retirement accounts, of which $7.5 trillion is in IRAs.[949] A total of 43.3 million U.S. households have either an IRA or a brokerage account; an estimated 20.2 million U.S. households have a brokerage account, and 37.7 million households have an IRA (including 72% of households that also hold a brokerage account).[950] With respect to IRA accounts, one commenter documents that 43 million U.S. households own either traditional or Roth IRAs and that approximately 70% are held with financial professionals, with the remainder being direct market.[951] Further, this commenter finds that approximately 64% of households have aggregate IRA (traditional and Roth) balances of less than $100,000, and approximately 36% of investors have balances below $25,000. As noted in one study, the growth of assets in traditional IRAs comes from rollovers from workplace retirement plans; for example, 58% of traditional IRAs consist of rollover assets, and contributions due to rollovers exceeded $460 billion in 2015 (the most recently available data).[952]

While the number of retail investors obtaining services from investment advisers and the aggregate value of associated AUM has increased, the OIAD/RAND study also suggests that the general willingness of investors to use planning or to take financial advice regarding strategies, securities, or accounts is relatively fixed over time.[953] With respect to the account assets associated with retail investors, the OIAD/RAND survey also estimates that approximately 10% of investors who have brokerage or advisory accounts hold more than $500,000 in assets, while approximately 47% hold $50,000 in assets or less. Altogether, investors who have brokerage or advisory accounts typically trade infrequently, with approximately 31% reporting no annual transactions and an additional approximately 30% reporting three or fewer transactions per year.[954]

With respect to particular securities, commenters have provided us with additional information about ownership of mutual funds and IRA account statistics. For example, one commenter stated that 56 million U.S. households and nearly 100 million individual investors own mutual funds, of which 80% are held through 401(k) and other work-based retirement plans, while 63% of investors hold mutual funds outside of those plans.[955] Of those investors who own mutual funds outside of workplace retirement plans, approximately 50% use financial professionals, while nearly one-third purchase direct-sold funds either directly from the fund company or through a discount broker.[956]

Table 7 below provides an overview of account ownership segmented by account type (*e.g.*, IRA, brokerage, or both) and investor income category based on the SCF Survey.[957]

TABLE 7—OWNERSHIP BY ACCOUNT TYPE IN THE U.S. BY INCOME GROUP

[As reported by the 2016 SCF Survey]

Income category	% Brokerage only	% IRA only	% Both brokerage and IRA
Bottom 25%	1.2	7.6	2.4
25%–50%	3.2	14.5	5.4
50%–75%	4.1	21.4	11.4
75%–90%	7.5	33.4	16.5
Top 10%	12.0	24.7	43.9
Average	4.4	18.3	11.6

With respect to the nature of the accounts held by investors and whether they are managed by financial professionals, the OIAD/RAND survey finds that 36% of its sample of participants report that they currently use a financial professional and approximately 33% receive some kind of recommendation service.[958] Of the

[946] *See* OIAD/RAND, defining "investors" as persons "owning at least one type of investment account, (*e.g.*, an employer-sponsored retirement account, a non-employer sponsored retirement account such as an IRA, a college savings investment account, or some other type of investment account such as a brokerage or advisory account), or owning at least one type of investment asset (*e.g.*, mutual funds, exchange-traded funds or other funds; individual stocks; individual bonds; derivatives; and annuities)."

[947] *Id.* at 36.

[948] *Id.* at 39.

[949] *See* Sarah Holden & Daniel Schrass, *The Role of IRAs in U.S. Households' Saving for Retirement, 2016,* ICI Res. Persp., Jan. 2017, *available at https://www.ici.org/pdf/per17-08.pdf. See also* ICI Letter.

[950] The data is obtained from the Federal Reserve System's 2016 Survey of Consumer Finances ("SCF Survey"), a triennial survey of approximately 6,200 U.S. households, and imputes weights to extrapolate the results to the entire U.S. population. As noted, some survey respondent households have both a brokerage and an IRA. *See* Board of Governors of the Federal Reserve System, *Survey of Consumer Finances* (2016), *available at https://www.federalreserve.gov/econres/scfindex.htm.* The SCF Survey data does not directly examine the incidence of households that could use advisory accounts instead of brokerage accounts; however, some fraction of IRA accounts reported in the survey could be those held at investment advisers.

[951] *See* Sarah Holden & Daniel Schrass, *The Role of IRAs in US Households' Saving for Retirement, 2018,* ICI Res. Persp., Dec. 2018, *available at https://www.ici.org/pdf/per24-10.pdf. See also* ICI Letter.

[952] *See* Holden & Schrass (2018), *supra* footnote 951.

[953] *See* OIAD/RAND at 50 (noting that this conclusion was limited by the methodology of comparing participants in a 2007 survey with those surveyed in 2018).

[954] *See* OIAD/RAND.

[955] *See* ICI Letter; *see also* Sarah Holden, Daniel Schrass, & Michael Bogdan, *Ownership of Mutual Funds, Shareholder Sentiment, and Use of the internet, 2018,* ICI Res. Persp., Nov. 2018, *available at https://www.ici.org/pdf/per22-06.pdf.*

[956] *See* Holden et al. (2018), *supra* footnote 955. *See also* ICI Letter.

[957] *See* SCF Survey, *supra* footnote 950. To the extent that investors have IRA accounts at banks that are not also registered as broker-dealers, our data may overestimate the numbers of IRA accounts held by retail investors that could be subject to Regulation Best Interest.

[958] *See* OIAD/RAND at 48. In a focus group preceding the survey, focus group participants provided a number of reasons for not using a financial professional in making investments, including being unable or unwilling to pay the fees, doing their own financial research, being unsure of how to work with a professional, and being concerned about professionals selling securities without attending to investors' plans and goals.

subset of those investors who report holding a brokerage, advisory, or similar account, approximately 33% self-direct their own account, 25% have their account managed by a financial professional, and 10% have their account advised by a financial professional.[959] For those investors who take financial advice, the OIAD/RAND study suggests that they may differ in characteristics from other investors. The survey further finds that investors who take financial advice are generally older, retired, and have a higher income than other investors, but also may have lower educational attainment (*e.g.,* high school or less) than other investors.[960]

Similarly, one question in the SCF Survey asks what sources of information households' financial decision-makers use when making decisions about savings and investments. Respondents can list up to fifteen possible sources from a preset list that includes "Broker" or "Financial Planner" as well as "Banker," "Lawyer," "Accountant," and a list of non-professional sources.[961] Panel A of Table 8 below presents the breakdown of where households who have brokerage accounts seek advice about savings and investments. The table shows that of those respondents with brokerage accounts, 23% (4.7 million households) use advice services of broker-dealers for savings and investment decisions, while 49% (7.8 million households) take advice from a "financial planner." Approximately 36% (7.2 million households) seek advice from other sources such as bankers, accountants, and lawyers. Almost 25% (5.0 million households) do not use advice from the above sources.

Panel B of Table 8 below presents the breakdown of advice received by households who have an IRA. Approximately 15% (5.7 million households) rely on advice services of their broker-dealers and 48% (18.3 million households) obtain advice from financial planners. Approximately 41% (15.5 million households) seek advice from bankers, accountants, or lawyers, while the 25% (9.5 million households) use no advice or seek advice from other sources.

TABLE 8—PANEL A: SOURCES OF ADVICE FOR HOUSEHOLDS WHO HAVE A BROKERAGE ACCOUNT IN THE U.S. BY INCOME GROUP[962]

Income category	% Taking advice from brokers	% Taking advice from financial planners	% Taking advice from lawyers, bankers, or accountants	% Taking no advice or from other sources
Bottom 25%	20.55	53.89	35.64	24.30
25%–50%	22.98	38.03	43.92	32.36
50%–75%	20.75	52.00	31.42	23.61
75%–90%	22.56	48.94	32.25	28.10
Top 10%	25.29	50.53	38.47	21.06
Average	23.02	49.02	35.99	24.94

TABLE 8—PANEL B: SOURCES OF ADVICE FOR HOUSEHOLDS WHO HAVE AN IRA IN THE U.S. BY INCOME GROUP[963]

Income category	% Taking advice from brokers	% Taking advice from financial planners	% Taking advice from lawyers, bankers, or accountants	% Taking no advice or from other sources
Bottom 25%	12.14	38.30	43.69	31.85
25%–50%	9.79	43.82	40.67	32.74
50%–75%	14.93	45.20	41.23	25.23
75%–90%	14.68	52.14	41.65	24.26
Top 10%	21.40	55.40	40.03	18.56
Average	15.25	48.45	41.17	25.28

The OIAD/RAND survey notes that for survey participants who reported working with a specific individual for investment advice, 70% work with a dual-registrant, 5.4% with a broker-dealer, and 5.1% with an investment adviser.[964]

f. Financial Incentives of Firms and Financial Professionals

Commission experience indicates that there is a broad range of financial incentives provided by standalone broker-dealers and dually registered firms to their financial professionals.[965] While some firms provide base pay for their financial professionals ranging from approximately $45,000 to $85,000 per year, many firms provide compensation only through a percentage of commissions, plus performance-

[959] *See* OIAD/RAND at 46.

[960] *See* OIAD/RAND at 48.

[961] *See* SCF Survey, *supra* footnote 950, which specifically asks participants "Do you get advice from a friend, relative, lawyer, accountant, banker, broker, or financial planner? Or do you do something else?" *See* Federal Reserve Codebook for 2016 Survey of Consumer Finances (2016), *available at https://www.federalreserve.gov/econres/files/codebk2016.txt.* Other response choices presented by the survey include "Calling Around," "Magazines," "Self," "Past Experience," "Telemarketer," and "Insurance Agent," as well as other choices. Respondents could also choose "Do Not Save/Invest." The SCF Survey allows for multiple responses, so these categories are not mutually exclusive. However, we would note that the list of terms in the question does not specifically include "investment adviser."

[962] *See* SCFR Survey, *supra* footnote 950.

[963] *Id.*

[964] *See* OIAD/RAND at 53. As documented by OIAD/RAND, retail investors surveyed had difficulty in accurately identifying the type of relationship that they have with their financial professional.

[965] Information on compensation and financial incentives generally relates to 2016 compensation arrangements for a sample of approximately 20 firms, comprising both standalone broker-dealers and dually registered firms. We acknowledge that the information provided in this baseline may not be representative of the compensation structures more generally because of the diversity and complexity of services and securities offered by standalone broker-dealers and dually registered firms.

based awards, such as individual or team bonuses based on production.[966] Commission-based compensation to financial professionals range from 30% to 95% of total commissions paid to the firm on a particular transaction, although this compensation is generally reduced by various costs and expenses attributable to the financial professional (e.g., clearing costs associated with some securities, charges related to an SRO or the Securities Investor Protection Corporation ("SIPC"), and insurance, among others).

Several firms have varying commission-based compensation rates depending on the investment type being sold. For example, compensation ranges from 76.5% for stocks, bonds, options, and commodities to 90% for open-ended mutual funds, private placements, and unit investment trusts. Several firms charge varying commissions on securities depending on the amount of security sold (*e.g.,* rates on certain proprietary mutual funds range from 0.75% to 5.75% depending on the share class), but do not provide those rates to financial professionals based on investment type. Some firms also provide incentives for their financial professionals to recommend proprietary securities and services over third-party or non-proprietary securities. Commission rates for some firms, however, decline as the dollar amount sold increases, and such rates vary across asset classes as well (*e.g.,* within a given share class, rates range from 1.50% to 5.75% depending on the dollar amount of the fund sold). With respect to compensation to individual financial professionals, if compensation rates for mutual funds are approximately 90% (as discussed above, for example), financial professionals can earn between 0.68% and 5.18%, depending on the type and amount of security sold.

For financial professionals who do not earn commission-based compensation, some firms charge retail customers flat fees ranging from $500 to $2,500, depending on the level of service required, such as financial planning, while others charge hourly rates ranging from $150 to $350 per hour. For dually registered firms that charge clients based on a percentage of AUM, the average percentage charge varies based on the size of the account: The larger the AUM, the lower the percentage fee charged. Percentage-based fees for the sample firms range from approximately 1.5% for accounts below $250,000 to 0.5% for accounts in excess of $1 million.[967] If compensation rates range between 30% and 95%, a firm charging a customer $500 can provide compensation to the financial professional between $150 and $475 for each financial plan provided. For fee-based accounts, assuming that a retail customer has an account worth $250,000, the firm will charge account-level fees of $3,750 ($250,000 × 1.5%), and the financial professional can earn between $1,170 and $3,560 annually for each account. However, accounts may also be subject to additional fees beyond those described here and the financial professionals also may receive additional compensation.

In addition to "base" compensation, most firms also provide bonuses (based on either individual or team performance) or variable compensation, ranging from approximately 10% to 83% of base compensation. These bonuses could be awarded based on either commissions generated or AUM. While the majority of firms base at least some portion of their bonuses on production, usually in the form of total gross revenue, other forms of bonus compensation are derived from customer retention, customer experience, and manager assessment of performance. Moreover, some firms use a tiered system within their compensation grids depending on firm experience and production levels. Financial professionals' variable compensation can also increase when they enroll retail customers in advisory accounts versus other types of accounts, such as brokerage accounts. Some firms also provide transition bonuses for financial professionals with prior work experience based on historical trailing production levels and AUM. Although many firms do not have any incentive-based contests or programs, some firms award non-cash incentives for meeting certain performance, best practices, or customer service goals, including trophies, dinners with senior officers, and travel to annual meetings with other award winners.[968]

2. Regulatory Baseline and Current Market Practices

Broker-dealers' current standards of conduct are governed by federal and state law and regulation as well as the rules and guidance of SROs,[969] particularly, for the purposes of this rulemaking, those related to the suitability of recommendations and disclosure of conflicts of interest. In response to comment letters that stated the Proposing Release did not fully consider the current market practices, we have provided an overview of these practices reported by commenters and from industry studies.[970] Together, these laws and regulations comprise the regulatory baseline.

a. Federal and State Securities Laws

Under the antifraud provisions of the federal securities laws and SRO rules, broker-dealers are required to deal fairly with their customers.[971] In addition, broker-dealers must comply with a wide

[966] Commission experience indicates that some firms award production bonuses based on commissions generated, while other firms provide awards based on AUM.

[967] We note that some firms could have higher or lower commission-based compensation rates or asset-based fee percentages than those provided here. For example, based on a review of Form ADV Part 2A (the brochure) of several large dual-registrants (not included in the sample above), asset-based fees for low AUM accounts could range as high as 2.0% to 3.0%, with the average fee for high AUM accounts ranging between 0.5% to 1.5%. *See also* AdvisoryHQ, *Average Financial Advisor Fees in 2018–2019: Fees Charged by Advisory & Wealth Management Firms, http://www.advisoryhq.com/articles/financial-advisor-fees-wealth-managers-planners-and-fee-only-advisors/.* The AdvisoryHQ report shows that average asset-based fees range from 1.18% for accounts less than $50,000 to less than 0.60% for accounts in excess of $30 million, while fixed-fees range from $7,500 for accounts less than $500,000 to $55,000 for accounts in excess of $7.5 million. Again, we note that these are charges to clients and are not indicative of the total compensation earned by the financial professional per account.

[968] *See* FINRA Regulatory Notice 16–29, Gifts, Gratuities and Non-Cash Compensation Rules—FINRA Requests Comment on Proposed Amendments to Its Gifts, Gratuities and Non-Cash Compensation Rules (Aug. 2016). At the time this notice was published, FINRA's impression was that investment-specific internal sales contests for non-cash compensation were not widely used.

[969] Generally, all registered broker-dealers that deal with the public must become members of FINRA, a registered national securities association, and may choose to become exchange members. *See* Exchange Act section 15(b)(8) and Exchange Act rule 15b9–1. FINRA is the sole national securities association registered with the SEC under section 15A of the Exchange Act. Accordingly, for purposes of discussing a broker-dealer's regulatory requirements when providing advice, we focus on FINRA's regulation, examination, and enforcement with respect to member broker-dealers.

[970] *See, e.g.,* AALU Letter; Letter from John L. Thornton, Co-Chair, Committee in Capital Markets Regulation (Jul. 18, 2018) ("CCMR Letter"); CFA August 2018 Letter; Davis & Harman Letter; EPI Letter; Lincoln Financial Letter; NASAA August 2018 Letter; UVA Letter (which stated that the Proposing Release did not adequately address current market practices and/or provide industry studies and surveys of those practices).

[971] *See, e.g.,* FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade); NASD Interpretive Material 2310–2, Fair Dealing with Customers ("Implicit in all member and registered representative relationships with customers and others is the fundamental responsibility for fair dealing. Sales efforts must therefore be undertaken only on a basis that can be judged as being within the ethical standards of [FINRA's] Rules, with particular emphasis on the requirement to deal fairly with the public."); *Charles Hughes & Co.* v. *SEC,* 139 F.2d 434 (2d Cir. 1943), *cert. denied,* 321 U.S. 786 (1944); *Hanly* v. *SEC,* 415 F.2d 589, 596 (2d Cir. 1969); *see also e.g.,* 913 Study at 51 and footnote 221.

range of specific obligations specified in the Exchange Act and the rules thereunder. Moreover, there is a body of case law holding that broker-dealers that exercise discretion or control over customer assets, or have a relationship of trust and confidence with their customers, may owe customers a fiduciary duty, depending on the circumstances.[972] Additionally, some states provide through statute or regulation, among other requirements such as minimum requirements for sales practices, that broker-dealers have some form of state-specific fiduciary duty to their customers in at least some circumstances. Substantial variation exists among states' fiduciary standards, ranging from states with express fiduciary standards that apply to broker-dealers to those with limited or no such standards.[973]

b. FINRA Rule 2111: Suitability

FINRA Rule 2111 (the "Suitability Rule") requires that a broker-dealer or associated person have a reasonable basis to believe that a recommended securities transaction or investment strategy involving securities is suitable for the retail customer.[974] A broker-dealer cannot disclaim away its suitability obligation under the Suitability Rule.[975] We reviewed the Suitability Rule and drew upon it and enhanced the suitability requirement in developing Regulation Best Interest.[976] FINRA also requires additional specific suitability obligations with respect to certain types of securities or transactions, such as variable insurance products and derivatives securities, including options and securities-based futures.[977]

As discussed by several commenters,[978] the regulatory baseline also includes FINRA guidance on best practices, such as guidance regarding suitability, which provides guidance on how broker-dealers and associated persons should comply with suitability obligations when making recommendations to customers. FINRA guidance regarding suitability includes Regulatory Notice 12–25, which states that under the Suitability Rule, "a broker's recommendations must be consistent with his customers' best interests," [979] as well as other regulatory notices that provide guidance on the suitability of specific securities or investment strategies involving securities, including, but not limited to, mutual funds, variable contracts including annuities, structured and complex securities, leveraged and inverse exchange-traded products, and IRA rollovers.[980]

c. FINRA Report on Conflicts of Interest

In 2013, FINRA published as guidance a Report on Conflicts of Interest ("FINRA Conflicts Report") to provide an overview of effective practices that broker-dealers could employ to manage and mitigate conflicts of interest.[981] In the report, FINRA provides suggestions for broker-dealers for addressing conflicts of interest related to three broad areas: A firm-level approach to identify and manage conflicts of interest; the production and distribution of new securities; and compensation and other financial incentives of associated persons.[982] With respect to new securities, the FINRA Conflicts Report recommends, among other things, new security review committees and disclosure of conflicts related to recommendations of new securities to customers.[983] The FINRA Conflicts Report also provides guidance to broker-dealers on managing conflicts of interest that arise from compensation and financial incentives of broker-dealers. For example, the FINRA Conflicts Report recommends increased surveillance of recommendations near compensation thresholds and capping compensation credits across similar

[972] *See, e.g., U.S.* v. *Skelly,* 442 F.3d 94, 98 (2d Cir. 2006) (fiduciary duty found "most commonly" where "a broker has discretionary authority over the customer's account"); *United States* v. *Szur,* 289 F.3d 200, 211 (2d Cir. 2002) ("Although it is true that there 'is no general fiduciary duty inherent in an ordinary broker/customer relationship,' 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.") (citations omitted); *Leib* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 461 F. Supp. 951, 953–954 (E.D. Mich. 1978), *aff'd,* 647 F.2d 165 (6th Cir. 1981) (recognizing that a broker who has de facto control over non-discretionary account generally owes customer duties of a fiduciary nature; looking to customer's sophistication, and the degree of trust and confidence in the relationship, among other things, to determine duties owed); *Arleen W. Hughes,* Exchange Act Release No. 4048 (Feb. 18, 1948) (Commission Opinion), *aff'd sub nom. Hughes* v. *SEC,* 174 F.2d 969 (D.C. Cir. 1949) ("Release 4048") (noting that fiduciary requirements generally are not imposed upon broker-dealers who render investment advice as an incident to their brokerage unless they have placed themselves in a position of trust and confidence, and finding that Hughes was in a relationship of trust and confidence with her clients). *See also* Gross Letter (which discussed the obligations of broker-dealers with discretionary or de facto control over customer accounts); Solely Incidental Interpretation.

[973] *See* AARP August 2018 Letter; PIABA Letter; U. of Miami Letter. *See also* Michael S. Finke & Thomas Patrick Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice* (Working Paper, Mar. 9, 2012) for a discussion of state fiduciary standards. One comment letter also provided an extensive overview of the fiduciary obligations of state-registered investment advisers, "typified by an expectation of undivided loyalty where the adviser acts primarily for the benefit of its clients." *See* NASAA February 2019 Letter at 22 and footnote 40. This comment letter also stated that "[s]ome states also extend these fiduciary obligations beyond investment advisers to brokers, especially in dual-hatted scenarios," and that these fiduciary obligations were extended even when broker-dealers handled non-discretionary accounts. *Id.* at 23–24 and footnote 41.

[974] *See* FINRA Rule 2111, *supra* footnote 161. As a "General Principle," the rule states that associated persons have a "fundamental responsibility for fair dealing" and that the rule is intended to promote ethical sales practices and high standards of commercial conduct. *See* FINRA Rule 2111.01. *See also, In re Application of Raghavan Sathianathan,* Exchange Act Release No. 54722 at 10 (Nov. 8, 2006) ("Sathianathan's recommendations . . . were unsuitable because they were designed to maximize his own commissions rather than to establish a suitable portfolio."). *See also* 913 Study at 59 and footnote 187.

[975] FINRA Rule 2111.02 (Disclaimers).

[976] *See supra* footnote 161. The primary requirements for the Suitability Rule are described in the Proposing Release at Section IV.B.2.a.

[977] *See, e.g.,* FINRA Rule 2330 (Members' Responsibilities Regarding Deferred Variable Annuities); FINRA Rule 2360 (Options); FINRA Rule 2370 (Securities Futures); FINRA Rule 2821 (Sales Practices for Deferred Variable Annuities including a Suitability Obligation). *See also* 913 Study at 65–66.

[978] *See* CFA August 2018 Letter; Bank of America Letter; Transamerica August 2018 Letter.

[979] *See* FINRA Regulatory Notice 12–25; *see also* FINRA Regulatory Notice 13–31, Suitability—FINRA Highlights Examination Approaches, Common Findings and Effective Practices for Complying With its Suitability Rules (Sep. 2013) (which provides ". . . effective practices . . . to help firms enhance compliance and supervision under the suitability rule").

[980] *See, e.g.,* NASD Notice to Members 94–16, NASD Reminds Members Of Mutual Fund Sales Practice Obligations (Mar. 1994) and NASD Notice to Members 95–80, NASD Further Explains Members Obligations and Responsibilities Regarding Mutual Funds Sales Practices (Sep. 1995) (mutual fund suitability and sales practices); NASD Notice to Members 96–86, NASD Regulation Reminds Members and Associated Persons that Sales of Variable Contracts are Subject to NASD Suitability Requirements (Dec. 1996) and NASD 99–35, NASD Reminds Members of Their Responsibilities Regarding Sales of Variable Annuities (May 1999) (suitability and sales practices of variable contracts and variable annuities); NASD Notice to Members 05–59, NASD Provides Guidance Concerning the Sale of Structure Products; and FINRA Regulatory Notice 12–03, Complex Products—Heightened Supervision of Complex Products (Jan. 2012); (suitability and sales practices of structured and complex products); FINRA Regulatory Notice 09–31, FINRA Reminds Firms of Sales Practice Obligations Relating to Leveraged and Inverse Exchange-Traded Funds (June 2009) (sales practices of leveraged and inverse ETFs); and FINRA Regulatory Notice 13–45, Rollovers to Individual Retirement Accounts—FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers (Dec. 2013) (obligations when recommending a rollover or transfer of assets from a sponsored retirement plan to an IRA).

[981] *See* FINRA Conflicts Report, *supra* footnote 459. *See also* IRI Letter, which notes that the FINRA Conflicts Report ". . . provides valuable guidance as to the elements of an effective practice framework for managing BDs' conflicts of interest. . ." *See also* SIFMA August 2018 Letter; CFA August 2018 Letter; Raymond James Letter; Ameriprise Letter; ACLI Letter; Fein Letter.

[982] *See* FINRA Conflicts Report, *supra* footnote 459.

[983] *Id.*

investment types to prevent representatives from preferentially recommending securities that yield the largest compensation.[984]

d. Other Broker-Dealer Obligations: Disclosure, Supervision, and Compensation

Broker-dealers are subject to other disclosure obligations under the federal securities laws and SRO rules. For instance, under existing antifraud provisions of the Exchange Act, a broker-dealer has a duty to disclose material adverse information to its customers.[985] Broker-dealers found to be acting as fiduciaries also have a duty to disclose material conflicts of interest.[986] Broker-dealers are also prohibited from making misleading statements.[987] Courts have found that broker-dealers, in making recommendations, should have disclosed that they were: Acting as a market maker for the recommended security; trading as a principal with respect to the recommended security; engaging in revenue sharing with a recommended mutual fund; or "scalping" a recommended security.[988]

Broker-dealers are also currently subject to supervisory obligations under Section 15(b)(4)(E) of the Exchange Act and SRO rules, including the establishment of policies and procedures reasonably designed to prevent and detect violations of, and to achieve compliance with, the federal securities laws and regulations, as well as applicable SRO rules.[989] Specifically, the Exchange Act authorizes the Commission to sanction a broker-dealer or any associated person that fails to reasonably supervise another person subject to the firm's or the person's supervision that commits a violation of the federal securities laws.[990] The Exchange Act provides an affirmative defense against a charge of failure to supervise where reasonable procedures and systems for applying the procedures have been established and effectively implemented without reason to believe those procedures and systems are not being complied with. Further, under the federal securities laws and FINRA rules, prices for securities and broker-dealer compensation are required to be fair and reasonable, taking into consideration all relevant circumstances.[991]

Broker-dealers also register with and report information, including about their business and affiliates, to the Commission, the SROs, and other jurisdictions through Form BD.[992] Form BD requires information about the background of the applicant, its principals, controlling persons, and employees, as well as information about the type of business in which the broker-dealer proposes to engage and all control affiliates engaged in the securities or investment advisory business.[993] Once a broker-dealer is registered, it must keep its Form BD current by amending it promptly when the information is or becomes inaccurate for any reason.[994] In addition, firms report similar information and additional information—such as written customer complaints and other disciplinary matters— to FINRA pursuant to FINRA Rule 4530 (Reporting Requirements).

e. DOL Fiduciary Rule as It Relates to Current Market Practice

This section discusses the recently vacated DOL Fiduciary Rule,[995] the implications for broker-dealers, and the industry response to the DOL Fiduciary Rule. Although the DOL Fiduciary Rule was vacated by the Fifth Circuit Court of Appeals in June, we discuss the DOL Fiduciary Rule as part of the baseline because certain broker-dealers and other industry participants may have adjusted their practices in order to plan for the implementation of the requirements of this rule. It is possible that some of these broker-dealers may continue to operate their business using these adjusted practices, while other may have reverted to the pre-DOL Fiduciary Rule practices. Below, we discuss actual and potential costs, as well as changes in services and securities offerings, in response to the DOL Fiduciary Rule as reported by industry participants through surveys. We also describe how, following the Fifth Circuit Court of Appeals decision vacating the DOL Fiduciary Rule, certain of those costs have been reduced and the trend toward reduction in retail investor access to services and securities offerings that may have been caused in part by the DOL Fiduciary Rule appears to have ended and may be reversing.

i. Department of Labor's Fiduciary Rule and Temporary Enforcement Policy

As noted above, prior to the Fifth Circuit decision, many firms took steps to come into compliance with the DOL Fiduciary Rule, and in particular, the BIC Exemption and other PTEs, including changes to business practices.[996]

Following the decision by the Fifth Circuit, the DOL acknowledged that uncertainty about fiduciary obligations and the scope of exemptive relief under the prohibited transaction provisions of ERISA and the Internal Revenue Code following the court's decision could temporarily disrupt existing investment advice arrangements during the transition period, and also that financial institutions had devoted significant resources to comply with PTEs issued in connection with the DOL Fiduciary Rule, including the BIC Exemption.[997] Based on these concerns, the DOL issued a temporary enforcement policy stating that it would not pursue claims against fiduciaries working in good faith to comply with the BIC Exemption's Impartial Conduct Standards for transactions that would have been exempted by the BIC Exemption or treat such fiduciaries as violating applicable

[984] *Id.*

[985] A broker-dealer may be liable if it does not disclose "material adverse facts of which it is aware." *See, e.g., Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167, 1172 (2nd Cir. 1970); *SEC* v. *Hasho*, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992); *In the Matter of RichMark Capital Corp.*, Exchange Act Release No. 48758 (Nov. 7, 2003) (Commission Opinion) ("When a securities dealer recommends stock to a customer, it is not only obligated to avoid affirmative misstatements, but also must disclose material adverse facts of which it is aware. That includes disclosure of 'adverse interests' such as 'economic self-interest' that could have influenced its recommendation.") (citations omitted). *See also* Relationship Summary Proposal.

[986] *See, e.g., United States* v. *Szur*, 289 F.3d 200, 212 (2d Cir. 2002) (broker's fiduciary relationship with customer gave rise to a duty to disclose commissions to customer, which would have been relevant to customer's decision to purchase stock); *Arleen W. Hughes*, Exchange Act Release No. 4048 (Feb. 18, 1948) (Commission Opinion), *aff'd sub nom. Hughes* v. *SEC*, 174 F.2d 969, 976 (D.C. Cir. 1949) (broker-dealer acted in the capacity of a fiduciary and, as such, broker-dealer was under a duty to make full disclosure of the nature and extent of her adverse interest when engaging in principal transactions, "including her cost of the securities and the best price at which the security might be purchased in the open market").

[987] *See* Proposing Release at footnotes 175–177 and 205, and accompanying text. *See* Exchange Act Sections 10(b) and 15(c).

[988] *See* 913 Study at footnotes 251–54. *See also id.* at footnotes 225–232 (which discuss existing SRO rules on disclosures).

[989] *See supra* footnote 809. *See also* Proposing Release at 21622.

[990] Exchange Act Sections 15(b)(4)(E) and (b)(6)(A).

[991] *See, e.g.*, Exchange Act Sections 10(b) and 15(c); FINRA Rules 2121 (Fair Prices and Commissions), 2122 (Charges for Services Performed), and 2341 (Investment Company Securities). *See also* FINRA Rule 3221 (Non-Cash Compensation). Several commenters stated that, as part of their overall business practices, they use non-cash compensation (*e.g.*, firm-sponsored business conferences), which they believe is in compliance with existing FINRA Rule 3221 on non-cash compensation practices. *See* Guardian August 2018 Letter; NY Life Letter.

[992] *See* Relationship Summary Proposal at 21472; *see also generally* Form BD.

[993] *See generally* Form BD.

[994] *See* Exchange Act rule 15b3–1(a).

[995] *See supra* footnote 32.

[996] *See supra* footnotes 32–34 and accompanying text.

[997] *See* U.S. Department of Labor Field Assistance Bulletin 2018–02, *available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02.*

prohibited transactions rules.[998] Prior to the Fifth Circuit decision, some broker-dealers that offered services to IRAs and other retirement accounts may have implemented changes to services and securities to comply with and meet the conditions of the BIC Exemption and other PTEs, including the Impartial Conduct Standards.[999] Although the Commission does not currently have data on the number of firms that may have devoted resources to comply with the PTEs,[1000] the Commission can broadly estimate the maximum number of broker-dealers that could have undertaken changes in order to comply with requirements of the PTEs from the number of broker-dealers that have retail customer accounts. Approximately 73.5% (2,766) of registered broker-dealers report sales to retail customers.[1001] Similarly, approximately 8,235 (62% of) investment advisers serve high net worth and non-high net worth individual clients. The Commission understands that these numbers are an upper bound and likely overestimate the broker-dealers and investment advisers that provide retirement account services and began compliance with the requirements of the PTEs.[1002]

ii. Industry Response to DOL Fiduciary Rule

Although the DOL Fiduciary Rule became effective in June 2017, the DOL provided transitional relief through July 2019,[1003] which is now indefinitely extended under the temporary enforcement policy put in place in June 2018 following the Fifth Circuit decision. As described above, a significant subset of broker-dealers have retail customers with retirement accounts and would have been affected by the DOL Fiduciary Rule, and at least some broker-dealers began taking steps to effectuate compliance with the DOL Fiduciary Rule. A number of commenters stated that we did not sufficiently consider the existing regulatory environment and the current market practices of firms and financial professionals in light of the DOL's Fiduciary Rule and other existing rules and regulations.[1004] Below, we discuss the industry response to the DOL Fiduciary Rule and the effect of the Fifth Circuit decision on broker-dealers.

In the Proposing Release, we predominantly based our discussion of the industry and customer effects of the DOL Fiduciary Rule on information from a single industry study.[1005] Commenters provided additional citations to industry studies,[1006] which describe changes in market practices across a broader-sample of broker-dealers in response to the DOL Fiduciary Rule.[1007] In these studies, certain of the survey participants reported that they responded to the DOL Fiduciary Rule and the BIC Exemption by reducing certain services and access to advice to small retirement accounts. Certain participants further reported that they encouraged customers toward self-directed accounts and/or advisory accounts, including robo-advisors. Certain other participants reported that they reduced or eliminated certain securities within certain types of retirement accounts that they offered. Finally, certain participants reported that they increased certain fees for some of their customers. However, as it is generally the case with survey analysis, the surveys in the aforementioned studies are subject to potential selection biases (*i.e.*, the sample of respondents is not necessarily random) and methodological limitations (*e.g.*, the design of the questionnaire may influence the choices made by the respondents). Given these limitations, it is generally not clear whether the results of these studies capture significant or marginal changes in broker-dealer practices, and whether these changes are indicative of broader trends in the market for advice in response to the DOL Fiduciary Rule.

Changes to Services and Securities

A number of studies indicated that, as a result of the DOL Fiduciary Rule, certain industry participants had already or were planning to alter their menu of services and securities that they made available to retail customers. For example, of the 21 SIFMA members that participated in the SIFMA Study, 53% eliminated or reduced access to certain brokerage advice services and 67% migrated away from open choice to fee-based or limited brokerage services.[1008] Another study also discussed a shift from commission-based accounts to fee-based accounts but offered no details about the sample or the methodology employed to arrive

[998] *Id.*

[999] *See, e.g.*, Michael Wursthorn, *A Complete List of Brokers and Their Approach to 'The Fiduciary Rule'*, Wall St. J., Feb. 6, 2017, *https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491?mod=article_inline* for a discussion of how broker-dealers adjusted certain practices in response to the DOL Fiduciary Rule.

[1000] In order to perform this analysis, the Commission would need to know which financial firms offer services to IRAs and other retirement accounts. Under the current reporting regimes for both broker-dealers and investment advisers, they are not required to disclose whether (or what fraction of) their accounts are held by retail investors in retirement accounts.

[1001] As of December 2018, 3,764 broker-dealers have filed Form BD. Retail sales by broker-dealers were obtained from Form BR. *See supra* footnote 900.

[1002] The Department of Labor Regulatory Impact Analysis ("DOL RIA") identifies approximately 4,000 broker-dealers (FINRA, 2016), of which approximately 2,500 are estimated to have either ERISA accounts or IRA accounts serviced by broker-dealers, similar to the estimates that we provide above. In addition to broker-dealers, the DOL RIA estimates that other providers of ERISA or IRA accounts include: Approximately 10,600 federally registered investment advisers and 17,000 state-registered investment advisers (NASAA 2012/2013 Report), of which approximately 17,000 of federal and state investment advisers that are not dually registered, approximately 6,000 ERISA plan sponsors (2013 Form 5500 Schedule C), and approximately 400 life insurance companies (2014 SNL Financial Data). *See* U.S. Department of Labor, *Regulating Advice Markets: Definition of the Term 'Fiduciary', Conflicts of Interest, Retirement Investment Advice: Regulatory Impact Analysis for Final Rule and Exemptions* (Apr. 2016), *available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[1003] *See supra* footnote 1002.

[1004] *See, e.g.*, AALU Letter; CCMC Letters; CCMR Letter; CFA August 2018 Letter; Davis & Harman Letter; EPI Letter; Lincoln Financial Letter; Morningstar Letter; NASAA August 2018 Letter; Wells Fargo Letter.

[1005] *See* SIFMA Study, *supra* footnote 33. The SIFMA Study surveyed 21 SIFMA members and captured 43% of U.S. "financial advisors" (132,000 out of 310,000), 35 million retail retirement accounts, and 27% of qualified retirement savings assets ($4.6 trillion out of $16.9 trillion). The types of retirement accounts serviced by the participants in the SIFMA Study were not defined.

[1006] *See, e.g.*, CCMC Letters; Davis & Harman Letter; EPI Letter; Lincoln Financial Letter.

[1007] *See, e.g.*, Financial Services Roundtable & Harper Polling, *Department of Labor Fiduciary Rule: National Survey of Financial Professionals* (July 2017), *available at https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2641320-161289.pdf* (*see* Appendix A) ("FSR Study"). The FSR Study surveyed 600 financial advisers in July 2017, including certified financial planners, chartered financial analysts, broker-dealers, and dually registered representatives. *See also* Center for Capital Markets Competitiveness, *Fiduciary Rule: Initial Impact Analysis*, FTI Consulting Report Presented to the U.S. Chamber of Commerce (Sept. 7, 2017), *available at https://www.centerforcapitalmarkets.com/wp-content/uploads/2017/07/Fiduciary-Rule-Initial-Impact-Analysis.pdf* ("Chamber Study"). The Chamber Study surveyed 14 financial advisory companies (insurance companies, securities manufacturers, and broker-dealers) responsible for $10 trillion in AUM and nearly 26 million investment accounts. The types of accounts serviced by the participants in the Chamber Study were not defined. *See also* A.T. Kearney, *The $20 Billion Impact of the New Fiduciary Rule on the U.S. Wealth Management Industry*, Perspective for Discussion (Oct. 2016), *available at https://www.atkearney.com/documents/10192/7041991/DOL+Perspective+-+August+2016.pdf/b2a2176b-c821-41d9-b12e-d3d2b0807d69* ("Kearney Study"). We note that the development of business models and practices discussed herein reflect changes made voluntarily by firms in response to the DOL Fiduciary Rule, but were not necessarily required by the DOL Fiduciary Rule.

[1008] *See* SIFMA Study, *supra* footnote 33.

at the estimates.[1009] Finally, another study documented that at least 29% of their survey participants expected to move clients, particularly those with low account balances, to robo-advisors.[1010] In addition, a number of media articles describe several cases of broker-dealers that have adjusted their practices with respect to the range of accounts offered as a result of the DOL Fiduciary Rule.[1011]

Further, industry studies noted that certain of their respondents changed their securities offerings as a result of the DOL Fiduciary Rule.[1012] For example, 95% of the SIFMA Study participants altered their securities offerings by reducing or eliminating certain asset or share classes; 86% of the respondents reduced the number or type of mutual funds (*e.g.*, 29% eliminated no-load funds, while 67% reduced the number of mutual funds), and 48% reduced annuity securities offerings.[1013] Similarly, another study found that nearly 30% of survey participants eliminated or reduced securities or services available to retirement investors in response to the DOL Fiduciary Rule,[1014] while the Chamber Study noted that 13.4 million accounts of the companies surveyed had limited access to certain securities, including mutual funds, variable annuities, and exchange-traded funds.[1015] Finally, the SIFMA Study states that although the DOL Fiduciary Rule applied only in connection with services for retirement accounts, certain of the survey participants had implemented the changes to both retirement and non-retirement accounts.[1016] These studies do not discuss the attributes of the securities that the participants chose to no longer offer. In addition, as noted above, survey analysis is subject to certain limitations that, generally, complicate the interpretation of their results. For instance, it is not generally clear whether the results of these studies capture significant or marginal changes in broker-dealer practices, and whether these changes are indicative of broader trends in the market for advice in response to the DOL Fiduciary Rule.

Besides the studies mentioned above, a number of media articles provide anecdotal evidence of broker-dealers that chose to no longer offer certain securities.[1017] Some commenters also provided data about historical trends in certain product markets.[1018] For example, one commenter provided data for the market of mutual funds and showed that between 2007 and 2018, the percentage of assets in load mutual funds declined from 27% to 12%, while no-load share classes increased from 51% to 71% over the same time period.[1019] Further, this commenter stated that this shift has occurred because of the growth in assets in 401(k) plans and other retirement accounts, as well as the increase in the number of advisory accounts, both of which tend to invest in no-load share classes.

However, the DOL Fiduciary Rule may have caused certain product markets to adjust.[1020] For example, innovations, including the introduction of T and clean share classes of mutual funds, can be regarded as a paradigm shift in terms of how product sponsors compensate broker-dealers for distribution services. One commenter noted that these products may reduce the expected fund underperformance net of costs for retail investors relative to A shares by nearly 50 basis points annually.[1021]

The Effect of Costs and Fees

Some firms may have responded to the DOL Fiduciary Rule by either presenting customers with the option to enter into different and potentially more costly advice relationships compared to a brokerage advice relationship or by passing some of the compliance costs to customers.[1022] However, one study observed that 63% of the responding firms that limited or eliminated access to advised brokerage services stated that they had at least some customers who chose to move to self-directed accounts rather than fee-based accounts and cited the reasons that customers provided as (1) "did not want to move to a fee-based account," (2) "was not in the retirement investor's best interest to move to a fee-

[1009] *See* Kearney Study (provided by the Davis & Harman and Lincoln Financial Letters).

[1010] *See* FSR Study, which states that "[a]dvisors who say the average net worth of their clients is under $25,000 are more likely to say they will definitely, probably, or have already directed more clients to robo advisor services, both online and at call centers (43% vs. 29% overall)."

[1011] For example, in response to the DOL Fiduciary Rule, J.P. Morgan and Merrill Lynch phased out commission-based retirement plans and instead charged fees based on AUM. *See* Crystal Kim, *BofA, JPMorgan, and the Fiduciary Rule: Will They or Won't They,* Barron's, Mar. 15, 2017, *https://www.barrons.com/articles/bofa-jpmorgan-and-the-fiduciary-rule-will-they-or-wont-they-1489588442.* However, upon the Fifth Circuit's ruling on the DOL Fiduciary Rule, J.P. Morgan and Merrill Lynch reversed their earlier decision and began to offer commission-based retirement plans again. *See* Jed Horowitz, *JPMorgan to Remove Some Fiduciary Rule Handcuffs, Others May Follow,* AdvisorHub, May 4, 2018, *https://advisorhub.com/jpmorgan-to-remove-some-fiduciary-rule-handcuffs-others-may-follow/*; Imani Moise, *Merrill Lynch Does about Face on Fiduciary-Era Policy,* Reuters, Aug. 30, 2018, *https://www.reuters.com/article/us-bank-of-america-fiducuary/merrill-lynch-does-about-face-on-fiduciary-era-policy-idUSKCN1LF1R9. See also* Daisy Maxey, *Winners and Losers in a Post-Fiduciary World,* Wall St. J., May 24, 2017, *available at https://www.wsj.com/articles/winners-and-losers-in-a-post-fiduciary-world-1495638708*; Nir Kaissir, *Merrill Lynch Can't Restore the Bad Old Days of Conflicts,* Bloomberg, Sept. 4, 2018, *available at https://www.bloomberg.com/opinion/articles/2018-09-04/merrill-lynch-can-t-restore-the-bad-old-days-of-conflicts.*

[1012] While the industry studies discussed in this section examined shifts in services and securities provided to retail investors, one limitation of these studies is that they did not discuss whether the quality of advice provided to retail investors also changed as a result.

[1013] *See* SIFMA Study, *supra* footnote 33.

[1014] *See* American Bankers Association, *ABA Survey: Department of Labor Fiduciary Rule* (July 20, 2017), *available at https://www.aba.com/Advocacy/Issues/Documents/dol-fiduciary-rule-survey-summary-report.pdf* ("ABA Study"). The ABA Study conducted a survey of 57 banks about their understanding of the DOL Fiduciary Rule on securities and services available to retirement investors. *See also* Kearney Study, which anticipated a shift from mutual funds to exchange-traded funds, and that "certain high-cost investment products (such as variable annuities) will be phased out as the business model is no longer viable under [the DOL Fiduciary Rule]." *See also* FSR Study, which reported that 63% of its survey participants anticipated fewer investment options and 56% had already reduced or anticipated reducing the number of mutual funds offered to retirement customers.

[1015] *See* Chamber Study. *See also* Editorial Board, *Tom Perez's Fiduciary Flop,* Wall St. J., Mar. 18, 2018, *https://www.wsj.com/articles/tom-perezs-fiduciary-flop-1521412228,* which noted that some firms restricted sales of commission-based securities such as load mutual funds and variable annuities in retirement accounts.

[1016] *See, e.g.,* SIFMA Study, *supra* footnote 33.

[1017] *See* Alex Steger, *Exclusive: UBS to Cut over 800 Funds from Platform,* City Wire, Mar. 13, 2018, *https://citywireusa.com/professional-buyer/news/exclusive-ubs-to-cut-over-800-funds-from-platform/a1100101*; Michael Thrasher, *Ameriprise Drops Hundreds of Funds Offered to Brokerage Clients,* WealthManagement.com, June 8, 2017, *https://www.wealthmanagement.com/industry/ameriprise-drops-hundreds-funds-offered-brokerage-clients*; Hugh Son, *Morgan Stanley to Reduce Wealth Fees Even with Rule Uncertainty,* Bloomberg, Jan. 26, 2017, *https://www.bloomberg.com/news/articles/2017-01-26/morgan-stanley-to-proceed-with-wealth-changes-ahead-of-new-rules*; Margarida Correia, *LPL Puts Final Touches on Product Lineups in Preparation for Fiduciary Rule,* Financial Planning, Mar. 9, 2017, *https://www.financial-planning.com/news/lpl-puts-final-touches-on-product-lineups-in-preparation-for-fiduciary-rule?tag=00000154-3e16-d45e-a175-7f9f48a20001*; Bruce Kelly, *Wells Fargo Advisors Restricting Investments for Retirement Accounts,* Investment News, May 24, 2017, *https://www.investmentnews.com/article/20170524/FREE/170529959/wells-fargo-advisors-restricting-investments-for-retirement-accounts.*

[1018] *See, e.g.,* ICI Letter.

[1019] *See id.*

[1020] *See, e.g.,* James Chen, *Clean Shares,* Investopedia, available at *https://www.investopedia.com/terms/c/clean-shares.asp,* stating that "[t]he mutual fund industry introduced clean shares, along with T shares, in response to the Department of Labor's fiduciary rule."

[1021] *See* Letter from Aron Szapiro, Director of Policy Research, Morningstar (Sept. 2017).

[1022] *See supra* footnote 1011 (which describes how certain firms responded to the DOL Fiduciary Rule and later reversed changes in response to the Fifth Circuit decision).

based account," (3) "did not meet the account minimums," or (4) "wished to maintain positions in certain asset classes which were not eligible for a fee-based account." [1023] Another study further observed that nearly 40% of the responding firms believed that the relationship with their customers had been altered as a result of the DOL Fiduciary Rule and that customers with smaller account balances were nearly ten times more likely to have been negatively affected by the DOL Fiduciary Rule than customers with larger account balances.[1024] Further, another study observed that 68% of the responding firms were less likely to provide services to smaller accounts, and 46% anticipated that they may service fewer clients overall.[1025]

One study observed that, generally, based on the numbers provided by the respondents, a fee-based account can be more costly than a brokerage account; however, such comparison is generally hard to make without knowing the securities in the two types of accounts, and it is not clear that the survey made this clear to respondents.[1026] One study [1027] observed that approximately 52% of its survey participants indicated that they may pass on the costs associated with complying with the DOL Fiduciary Rule to clients in the form of higher fees, while another study stated that more than 6 million client accounts of the survey participants may be subject to higher costs and fees as a result of the DOL Fiduciary Rule, although it is not clear whether this estimate assumes full adoption of the DOL Fiduciary Rule.[1028]

Estimated Costs of Compliance and Effects on Compensation Structures

One study observed that survey respondents were expecting to incur compliance costs as a result of the DOL Fiduciary Rule that would vary by the size of the respondent.[1029] For instance, large firms with net capital in excess of $1 billion were expected to have start-up and ongoing compliance costs of $55 million and $6 million, respectively, while firms between $50 million and $1 billion in net capital were expected to have start-up and ongoing compliance costs of $16 million and $3 million, respectively. The study further estimated that the total start-up compliance costs for large and medium-size firms combined would have been approximately $4.7 billion, while ongoing costs would have been approximately $700 million per year.

Another study observed that the costs of complying with DOL Fiduciary Rule would encompass technology, legal, process changes, educational, and training costs for firms.[1030] This study forecasted that the DOL Fiduciary Rule may cause a $2 trillion redistribution in assets from broker-dealers to investment advisers, robo-advisors, and self-directed accounts, and a nearly $20 billion decrease in revenues to the entire financial services industry, including broker-dealers.

The study further forecasted that as a result of the DOL Fiduciary Rule product sponsors "will be incentivized to streamline product offerings, lower fees, and improve performance," and investor would pay $7.5 billion less in mutual fund and ETF expenses by the end of 2010. However, as noted above, this study does not provide details about how it obtained its estimates.

Several media articles provide some anecdotal evidence suggesting that as a response to the DOL Fiduciary Rule some broker-dealers began to alter the compensation structures of their registered representatives.[1031] For example, some broker-dealers have indicated that they adjusted their compensation structures by equalizing commissions and deferred sales charges across similar securities.[1032] Other broker-dealers banned sales quotas, contests, special awards, and bonuses,[1033] including deferred bonuses as part of recruitment efforts.[1034] However, following the decision by the Fifth Circuit to vacate the DOL Fiduciary Rule, some firms reinstated back-end recruiting bonuses.[1035]

iii. Additional Evidence of Current Market Practices

In this section, we include information on Commission observations on the broker-dealer industry. Commission experience indicates that there have been a number of changes to the broker-dealer industry and its business practices over time.[1036] Consistent with the trend baseline provided in Section III.B.1.c and industry studies and anecdotal evidence described above, we have observed firms choosing to do business with retail investors as investment advisers, not as broker-dealers, by either migrating existing brokerage accounts to advisory accounts or directing new retail customers to advisory accounts.

Beyond broker-dealer trends in business practices, Commission experience also indicates that some broker-dealers have responded to the DOL Fiduciary Rule and the Fifth Circuit decision vacating the DOL Fiduciary Rule by modifying their existing business practices. For example, some firms, consistent with anecdotal evidence discussed above, eliminated brokerage IRA accounts in response to the DOL Fiduciary Rule; however, upon the Fifth Circuit decision, the firms reinstituted

1023 *See* SIFMA Study, *supra* footnote 33.

1024 *See* ABA Study.

1025 *See* FSR Study. *See also* Chamber Study, which found that some survey participants have added minimum account balances and have migrated away from commission-based models toward fee-based models.

1026 *See* SIFMA Study. We note that only a subset of the SIFMA Study participants provided information on the costs associated with brokerage and advisory accounts. *See* CFA August 2018 Letter. The SIFMA Study did not provide any information on the set of firms comprised in this subset that provided information on brokerage and advisory costs. *See also* ICI Letter (which provided similar estimates for fees and costs attributable to brokerage and advisory accounts).

1027 *See* FSR Study.

1028 *See* Chamber Study.

1029 *See* SIFMA Study. As a general matter, we note that the estimates reported by industry studies, including this study, are based on a rulemaking with more extensive requirements for changes to business models than those required by Regulation Best Interest.

1030 *See* Kearney Study.

1031 *See* Son (2017), *supra* footnote 1017; Tara Siegel Bernard, *Do Financial Advisers Have to Act in Your Interest? Maybe,* N.Y. Times, Mar. 22, 2018, *https://www.nytimes.com/2018/03/22/your-money/financial-advisers-customer-interest.html.*

1032 *See, e.g.,* Andrew Welsch, *Facing Higher Costs, Raymond James Cuts Adviser Pay in Rare Move,* Financial Planning, July 11, 2017, *https://onwallstreet.financial-planning.com/news/facing-higher-costs-raymond-james-cuts-adviser-pay-in-rare-move?tag=00000151-16d0-def7-a1db-97f024310000.*

1033 *See* Bernard (2018).

1034 *See* Mason Braswell, *Morgan Stanley Resumes Recruiting Offers—Slimmer and DOL-Compliant,* AdvisorHub, Nov. 3, 2016, *https://advisorhub.com/morgan-stanley-resumes-recruiting-offers-slimmer-and-dol-compliant/*; Deon Roberts, *Wells Fargo Overhauling Bonuses to Comply with New Rules on Financial Advisers,* Charlotte Observer, Dec. 14, 2016, *https://www.charlotteobserver.com/news/business/banking/bank-watch-blog/article120961138.html.*

1035 *See* Mason Braswell, *Farewell Fiduciary Rule? Morgan Stanley Sweetens Recruiting Bonuses,* AdvisorHub, May 1, 2018, *https://advisorhub.com/farewell-fiduciary-rule-morgan-stanley-sweetens-recruiting-bonuses/.* "Back-end" bonuses are expressly contingent on the achievement of sales or asset targets. *See* U.S. Department of Labor, *Conflict of Interest FAQs (Part I—Exemptions)* (Oct. 27, 2016), *available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-1.pdf.*

1036 Information on the broker-dealer industry and business practices comes from a variety of Commission resources and generally relates to market trends and changes to business practices that have emerged in recent years and is comprised of both standalone broker-dealers and dually registered firms. With respect to industry trends, Commission resources generally verify data cited above in Section III.B.2.e.ii. We acknowledge that the information provided in this baseline may not be representative of business practices more generally because of the diversity and complexity of services and securities offered by standalone broker-dealers and dually registered firms.

brokerage IRAs. Other examples of changes following the Fifth Circuit decision include changes to incentive-based compensation in certain types of accounts and principal trading restrictions.

3. Investment Advice and Evidence of Potential Investor Harm

A number of commenters expressed the view that the Proposing Release did not fully document the problems attributed to potential conflicts of interest stemming from the broker-dealer model and the resulting harm to retail customers.[1037] In order to address these commenters' concerns, we analyze academic and industry studies to present an overview of the market for advice for retail customers.[1038] Below, we discuss which types of investors seek investment advice; the benefits attained through investment advice for retail investors; limitations to the value of that advice that stem from agency costs, particularly those related to conflicts of interest arising from financial professional compensation; and evidence of potential investor harm. Where appropriate, we note limitations to the application of various academic studies that form the basis of other economic analyses, which investigate potential investor harm attributed to recommendations received from financial professionals.

a. Who Seeks Investment Advice[1039]

Approximately 37% of U.S. households currently engage with financial professionals according to OIAD/RAND; however, households who hire these professionals are not uniformly distributed among the U.S. population.[1040] In addition to OIAD/RAND, a number of academic studies, provided with comment letters, examine characteristics of investors and their propensity for seeking (and following) investment advice. Older, wealthier, more educated, and financially more literate retail investors are more likely to seek and act on advice obtained from financial professionals, suggesting that investors who may benefit most from advice (younger, less educated, and less financially sophisticated) are least likely to obtain it.[1041] Several studies examine the choice by retail investors to select into broker-sold or direct-sold mutual funds. These studies find less financially sophisticated investors are more likely to purchase "broker-sold" funds and therefore more likely to receive advice from a financial professional.[1042]

As we detail below, retail investors bear costs associated with obtaining advice from financial professionals, which may deter some investors, especially those with limited wealth or income, from seeking investment advice. However, an investor's lack of sophistication may also prevent the investor from obtaining or using investment advice even when advice is provided at no cost. One paper examines the outcomes from a large sample of active retail investors of a large broker-dealer.[1043] These retail investors received unsolicited and unbiased advice from the broker-dealer at no cost. Although the advice was designed to improve the efficiency of the investors' portfolios, only 5% of investors accepted the offer to receive the free advice. Moreover, those that did accept the advice rarely followed the advice. Investors who participated in the study had only minimal improvements to their portfolio efficiency. The authors cite lack of financial sophistication and lack of familiarity or trust as reasons why the unsolicited advice was not followed.[1044]

[1037] *See, e.g.,* AARP August 2018 Letter; Better Markets August 2018 Letter; CFA August 2018 Letter; EPI Letter; U. of Miami Letter; Morningstar Letter; PIABA Letter; Letter from Ron A. Rhoades, Director, Personal Financial Planning Program and Assistant Professor of Finance, Gordon Ford College of Business, Western Kentucky University (Aug. 6, 2018) ("Rhoades August 2018 Letter"); Former SEC Senior Economists Letter.

[1038] Although the discussion here generally focuses on studies provided by comment letters, at times we have included additional references either to more fully articulate specific arguments or to provide counterarguments to studies provided by comment letters in an effort to present a complete overview of pertinent literature. Because the studies we cite in this section generically discuss investment advice or advice rather than recommendations, and use a variety of terms to describe financial professionals or firms (*e.g.,* brokers, advisers, or financial advisers) and investors (*e.g.,* investors, customers, or clients), in the discussion that follows, we use generic terms of advice or investment advice, financial professional, firm, and retail investor or investor. Although we believe that the studies generally discuss advice as it relates to broker-dealers or investment advisers, because of generic terms used, such as "financial adviser," it is possible that other types of advice providers (*e.g.,* commercial banks, tax consultants, etc.) could be included in some of the studies cited below. However, because not all authors clearly define which financial professionals are included in a given study, we are unable to provide an exhaustive list of all types of financial professionals that make up the market for advice.

[1039] One limitation of the majority of the studies examined is that we are unable to distinguish whether the retail investor is seeking and/or receiving investment advice from a broker-dealer or an investment adviser (or some other type of financial professional). The studies generally do not have sufficiently granular data to distinguish broker-dealer customers from investment adviser clients. Further, for studies where retail investors can be distinguished by their investment choices (*e.g.,* purchasing direct-sold versus broker-sold funds), we are unable to determine whether differences exist between broker-sold funds sold by broker-dealers and broker-sold funds sold by investment advisers. As discussed below, some commenters expressed the view that buy-and-hold retail investors were more likely to prefer the services of brokerage accounts over advisory accounts. *See infra* footnote 1055.

[1040] According to OIAD/RAND, the use of financial professionals varies by both income and education levels. For example, 38% of retail investors with income greater than $100,000 engage with financial professionals, while only 13.7% of retail investors with incomes below $25,000 did so. Another study, the Survey of Consumer Finance, indicates that the use of financial professionals by American households is closer to 60%, but also includes financial planners, accountants, lawyers, and bankers, in addition to broker-dealers and investment advisers. *See* SCF Survey, *supra* footnote 950.

[1041] *See, e.g.,* Utpal Bhattacharya et al., *Is Unbiased Financial Advice to Retail Investors Sufficient? Answers from a Large Field Study,* 25 Rev. Fin. Stud. 975 (2012); Daniel Hoechle et al., *The Impact of Financial Advice on Trade Performance and Behavioral Biases,* 21 Rev. Fin. 871 (2017); Jeremy Burke & Angela A. Hung, *Do Financial Advisors Influence Savings Behavior?,* RAND Labor and Population Report Prepared for the Department of Labor (2015), *available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR1200/RR1289/RAND_RR1289.pdf;* Claude Montmarquette & Nathalie Viennot-Briot, *Econometric Models on the Value of Advice of a Financial Advisor,* CIRANO Project Report No. 2012RP–17 (July 2012), *available at https://www.cirano.qc.ca/pdf/publication/2012RP-17.pdf;* Andreas Hackethal, Michael Haliassos, & Tullio Jappelli, *Financial Advisors: A Case of Babysitters?,* 36 J. Banking & Fin. 509 (2012). *See also* AARP August 2018 Letter; CFA August 2018 Letter; FPC Letter; Primerica Letter; Wells Fargo Letter (which provided several studies cited here; other studies (*e.g.,* Hoechle et al. (2017)) are included because they capture characteristics of the investors most likely to seek and act on financial advice that are not captured by the studies suggested by the commenters). Studies also note that the characteristics of investors most likely to seek advice are also likely to be those most attractive to financial professionals as they have more assets to manage. *See* Michael S. Finke, *Financial Advice: Does it Make a Difference?* (Working Paper, May 5, 2012) (which describes the relationship between investors and financial professionals).

[1042] *See, e.g.,* Christopher J. Malloy & Ning Zhu, *Mutual Fund Choices and Investor Demographics* (Working Paper, Mar. 14, 2004), *available at https://pdfs.semanticscholar.org/16a1/8daed89c3c48a765ad3a265018b4d27bd0f4.pdf;* John Sabelhaus, Daniel Schrass, & Steven Bass, *Characteristics of Mutual Fund Investors, 2008,* ICI Res. Fundamentals, Feb. 2009, *available at https://www.ici.org/pdf/fm-v18n2.pdf;* John Chalmers & Jonathan Reuter, *Is Conflicted Advice Better than No Advice?* (Working Paper, Sept. 14, 2015), *available at https://www.semanticscholar.org/paper/Is-Conflicted-Investment-Advice-Better-than-No-Chalmers-Reuter/3337ce8c3a72bf55dac43f407fd104b93aec863b. See also* AARP August 2018 Letter; CFA August 2018 Letter; EPI Letter (which provided the Chalmers & Reuter (2015) citation; Malloy & Zhu (2004) and Sabelhaus et al. (2009) are included because they capture aspects of the mutual fund selection decision by retail investors that are not captured by the studies suggested by the commenters). We provide a more detailed discussion of these studies below in Section III.B.3.c.

[1043] *See* Bhattacharya et al. (2012), *supra* footnote 1041.

[1044] *See id.*

b. Benefits and Limitations of Investment Advice

A number of commenters provided academic studies of benefits that investors may obtain from hiring financial professionals.[1045] One benefit of hiring a firm or financial professional is that professional advice can help the average retail investor overcome common "investment mistakes" that he or she may make when investing.[1046] Common "investment mistakes" made by retail investors include limited allocation of assets to equities, under-diversification, excessive trading, and home bias.[1047] These studies also attempt to identify reasons why retail investors persistently make inefficient investment choices.

Beyond correcting potential "investment mistakes," academic studies document a multitude of other benefits that accrue to retail investors as a result of seeking investment advice, including, but not limited to: Higher household savings rates, setting long-term goals and calculating retirement needs, more efficient portfolio diversification and asset allocation, increased confidence and peace of mind, improvement in financial situations, and improved tax efficiency.[1048] For example, one study notes that investors who engaged financial professionals for at least 15 years had approximately 173% more assets on average than investors who did not hire financial professionals, driven by higher household savings rates and increased asset allocation to non-cash instruments.[1049] Further, financial professionals may be able to help retail investors overcome information asymmetries that exist between firms that supply securities and their customers that retail investors would not be able to disentangle on their own.[1050]

Commenters also provided academic studies which discussed the limitations of the advice received from financial professionals, including how both direct and indirect costs of advice can reduce returns earned by investors.[1051] How financial professionals are compensated can erode the value of advice in two primary ways: (1) The direct costs associated with purchasing advice detract from returns over time;[1052] and (2) the indirect costs to retail investors that arise from conflicts of interest between financial professionals and investors. Financial professionals are generally compensated directly by retail investors in three principal ways: Commission-based (*e.g.*, broker-dealers), fee-based on AUM (*e.g.*, investment advisers), and flat or hourly fees (*e.g.*, financial planners), although some financial professionals may receive compensation in multiple ways for providing advice to the same investor.[1053]

One study estimates that the average annual costs associated with commission-based accounts are approximately 75 bps, while the average fee-based account costs 130 bps.[1054] We acknowledge that in addition to the fees charged for particular types of services, other expenses may be incurred that reduce returns earned by investors, some of which may be earned by the financial professional or the firm and paid by the firm's product or service providers (*e.g.*, fund loads, 12b–1 fees, and shareholder servicing fees).

Some commenters expressed the view that certain investors (*e.g.*, buy-and-hold investors) may prefer to pay a single commission relative to an ongoing fee-

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[1045] *See infra* footnote 1048.

[1046] *See* Bhattacharya et al. (2012), *supra* footnote 1041. "Investment mistakes" are investors' actions that would go against what a rational investor would do when undertaking efficient investment decisions (here and below, *infra* footnote 1047, we provide studies that analyze common "investment mistakes" made by retail investors). For example, evidence suggests that retail investors tend to trade too frequently. *See* Brad M. Barber & Terrance Odean, *Trading is Hazardous to Your Wealth: The Common Stock Performance of Individual Investors*, 55 J. FIN. 773 (2000).

[1047] As described in Bhattacharya et al. (2012), *supra* footnote 1041, possible explanations for common "investment mistakes" may arise from behavioral biases (*e.g.*, cognitive errors), the cost of information acquisition, or the selection of the financial professional. *See, e.g.*, Luigi Guiso, Paolo Sapienza, & Luigi Zingales, *People's Opium? Religion and Economic Attitudes*, 50 J. Monetary Econ. 225 (2003); Laurent E. Calvet, John Y. Campbell, & Paolo Sodini, *Down or Out: Assessing the Welfare Costs of Household Investment Mistakes*, 115 J. Pol. Econ. 707 (2007); Barber & Odean (2000), *supra* footnote 1046; Karen K. Lewis, *Trying to Explain Home Bias in Equities and Consumption*, 37 J. Econ. Literature 571 (1999).

[1048] *See, e.g.*, Mitchell Marsden, Catherine D. Zick, & Robert N. Mayer, *The Value of Seeking Financial Advice*, 32 J. Fam. & Econ. Issues 625 (2011); Jinhee Kim, Jasook Kwon, & Elaine A. Anderson, *Factors Related to Retirement Confidence: Retirement Preparation and Workplace Financial Education*, 16 J. Fin. Counseling & Plan. 77 (2005); Michael S. Finke, Sandra J. Huston, & Danielle D. Winchester, *Financial Advice: Who Pays*, 22 J. Fin. Counseling & Plan. 18 (2011); Daniel Bergstresser, John M.R. Chalmers, & Peter Tufano, *Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry*, 22 Rev. Fin. Stud. 4129 (2009); Ralph Bluethgen, Steffen Meyer, & Andreas Hackethal, *High-Quality Financial Advice Wanted!* (Working Paper, Feb. 2008), *available at http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.596.2310*; Neal M. Stoughton, Youchang Wu, & Josef Zechner, *Intermediated Investment Management*, 66 J. Fin. 947 (2011). Marsden et al. (2011) documents benefits attributable to hiring a financial professional, such as better retirement account diversification and savings goals, but does not find that hiring a financial professional measurably increases the amount of overall wealth accumulation for those investors. *See also*, Burke & Hung (2015), *supra* footnote 1041, for additional studies on the causal relation between the use of a financial professional and wealth accumulation. Francis M. Kinniry et al., *Putting a Value on Your Value: Quantifying Vanguard Advisor's Alpha*, Vanguard Research (Sept. 2016), *available at https://www.vanguard.com/pdf/ISGQVAA.pdf*, estimates the value to investors associated with obtaining financial advice of approximately 3% in net returns to investors, associated with suitable asset allocation, managing expense ratios, behavioral coaching, alleviating home bias, among others. *See also* AARP August 2018 Letter; CCMC Letters; CFA August 2018 Letter; Edward Jones Letter; Letter from Brian M. Nelson (Jul. 10, 2018) ("Nelson Letter") (which provided several of these studies; other studies were included because they capture aspects of the benefits of advice for retail investors that are not captured by the studies suggested by the commenters (*e.g.*, Marsden et al. (2011), Finke et al. (2011)).

[1049] *See* Montmarquette & Vionnet-Briot (2012), *supra* footnote 1041. While this study describes the benefits of hiring financial professionals on asset accumulation, it also notes that termination of relationships with financial professionals resulted in a significant loss of overall investment asset value. *See* Primerica Letter; Wells Fargo Letter (which provided references to this academic study).

[1050] *See* Roman Inderst & Marco Ottaviani, *Financial Advice*, 50 J. Econ. Literature 494 (2012). *See also* AARP August 2018 Letter.

[1051] *See, e.g.*, AARP August 2018 Letter; CFA August 2018 Letter; EPI Letter; Letter from Ron A. Rhoades, Director, Personal Financial Planning Program and Assistant Professor of Finance, Gordon Ford College of Business, Western Kentucky University (Dec. 6, 2018) ("Rhoades December 2018 Letter").

[1052] As noted in one study, the direct costs (fees and expenses) may not be transparent to retail investors. Coupled with conflicts of interest that can bias any advice provided, information asymmetry between financial professionals and retail investors may be large. *See* Finke (2012), *supra* footnote 1041.

[1053] For example, investment advisers and supervised persons may receive account-level advisory fees, and may also receive compensation for the sale of securities or other investment products, including asset-based sales charges or service fees for the sale of mutual funds to their advisory clients. *See* Items 5.C, 5.E, and 14.A of Form ADV Part 2A; Items 4.A.2, 4.B, and 5 of Form ADV Part 2B. When we refer to advisers and supervised persons receiving fees for the sale of securities or other investment products, we generally mean advisers that are also registered broker-dealers or advisers whose affiliated broker-dealers receive these fees. Form ADV instructs advisers that if they receive compensation in connection with the purchase or sale of securities, they should carefully consider the applicability of broker-dealer registration requirements of the Exchange Act and any applicable state securities statutes. *See* Form ADV, Part 2A, Note to Item 5.E.

[1054] *See* John H. Robinson, *Who's the Fairest of Them All? A Comparative Analysis of Financial Advisor Compensation Models*, 20 J. Fin. Plan. 56 (2007). *See also* AARP August 2018 Letter. One study, however, argues that when the direct costs associated with commissions are combined with the estimated agency costs, there is little difference in the costs between commission-based and fee-based advice. *See* Quinn Curtis, *The Fiduciary Rule Controversy and the Future of Investment Advice* (Univ. of Va. Sch. of Law, Law & Econ. Research Paper Series No. 2018–04, Mar. 2018). *See also* UVA Letter. We note that services provided may also vary between brokerage and advisory accounts, which could also affect differences in costs paid by retail investors.

based obligation that is tied to AUM in their account.[1055] We note that this choice may be dependent on the investor's holding period and other ongoing expenses that affect an investor's net return over time. For example, a buy-and-hold investor that chooses an account where fees are based on AUM may pay more over time than a similar buy-and-hold investor that pays a single commission. Further, some commission-based securities, such as mutual funds, may have ongoing expenses, including 12b–1 fees, which could lead to an erosion of net returns over time.[1056] Such ongoing expenses, however, may not be adequately accounted for by investors when making investment decisions about the type of account to open and what type of security to purchase.[1057] Several commenters provided analyses to show the expected effect of one-time costs and ongoing expenses (*e.g.*, operating costs or advisory fees) to investors from both commission-based and fee-based perspectives, conditional on the investor's holding period.[1058]

Separately, investors may face indirect costs that are a result of agency problems that emerge when financial professionals seek to maximize their own compensation and take actions that place their own interests ahead of the investors that they are supposed to serve.[1059] A number of commenters and academic studies have stated that commission-based compensation is more likely to contribute to conflicts of interest between financial professionals and retail investors than fee-based compensation.[1060] Other commenters, however, indicated that commission-based compensation provides benefits to investors.[1061] One study finds that conflicts of interest are likely to be present in *all* forms of compensation earned by financial professionals. For example, fee-based compensation could result in so-called "reverse churning" and a disincentive to reduce AUM, even if that would be in the investor's best interest, while flat-fee models can lead to shirking and overbilling.[1062] However, due to limitations on the data available regarding fee-based advice, most of the academic studies to date regarding conflicts of interest focus on commission-based compensation models. As such, the potential conflicts associated with the fee-based compensation models, including fee-based compensation earned by broker-dealers, have not been subject to as much analysis. Studies show that commission-based compensation potentially leads to biased advice, including excessive trading in accounts and recommendations to purchase high-commission securities, both of which benefit the financial professional and may lead to lower net returns.[1063]

Financial professionals also may benefit from other forms of transaction-based payment from customers, such as mark-ups and mark-downs; for instance, one study documents that the size of the mark-up or mark-down is significantly positively related to whether the broker-dealer solicits the transaction and whether the broker-dealer acts in a principal capacity.[1064] Because mark-ups and mark-downs are payments from the customer to the broker-dealer, they give rise to conflicts of interest between a broker-dealer and his or her customer at the time of a recommendation, particularly if they are opaque to the customer, at the time of the recommendation. Mechanisms, including regulation,[1065] disclosure, and reputation,[1066] may be able to mitigate the risk of financial professionals acting on conflicts of interest to the detriment of their customers.[1067] In addition to direct payments of commissions from retail investors, financial professionals may receive payments from third parties, such as securities issuers, which can increase costs to investors through higher management fees and reduced net returns, and provide incentives to recommend these securities over those that do not provide such incentives.[1068]

While a number of studies suggest that conflicts of interest may lead to investor harm, one study, which provides a survey of the literature on conflicts of interest, states that "although conflicts of interest are omnipresent when contracting is costly and parties are imperfectly informed, there are important factors that mitigate their impact and, strikingly, it is possible for customers of financial institutions to benefit from the existence of such conflicts . . . The existence of a conflict of interest . . . does not mean that . . . the customers of that

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[1055] *See, e.g.*, Cetera August 2018 Letter; AALU Letter; Pacific Life August 2018 Letter; NAIFA Letter; Empower Retirement Letter; CCMR Letter; Primerica Letter.

[1056] *See* CFA August 2018 Letter; EPI Letter. *See also* ICI Letter (which described a shift from load to no load funds, decreasing expense ratios, and a decline in the percentage of funds that charge 12b–1 fees).

[1057] *See infra* footnote 1084 and corresponding discussion.

[1058] *See, e.g.*, Cetera August 2018 Letter and November 2018 Letter; Pacific Life August 2018 Letter.

[1059] *See* Jeremy Burke et al., *Impacts of Conflicts of Interest in the Financial Services Industry* (RAND Labor & Population, Working Paper No. WR–1076, Feb. 2015), *available at https://www.rand.org/pubs/working_papers/WR1076.html*; Hamid Mehran & Rene M. Stulz, *The Economics of Conflicts of Interest in Financial Institutions*, 85 J. Fin. Econ. 267 (2007). *See also* Letter from D. Bruce Johnsen, Professor of Law, Scalia Law School, George Mason University (Aug. 7, 2018) ("Johnsen Letter"); Robinson (2007), *supra* footnote 1054. Broker-dealers may act in a brokerage (*i.e.*, agency) capacity or a dealer (*i.e.*, principal) capacity. *See* Proposing Release at Section I. While the discussion is framed in terms of agency problems, it is applicable to both capacities.

[1060] *See* IPA Letter; CFA August 2018 Letter.

[1061] *See* AALU Letter; Invesco Letter; ACLI Letter; NAIFA Letter. *See* Burke et al. (2015), *supra* footnote 1059 for a survey on the academic literature on conflicts of interest.

[1062] *See* Robinson (2007), *supra* footnote 1054.

[1063] *See, e.g.*, Stoughton et al. (2011), *supra* footnote 1048; Roman Inderst & Marco Ottaviani, *Misselling Through Agents*, 99 Am. Econ. Rev. 883 (2009); Max Beyer, David de Meza, & Diane Reyniers, *Do Financial Advisor Commissions Distort Client Choice?*, 119 Econ. Letters 117 (2013). *See also* AARP August 2018 Letter. Financially unsophisticated investors, as discussed by Stoughton et al. (2011), are those most likely to purchase inefficient assets.

[1064] *See* Allen Ferrell, *The Law and Finance of Broker-Dealer Mark-Ups* (Harvard John M. Olin Ctr. for Law, Econ., and Bus., Discussion Paper, Apr. 6, 2011), *available at https://www.finra.org/sites/default/files/NoticeAttachment/p123492.pdf*. *See* AARP August 2018 Letter.

[1065] *See, e.g.*, antifraud provisions of the federal securities laws, FINRA Rule 2121 (Fair Prices and Commissions); MSRB Rules G–15 and G–30, amended pursuant to Exchange Act Release No. 79347 (Nov. 17, 2016) [81 FR 84637] (Nov. 23, 2016); and FINRA Rules 2121 and 2232, amended pursuant to Exchange Act Release No. 79346 (Nov. 17, 2016) [81 FR 84659] (Nov. 23, 2016).

[1066] *See* William P. Rogerson, *Reputation and Product Quality*, 14 Bell J. Econ. 508 (1983); Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. Pol. Econ. 615 (1981); W. Bentley MacLeod, *Reputations, Relationships, and Contract Enforcement*, 45 J. Econ. Literature 595 (2007) for theoretical models of the effect of reputation on investment quality. *See* AARP August 2018 Letter. For example, FINRA and MSRB introduced rules in May 2018 regarding mark-up disclosure rules for same-day trades, allowing investors to be able to see what they have paid for riskless principal transactions (FINRA Rule 2232 and MSRB Rule G–15). The Commission has also brought enforcement cases for undisclosed excessive markups under Exchange Act Rule 10b–5.

[1067] *See, e.g.*, Inderst & Ottaviani (2012), *supra* footnote 1050. *See also* Bolton et al. (2007), *infra* footnote 1073, which posits that competition or consolidation affect reputation costs and provide a disciplining mechanism for providers of financial advice. Although various mechanisms exist to address agency problems in general, such as monitoring, bonding, and contracting (*see, e.g.*, Finke (2012), *supra* footnote 1041), the agency problem between financial professionals and retail investors is not necessarily one that can be solved cost-effectively through these approaches. *See infra* Section III.A.2 for a discussion of limitations to these approaches. See *also* Curtis (2018), *supra* footnote 1054. *See also* AARP August 2018 Letter; CFA August 2018 Letter; UVA Letter.

[1068] *See* Stoughton et al. (2011), *supra* footnote 1048. The authors also state that "[i]n addition to the advisory fees charged to the clients, wrap account managers may receive rebates from fund management companies as well," and that wrap accounts have increased in popularity. *See also* Mark Egan, *Brokers* vs. *Retail Investors: Conflicting Interests and Dominated Products*, J. Fin. (forthcoming 2019). *See also* AARP August 2018 Letter; CFA August 2018 Letter.

institution will be harmed . . . [A] variety of mechanisms help control conflicts of interest and their impact [*e.g.*, a financial institution's reputation]." [1069] Another study of commission-based compensation in the United Kingdom indicates that commission-based compensation leads to significant bias in certain types of securities (*e.g.*, with profit bonds or distribution bonds) and financial professionals and when bias exists, retail investors are harmed and the costs associated with such harm are significant; however, the study also states that the advice market in the United Kingdom is not overrun with bias ("adviser recommendations are not dominated by self-interest") and the market for advice generally works well.[1070]

Although financial professionals may aid retail investors in correcting common investing mistakes and overcoming informational hurdles associated with securities transactions or investment strategies, the average retail investor may not be able to assess the quality of advice received from financial professionals.[1071] The difficulty in assessment can arise from several sources, including a large degree of heterogeneity in the quality of advice, insufficient financial literacy on the part of investors, and information asymmetry between the financial professional and investors.[1072] Information asymmetry arises when information necessary to assess the quality of the advice received may not be available to the retail investor, even when it is available to the financial professional. For example, a financial professional may disclose conflicts of interest that could affect the advice provided, but the information may not be sufficiently precise to help a retail investor gauge how those conflicts affect the advice provided.

Conflicts of interest, therefore, can erode the benefits of advice provided to retail investors, particularly if investors are unaware that the conflicts exist or if they do not understand the implications of conflicts.[1073] Financial professionals may use this information asymmetry, particularly with unsophisticated investors, to capture economic rents for themselves, and this could exacerbate biases that investors sometimes exhibit, such as return chasing or under-diversification.[1074] One experimental study sent "mystery shoppers" to broker-dealers and investment advisers in several large cities in the United States and found that financial professionals provided recommendations that benefited themselves and exacerbated behavioral biases on the part of investors, including return chasing or recommendations of high-cost actively managed funds.[1075]

Although financial professionals may be hired to help overcome "investment mistakes" made by investors,[1076] a number of studies show that financial professionals themselves may be subject to the same behavioral biases as unadvised retail investors, such as return chasing and overconfidence.[1077] One study, using data on Canadian investors and their financial professionals, observes that financial professionals appear to have the same "misguided beliefs" as their investors, and therefore do not correct, and may even exacerbate common investment mistakes.[1078] In that study, financial professionals invested in the same manner that they recommended to their

[1069] *See* Mehran & Stulz (2007), *supra* footnote 1059. *See also* Johnsen August 2018 Letter.

[1070] *See* Robert Laslett, Tim Wilsdon, & Kyla Malcolm, *Polarisation: Research into the Effect of Commission Based Remuneration on Advice,* Charles River Associates Report Submitted to the U.K. Financial Services Authority (Jan. 2002), *available at http://www.crai.com/sites/default/files/publications/polarisation-research-into-the-effect-of-commission-based-remuneration-on-advice.pdf.* Laslett et al. (2002) estimate harm resulting from biased advice of approximately £140 million per year. Following the ban on commission-based compensation in the U.K. in 2013, another study finds that while the quality of financial advice increases, increased costs of providing advice lead some financial professionals to turn away small retail investors. *See* Tracey McDermott & Charles Roxbury, *Financial Advice Market Review,* Financial Conduct Authority and HM Treasury Final Report (Mar. 2016), *available at https://www.fca.org.uk/publication/corporate/famr-final-report.pdf* (which provides an overview of the effects of the Retail Distribution Review by the Financial Conduct Authority in the United Kingdom). Further, McDermott & Roxbury (2016) report that financial advice costs approximately £150 per hour and that giving retirement advice requires an average of nine hours on the part of the financial professional.

[1071] A number of studies consider advice to be a credence good, which is a type of good with qualities that cannot be observed by the consumer after purchase, making it difficult to assess its utility. *See, e.g.,* Roman Inderst, *Consumer Protection and the Role of Advice in the Market for Retail Financial Services,* 167 J. Institutional & Theoretical Econ. 4 (2011) (which provides a review of investors' ability to assess the quality of investment advice).

[1072] *See, e.g.,* Bluethgen et al. (2008), *supra* footnote 1048. Although this study documents reasons why investors may be unable to assess the quality of advice, the focus is on using adviser characteristics as screening mechanisms to alleviate the first complication noted, the high degree of heterogeneity in the quality of advice. The paper finds that good predictors of high quality advice include the financial professional's cognitive ability (*e.g.,* analytical skills, rationality, and financial knowledge), how financial professionals are compensated (financial professionals that have a high fraction of commission-based revenue are less likely to recommend high quality investments, *e.g.,* index funds), and the firm's business model. *See also* Finke (2012), *supra* footnote 1041; AARP August 2018 Letter. *See also* Relationship Summary Adopting Release.

[1073] *See, e.g.,* Inderst & Ottaviani (2012), *supra* footnote 1050; Patrick Bolton, Xavier Freixas, & Joel Shapiro, *Conflicts of Interest, Information Provision, and Competition in the Financial Services Industry,* 85 J. Fin. Econ. 297 (2007). *See also* AARP August 2018 Letter.

[1074] *See, e.g.,* Marco Ottaviani, *The Economics of Advice* (Working Paper, May 2000), *available at http://faculty.london.edu/mottaviani/EOA.pdf* (included because they capture aspects of the information asymmetries between retail investors and financial professionals that are not captured by the studies suggested by the commenters); Miriam Krausz & Jacob Paroush, *Financial Advising in the Presence of Conflict of Interests,* 54 J. Econ. & Bus. 55 (2002); Inderst & Ottaviani (2012), *supra* footnote 1050; Stoughton et al. (2011), *supra* footnote 1048. *See also* AARP August 2018 Letter.

[1075] *See* Sendhil Mullainathan, Markus Noeth, & Antoinette Schoar, *The Market for Financial Advice: An Audit Study* (Nat'l Bureau of Econ. Research, Working Paper No. 17929, Mar. 2012), *available at https://www.nber.org/papers/w17929.pdf. See also* AARP August 2018 Letter; CFA August 2018 Letter; EPI Letter. Although the Mullainathan et al. (2012) study included both broker-dealers and investment advisers, the study notes that most professionals in their sample focused on the lower end of the retail spectrum and tended to be compensated through commissions rather than fees based on AUM. *See also* Santosh Anagol, Shawn Cole, & Shayak Sarkar, *Understanding the Advice of Commissions Motivated Agents: Evidence from the Indian Life Insurance Market* (Harvard Bus. Sch., Working Paper No. 12–055, Oct. 2015), *available at https://www.hbs.edu/faculty/Publication%20Files/12-055_13c23c02-e57f-4aea-9630-316aa4b772ce.pdf,* which used a similar audit approach to evaluate the quality of advice provided by life insurance agents in India, and found that agents recommended unsuitable products and strategies that paid high commissions.

[1076] *See supra* footnote 1046.

[1077] *See, e.g.,* Mullinathan et al. (2012), *supra* footnote 1075; Terrance Odean, *Are Investors Reluctant to Realize Their Losses?,* 53 J. Fin. 1775 (1998); Zur Shapira & Itzhak Venezia, *Patterns of Behavior of Professionally Managed and Independent Investors,* 25 J. Banking & Fin. 1573 (2001). *See also* AARP August 2018 Letter. *See also* Anagol et al. (2015), *supra* footnote 1075, which documents that life insurance agents in India purchase the same inefficient products that they recommend to their clients. One study of Canadian financial professionals and their clients observed a commonality among portfolios of a given financial professional, and that the financial professional's own portfolio allocations strongly predicted the asset allocations of his or her customers, indicating limited customization, regardless of the customer's risk tolerance, age, or financial sophistication. Although the results of this paper indicate that conflicts of interest are unlikely to motivate advice because financial professionals and their investors hold similar portfolios, it does raise questions of the high cost of financial advice when customization is limited. *See* Stephen Foerster et al., *Retail Financial Advice: Does One Size Fit All?,* 72 J. Fin. 1441 (2017) (included because they capture insights into how financial professionals may be subject to similar biases as retail investors that are not captured by the studies suggested by the commenters). *See* Robinson (2007), *supra* footnote 1054.

[1078] *See* Juhani T. Linnainmaa, Brian T. Melzer, & Alessandro Previtero, *The Misguided Beliefs of Financial Advisors* (Kelley Sch. of Bus., Research Paper No. 18–9, May 2018), *available at http://www.aleprevitero.com/wp-content/uploads/2018/06/SSRN-id3101426.pdf. See also* CFA August 2018 Letter.

clients; they traded excessively, chased returns, bought expensive actively managed funds, under-diversified their portfolios, and earned similar net returns. Further, these financial professionals continued to follow similar investment strategies as those they recommended to their clients, even after they had left the industry, suggesting that they believed their own investment advice.[1079]

c. Evidence of Potential Investor Harm

A number of commenters provided citations to academic studies that analyze the evidence of potential investor harm driven by conflicts of interest of financial professionals.[1080] A number of these studies, including Bergstresser et al. (2009), Del Guercio and Reuter (2014), and Christoffersen, Evans, and Musto (2013), underpinned the economic analyses of the Council of Economic Advisors 2015 Study ("CEA Study") and the DOL RIA assessment of the aggregate harm borne by retail investors in retirement plans due to conflicts of interest.[1081] Below we discuss evidence of potential investor harm attributable to recommendations of certain investments by financial professionals, including mutual funds, 401(k) plans, corporate bonds, and non-traded REITs. We then discuss the aggregate measures of investor harm estimated by the CEA Study and the DOL RIA and the limitations of those estimates.

Directly addressing the question of whether and how brokerage customers or advisory clients are affected by conflicts of interest (*e.g.*, through quantification) requires measurement of the effect of advice, subject to different levels of conflict, received from broker-dealers or investment advisers. Most data currently available to researchers does not make distinctions between types of firms or financial professionals, and generally aggregates all firms or financial professionals into a single category of financial professionals (*e.g.*, "adviser" or "financial adviser"). Further, an investor's propensity to choose a particular type of relationship may be correlated with the investor's skill or choice of investment and, therefore, may introduce bias into studies that are able to differentiate between types of advice relationships. Despite these limitations, by examining the existing academic literature, discussed below, we are able to gain qualitative insight into, and address commenter concerns, about conflicts of interest in the market for financial advice and the potential harm to investors.

The majority of studies to date that investigate the potential harm to investors arising from potential conflicts of interest have generally centered on findings based on analysis of investments in mutual funds. Due to the readily available data for mutual funds, the literature is rich with studies exploring various aspects of those securities, including the performance of funds, relationships between flows and performance or expenses, and differences in performance of funds depending on the distribution channel. These studies have further been used by commenters and other providers of economic analyses to estimate the magnitude of investor harm potentially stemming from conflicts of interest as it relates to mutual fund investments.[1082]

Evidence suggests that there is a strong relationship between past performance and subsequent fund flows, even when funds do not persistently outperform, suggesting that investors and/or their financial professionals may engage in return-chasing behavior.[1083] Several studies also examine the effect of mutual fund costs, and find that (1) fund flows are negatively related to front-end loads, but are relatively insensitive to fund-level operating expenses (*e.g.*, 12b–1 fees), indicating that investors may be aware of upfront costs when selecting funds, but may be less attuned to the effect on net returns of ongoing operating expenses;[1084] and (2) unsophisticated investors are more likely to pay higher fees than sophisticated investors and are less likely to expend search costs to look for lower-fee funds.[1085] Retail investors, however, can benefit when funds commence operation of an institutional "twin" fund as overall expenses decrease and managerial effort increases, suggesting that retail investors may not be able to monitor fund managers as effectively as institutional investors.[1086]

Analyses in the CEA Study and the DOL RIA focus on the underperformance of certain broker-sold funds, potentially driven by conflicts of interest and a misalignment of incentives between financial professionals and investors.[1087] A number of studies document that actively managed load mutual funds purchased by investors through a financial professional underperform

[1079] Linnainmaa et al. (2018), *supra* footnote 1078, also suggest that conflicts of interest may not be driven by financial professionals, but instead are between the firm and its clients, and that firms deliberately hire financial professionals who believe their misguided (and ultimately expensive) advice. In light of their findings, the authors suggest that regulation designed to stem conflicts of interest could be ineffective if aligning investors and financial professionals does not alter the advice that they provide, could raise barriers to entry that could reduce the amount of advice available, and may limit investor choice.

[1080] *See, e.g.*, AARP August 2018 Letter; Better Markets August 2018 Letter; CFA August 2018 Letter; EPI Letter; State Attorneys General Letter.

[1081] *See* Letter from Linda Agerbak (Jun. 21, 2018) ("Agerbak Letter"); Better Markets August 2018 Letter; CFA August 2018 Letter; EPI Letter; Letter from Public Citizen (Aug. 7, 2018) ("Public Citizen Letter"); State Attorneys General Letter; Former SEC Senior Economists Letter. *See also* Bergstresser et al. (2009), *supra* footnote 1048; Diane Del Guercio & Jonathan Reuter, *Mutual Fund Performance and the Incentive to Generate Alpha*, 69 J. Fin. 1673 (2014); Susan E.K. Christoffersen, Richard Evans, & David K. Musto, *What Do Consumers' Fund Flows Maximize? Evidence from Their Brokers' Incentives*, 68 J. Fin. 201 (2013). *See* Office of the President of the United States, Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings* (Feb. 2015), *available at https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf*. *See also* DOL RIA, *supra* footnote 1002. Both the CEA Study and the DOL RIA assumed that the DOL Fiduciary Rule would eliminate all conflicts of interest and, therefore, all of the harms to retirement investors resulting from conflicts. *See also* Curtis (2018) and *infra* footnote 1103. By contrast, Regulation Best Interest would not require elimination or mitigation of firm-level conflicts, and will require written policies and procedures reasonably designed to eliminate or mitigate of some representative-level conflicts, which means that some conflicts and their attendant harms may remain, especially at the firm level. The disclosure requirements of Regulation Best Interest, however, may empower some customers to push back on broker-dealer conflicts of interest and more generally may have a deterrent effect.

[1082] *See* CEA Study, *supra* footnote 1081, and DOL RIA, *supra* footnote 1002. *See also* EPI Letter; Better Markets August 2018 Letter; St. John's U. Letter; Letter from Royce A. Charney, President, Trust Administrators (Aug. 7, 2018) ("Charney Letter"); Agerbak Letter; CFA August 2018 Letter.

[1083] *See* Judith Chevalier & Glenn Ellison, *Risk Taking by Mutual Funds as a Response to Incentives*, 105 J. Pol. Econ. 1167 (1997); Jonathan B. Berk & Richard C. Green, *Mutual Fund Flows and Performance in Rational Markets*, 112 J. Pol. Econ. 1269 (2004); Brad M. Barber, Terrance Odean, & Lu Zheng, *Out of Sight, Out of Mind: The Effects of Expenses on Mutual Fund Flow*, 78 J. Bus. 2095 (2005); Erik R. Sirri & Peter Tufano, *Costly Search and Mutual Fund Flows*, 53 J. Fin. 1589 (1998). In the theoretical model provided by Berk and Green (2004), active funds do not outperform passive funds because investors compete to invest in strong past performers (*i.e.*, they chase returns), driving these funds' returns to the competitive level. *See also* AARP August 2018 Letter; CFA August 2018 Letter.

[1084] *See* Barber et al. (2005), *supra* footnote 1083.

[1085] *See* Todd Houge & Jay Wellman, *The Use and Abuse of Mutual Fund Expenses*, 70 J. Bus. Ethics 23 (2007). *See* AARP August 2018 Letter.

[1086] *See* Richard B. Evans & Rudiger Fahlenbrach, *Institutional Investors and Mutual Fund Governance: Evidence from Retail-Institutional Fund Twins*, 25 Rev. Fin. Stud. 3530 (2012). *See* AARP August 2018 Letter. The authors identify funds as "twins" if they share the same manager, investment objectives, fund families, and have a gross return correlation of 0.95 or greater.

[1087] *See* CEA Study, *supra* footnote 1081, and DOL RIA, *supra* footnote 1002.

other types of mutual funds.[1088] For example, several studies find that actively managed load funds underperform a buy-and-hold strategy by between 1.56% and 2.28% annually, while other studies show that actively managed load funds underperform no-load funds by between 1% and 1.5% per year.[1089] This underperformance could be driven by poor market timing of investors (*e.g.,* return chasing),[1090] or because increased expenditures by the funds on marketing and advertising successfully attract retail flows, and such expenses decrease net returns to investors over time.[1091] Fees and expenses, as documented by several studies, are two of the most reliable predictors of future returns, and fees should reflect performance (*e.g.,* funds with high fees hypothetically should have better ex post performance in order to justify the fees), as at least some portion of the fees are dedicated to portfolio management; however, these studies consistently find a negative relationship between fees and performance—lower cost funds on average are more likely to generate higher performance net of fees than high cost funds.[1092]

A number of studies, also cited by the DOL RIA and the CEA Study, explore the distinction between broker-sold funds and direct-sold funds, and the effect of the distribution channel on fund flows and performance. When examining a sample of only broker-sold funds, one study shows that funds that pay higher fees to financial professionals or charge higher excess loads generate greater fund inflows.[1093] Moreover, broker-sold funds, on average, underperform direct-sold funds by between 23 bps and 255 bps per annum, with most studies observing average underperformance of approximately 100 bps (1%) per year.[1094]

Further, conflicts of interest appear to depend upon the choice of investment (*e.g.,* broker-sold versus direct-sold funds) as well as the magnitude of the costs (*e.g.,* mutual fund loads). One study suggests that the market for funds is segmented: More financially sophisticated investors select direct-sold funds, which unbundle portfolio management from advice of financial professionals, while less financially sophisticated investors purchase broker-sold funds, which combine portfolio management and advice.[1095] Another study focuses exclusively on broker-sold funds, but segments those funds into groups that depend on the size of excess loads and whether the funds are sold by affiliated or unaffiliated brokers.[1096] That study observes that funds with a one-standard deviation increase in excess loads are related to a reduction in future performance of between 34 bps and 49 bps in the following year. As detailed in Bergstresser et al. (2009), the broker-sold channel is likely to include funds sold through both broker-dealers and investment advisers; however, the data provided to the authors is not granular enough to be able to distinguish the performance characteristics of the two distinct channels.[1097]

A number of commenters stated that the Proposing Release did not appropriately account for existing economic analyses produced by the CEA Study and the DOL RIA to measure the potential harm to investors from conflicts of interest.[1098] The CEA Study and the DOL RIA use the literature on underperformance of broker-sold mutual funds as the foundation for their analyses on the potential harm of retail investors, focusing on harm specifically directed at retirement savings. Applying an estimate of approximately 1% underperformance to broker-sold funds, which is consistent with estimates of underperformance provided by several studies,[1099] the CEA Study and the DOL

[1088] *See* Bergstresser et al. (2009), *supra* footnote 1048; Del Guercio & Reuter (2014), *supra* footnote 1081.

[1089] *See, e.g.,* Mercer Bullard, Geoffrey Friesen, & Travis Sapp, *Investor Timing and Fund Distribution Channels* (Working Paper, 2008); Geoffrey C. Friesen & Travis R.A. Sapp, *Mutual Fund Flows and Investor Returns: An Empirical Examination of Fund Investor Timing Ability,* 31 J. Banking & Fin. 2796 (2007); Matthew R. Morey, *Should You Carry the Load? A Comprehensive Analysis of Load and No-Load Mutual Fund Out-of-Sample Performance,* 27 J. Banking & Fin. 1245 (2003). *See also* Eugene F. Fama & Kenneth R. French, *Luck Versus Skill in the Cross-Section of Mutual Fund Returns,* 65 J. Fin. 1915 (2010), which notes that although some active managers may outperform passive benchmarks while others underperform, on average, the alpha attributable to active management will net to zero; therefore, net of fees, on average, and the alpha earned by actively managed funds will be reduced by the aggregate amount of fees and expenses of active management. *See also* William F. Sharpe, *The Arithmetic of Active Management,* 47 Fin. Analysts J. 7 (1991). *See* AARP August 2018 Letter; CFA August 2018 Letter.

[1090] *See, e.g.,* Bullard et al. (2008), *supra* footnote 1089; Friesen & Sapp (2007), *supra* footnote 1089.

[1091] One study documents that heavily advertised funds outperform their benchmarks prior to the marketing efforts, but do not outperform their benchmarks in the post-advertising period. These funds, however, attract significantly more inflows, relative to a control group. *See* Prem C. Jain & Joanna Shuang Wu, *Truth in Mutual Fund Advertising: Evidence on Future Performance and Fund Flows,* 55 J. Fin. 937 (2000). *See also* Nikolai Roussanov, Hongxun Ruan, & Yanhao Wei, *Marketing Mutual Funds* (Nat'l Bureau of Econ. Research, Working Paper No. 25056, Sept. 2018), *available at https://www.nber.org/papers/w25056.pdf. See* AARP August 2018 Letter; CFA August 2018 Letter; EPI Letter.

[1092] *See* Javier Gil-Bazo & Pablo Ruiz-Verdu, *The Relation Between Price and Performance in the Mutual Fund Industry,* 64 J. Fin. 2153 (2009); Russel Kinnel, *Predictive Power of Fees: Why Mutual Fund Fees Are So Important,* Morningstar Manager Research (May 2016); William F. Sharpe, *The Arithmetic of Investment Expenses,* 69 Fin. Analysts J. 34 (2013). Gil-Bazo & Ruiz-Verdu (2009) find that actively managed funds with the worst performance charge, on average, the highest fees. *See* AARP August 2018 Letter; CFA August 2018 Letter.

[1093] *See* Christoffersen et al. (2013), *supra* footnote 1081; Chalmers & Reuter (2015), *supra* footnote 1042; Jasmin Sethi, Jake Spiegel, & Aron Szapiro, *Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?,* 6 J. Retirement 46 (2019). Christoffersen et al. (2013) and Sethi et al. (2019) measure excess loads by first estimating the baseline (average) load paid with regressions of loads on a number of explanatory variables, then using the residuals from these regressions (excess loads) to explain fund flows and performance. *See also* Morningstar Letter; Letter from Aron Szapiro, Director of Policy Research, Morningstar, Inc., et al. (Aug. 24, 2018) ("Morningstar Letter Supplement"). Sethi et al. (2019) find, however, that the relation between excess loads and fund flows tapered off after the DOL Fiduciary Rule was adopted, suggesting that the DOL Fiduciary Rule may have discouraged financial professionals from directing flows to funds with high excess loads.

[1094] *See, e.g.,* Bergstresser et al. (2009), *supra* footnote 1048; Chalmers & Reuter (2015), *supra* footnote 1042; Xuanjuan Chen, Tong Yao, & Tong Yu, *Prudent Man or Agency Problem? On the Performance of Insurance Mutual Funds,* 16 J. Fin. Intermediation 175 (2007). *See* AARP August 2018 Letter.

[1095] *See* Del Guercio & Reuter (2014), *supra* footnote 1081. Moreover, this study finds that broker-sold actively managed funds underperform broker-sold index funds by between 1.1% and 1.3% per year, which the authors suggest may reflect an agency conflict. *See also* Diane Del Guercio, Jonathan Reuter, & Paula A. Tkac, *Broker Incentives and Mutual Fund Market Segmentation* (Nat'l Bureau of Econ. Research, Working Paper No. 16312, Aug. 2010), *available at https://www.nber.org/papers/w16312.pdf. See* AARP August 2018 Letter; CFA August 2018 Letter. Although some of the growth in direct-sold funds comes from passive investing (*e.g.,* index funds), greater than 75% of the number of direct-sold funds are actively managed (as of 2012). *See* Jonathan Reuter, *Revisiting the Performance of Broker-Sold Mutual Funds* (Working Paper, Nov. 2, 2015), *available at https://www2.bc.edu/jonathan-reuter/research/brokers_revisited_201511.pdf.*

[1096] *See* Christoffersen et al. (2013), *supra* footnote 1081.

[1097] *See* Bergstresser et al. (2009), *supra* footnote 1048. The Bergstresser et al. study also notes that many funds in the direct-sold channel may be recommended by fee-based advisers, whose services "are typically paid for with an advisory fee that is outside of the fund expenses or distribution costs. As a practical matter, the 'direct' channel may not be as direct as one might imagine."

[1098] *See also* ARA August 2018 Letter; EPI Letter; Better Markets August 2018 Letter; St. John's U. Letter; Charney Letter; Agerbak Letter; CFA August 2018 Letter.

[1099] *See* Bergstresser et al. (2009), *supra* footnote 1048; Del Guercio & Reuter (2014), *supra* footnote 1081; Christoffersen et al. (2013), *supra* footnote 1081. A number of commenters, regarding the DOL RIA, indicated that both the CEA Study, *supra* footnote 1081, and the DOL RIA, *supra* footnote 1002, misinterpreted estimated effects described in the Christoffersen et al. (2013) paper, and overstated the potential harm associated with funds with high excess loads by more than double the actual

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RIA apply different methods and approaches to calculate the aggregate dollar harm for retail investors in their retirement accounts.[1100] Based on $1.7 trillion invested in potentially conflicted funds, the CEA Study estimates annual harm to retirement investors of approximately $17 billion.[1101] Similarly, the DOL RIA, which estimates potential loss due to conflicts of interest of between 50 bps and 100 bps per year, produces ten-year aggregate estimates of investor harm of between $95 billion and $189 billion stemming from the underperformance of broker-sold mutual funds.

The level of underperformance due to fund selection is highly sensitive to the data sample, including the sample period, as well as the methodology employed to calculate performance. Many of the studies used to support the analyses underlying the CEA Study and the DOL RIA rely on data obtained prior to 2011. However, since 2011 there have been a number of advances in the market for mutual funds (*e.g.,* shifts from load to no-load funds and increase in no-load funds without 12b–1 fees), likely leading some of the inferences drawn from those studies to be dated and not reflective of the current market environment.[1102] A number of commenters indicated potential flaws associated with the approach and interpretation of the analyses used by the CEA Study and the DOL RIA.[1103] One study updates the Del Guercio and Reuter (2014) sample using data from between 2003 and 2012 and tests the robustness of the methodology by examining the underperformance of broker-sold funds relative to direct-sold funds.[1104] While underperformance of broker-sold funds still existed, depending on the methodology and empirical approach used, the underperformance of these funds was reduced to between 20 bps and 70 bps, with the majority of the estimation approaches falling to between 20 bps and 50 bps, indicating a reduction in the underperformance of broker-sold funds relative to earlier studies.[1105] Another study replicates the Christoffersen et al. (2013) analysis of excess loads on underperformance using data from between 2010 and 2017, and finds that after 2010, funds with high excess loads did not underperform funds with low excess loads, which the authors interpret as evidence that financial professionals have improved their recommendations over time.[1106] Taken together, these recent studies on fund selection suggest that the magnitude of potential investor harm likely is not as large as that estimated by the CEA Study and the DOL RIA when more recent data is used to compute the underperformance of broker-sold mutual funds.

Another recent study replicates and extends the Friesen and Sapp (2007) and Bullard et al. (2008) analyses of market timing ability by investors in mutual fund sales and purchases to newer data (2007 through 2016).[1107] The study shows that the difference between dollar returns and buy-and-hold returns (''performance gap'') declined from 1.56% between 1991 and 2004 to 1.01% between 2007 and 2016 for a combined sample of load and no-load funds, suggesting a moderation in market timing errors in the most recent period. However, the excess performance gap (the difference between the performance gap on load funds and no load funds) has slightly increased between 2007 and 2016, from approximately 1% to 1.12%, indicating that, to the extent that load funds are sold by financial professionals and that all inflows and outflows are due solely to market timing motivations, investors who hold load funds are more prone to market timing errors than investors in no-load funds, and these errors are not being corrected by financial professionals. The studies discussed above acknowledge that interpretation of the empirical result that broker-sold funds underperform direct-sold funds is subject to another caveat because there is likely to be a selection bias in the type of investor that utilizes the direct-sold fund channel relative to those investors who rely on financial professionals for advice and recommendations about which funds to purchase. A similar selection bias is likely to exist for investors who purchase no-load funds versus those that purchase load funds from financial professionals. For example, although numerous studies discussed above suggest that financial advice is more likely to be obtained by older, more financially sophisticated, and wealthier investors,[1108] Chalmers and Reuter (2015) observe that younger, less financially experienced, and less wealthy investors are more likely to buy broker-sold funds.[1109]

Beyond mutual funds, a nascent literature is emerging on other securities that may be prone to conflicts of interest by financial professionals.[1110] Recent

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estimate had the interpretation been correct. *See* Craig M. Lewis, *The Flawed Cost-Benefit Analysis Underlying the Department of Labor's Fiduciary Rule* (White Paper, Aug. 2017), *available at https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2268185-160965.pdf*; Public Interest Comment from Mark Warshawsky & Hester Peirce, George Mason University Mercatus Center (Apr. 17, 2017), *available at https://www.mercatus.org/system/files/warshawsky-dol-fiduciary-rule-pic-v1.pdf. See also* Curtis (2018), *supra* footnote 1054.

[1100] *See* CEA Study, *supra* footnote 1081, and DOL RIA, *supra* footnote 1002.

[1101] *See* CEA Study, *supra* footnote 1081.

[1102] *See* ICI Letter and Section III.B.2.e.ii, *supra*.

[1103] *See* Lewis (2017), *supra* footnote 1099; Warshawsky & Peirce (2017), *supra* footnote 1099. *See also* Curtis (2018), *supra* footnote 1054. To date, only one academic study of which we are aware (Curtis (2018)) has analyzed the DOL Fiduciary Rule and the DOL RIA, and discusses issues with the approach taken by the DOL RIA in estimating the benefits and costs of the DOL Fiduciary Rule, noting that the DOL RIA likely underestimates the potential costs of the rule. This study also indicates that the net benefits of the DOL Fiduciary Rule are expected to be close to zero because the DOL Fiduciary Rule may not completely eliminate conflicts of interest and the actual cost of investment advice at the intermediary-level was excluded from the DOL RIA computation of benefit. Once the calculation accounted for costs of advice, Curtis (2018) estimates that the total costs attributed to conflicts of interest, including underperformance of some securities, is only slightly higher than the costs associated with advice that is free of conflicts.

[1104] *See* Reuter (2015), *supra* footnote 1095.

[1105] Reuter (2015), *supra* footnote 1095, states that ''[t]hese changes suggest that the average broker-sold fund has become more competitive with the average direct-sold fund''; however additional research would be required to determine if these changes are driven by existing fund families, new fund families, or some combination of factors. When performance is value-weighted, Reuter (2015) discusses that brokers appear to direct clients toward funds that pay ''higher-than-average distribution costs.''

[1106] *See* Sethi et al. (2019), *supra* footnote 1093. The authors note that the underperformance of high excess load funds becomes statistically insignificant in the analysis only with the inclusion of prior-year performance of the fund (which Christoffersen et al. (2013), *supra* footnote 1081, include in one of their models). The authors suggest that the reduction in flows to funds with excess loads could be due in part to the DOL Fiduciary Rule; however, they also note that their analysis does not reveal a clear association between the DOL Fiduciary Rule and returns. The authors further cite to Holden et al. (2018), *supra* footnote 955, which discusses the shift away from load mutual funds to no-load funds over time. *See also* ICI Letter; Morningstar Letter; Morningstar Letter Supplement.

[1107] *See* Karthik Padmanabhan, Constantijn Panis, & Timothy Tardiff, *The Ability of Investors to Time Purchases and Sales of Mutual Funds* (Working Paper, Nov. 1, 2017) (*see also* Department of Labor April 2019 memo). *See, e.g.,* Bullard et al. (2008), *supra* footnote 1089; Friesen & Sapp (2007), *supra* footnote 1089.

[1108] *See supra* Section III.B.3.a.

[1109] *See supra* footnote 1042.

[1110] Some commenters (*see, e.g.,* CFA August 2018 Letter; AARP August 2018 Letter; EPI Letter) also provided studies about conflicts of interest in 401(k) plans which have shown that (i) plan sponsors tilt securities toward high-cost securities (*see* Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans,* 124 Yale L.J. 1476 (2015)); (ii) plans have inadequate or excessive investment choices (*see* Edwin J. Elton, Martin J. Gruber, & Christopher R. Blake, *The Adequacy of Investment Choices Offered by 401(K) Plans,* 90 J. Pub. Econ. 1299 (2006); Sheena Sethi-Iyengar, Gur Huberman, & Wei Jiang, *How Much Choice is Too Much? Contributions to 401(k) Retirement Plans, in* Pension Design and Structure: New Lessons from Behavioral Finance (Olivia S.

studies have examined potential conflicts of interest in markets for more complex investments, including reverse convertible corporate bonds and non-traded REITs. One study uses a sample of reverse convertible corporate bonds that differ only in the financial incentives provided to financial professionals and the coupon rate, and finds that investors are more likely to purchase—based on the advice given—the inferior bond (lower coupon, all else equal) with the higher "kick-back" to the broker-dealer, which appears to be driven by conflicts of interest between the financial professional and the investors.[1111] In an examination of non-traded REITs, one study documents that retail investors in non-traded REITs underperformed by over $45 billion relative to a portfolio of traded REITs, and that nearly one-third of that underperformance was driven by upfront fees used to compensate broker-dealers.[1112]

Finally, although a significant amount of empirical evidence suggests that there may be investor harm due to conflicts of interest between financial professionals and investors, because of changes to the mutual fund industry (*e.g.*, shifts from load to no-load funds and the introduction of new share classes),[1113] increased competition,[1114] and the anticipation of regulation designed to ameliorate potential conflicts of interest, several new studies indicate that potential harm to investors arising from conflicts of interest may be declining.[1115] One survey paper concludes that although the empirical evidence is consistent with financial professionals having conflicts of interest that may harm consumers, "none of the articles concludes that clients would have been better off by foregoing advice. Even if people receive lower returns . . . consulting with an advisor may provide intangible benefits that consumers value," and "it is important to bear in mind that these studies may have data limitations and in general cannot account for selection issues and the intangible benefits that investors receive from financial advisors." [1116]

4. Trust, Financial Literacy, and the Effectiveness of Disclosure

A number of commenters stated that the Proposing Release did not sufficiently address how issues related to trust in financial professionals, investors' level of financial literacy or sophistication, and limitations on the effectiveness of disclosure likely exacerbate the problems of information asymmetry and potential conflicts of interest between retail investors and financial professionals.[1117] In order to address commenters' concerns, we examined and discuss below both academic and industry research on how trust and financial literacy could affect the recommendations provided by financial professionals to retail investors, as well as the effectiveness and limitations of disclosure in ameliorating potential conflicts of interest.

a. Trust in Investment Advice

In seeking financial advice, a retail investor places not only money but also trust in a financial professional. Commenters stated that retail investors will follow the advice of their "trusted advisors," because they believe "financial professional[s] will place the investor's financial interest before his or her own." [1118] Moreover, one industry study of over 800 investors notes that "96% of U.S. investors report that they trust their financial professional and 97% believe their financial professional has their best interest in mind." [1119] Academic studies have explored the issue of trust and how it affects financial decisions of investors. Studies in this strand of academic literature find that higher levels of trust increase investors' propensity to seek investment advice and hire financial professionals,[1120] increase levels of stock market participation,[1121] and increase willingness to take on higher-risk investments.[1122] Regarding the importance of trust in established advice relationships, some studies find that trust in financial professionals is greater when investors have lower financial literacy or when purchasing complex products, such as insurance products.[1123] Further, as trust in

Mitchell & Stephen P. Utkuss eds., 2004)); (iii) plans may include proprietary funds even when other funds perform better (*see* Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *It Pays to Set the Menu: Mutual Fund Investment Options in 401(K) Plans*, 71 J. Fin. 1779 (2016)); and (iv) funds included in 401(k) plans underperform passive benchmarks by approximately 31 bps annually (*see* Edwin J. Elton, Martin J. Gruber, & Christopher T. Blake, *How do Employer's 401(K) Mutual Fund Selections Affect Performance?*, Ctr. for Retirement Research at Bos. Coll., Issue in Brief No. 13–1 (Jan. 2013), *available at https://crr.bc.edu/wp-content/uploads/2013/01/IB_13-1-508.pdf*).

[1111] *See* Egan (2019), *supra* footnote 1068.

[1112] *See* Craig McCann, *Fiduciary Duty and Non-Traded REITs*, Investments & Wealth Monitor, July/Aug. 2015, at 39, *available at https://www.slcg.com/pdf/workingpapers/Fiduciary%20duty%20and%20Non-traded%20REITs.pdf*. *See* CFA August 2018 Letter.

[1113] *See* ICI Letter and Holden et al. (2018), *supra* footnote 951. *See also* Capital Group Letter; Money Management Institute Letter; FPC Letter at footnote 73. As noted above, innovations, including the introduction of T and clean share classes of funds may reduce the expected fund underperformance net of costs for retail investors relative to A shares by nearly 50 basis points annually. *See supra* footnote 1021 and accompanying text. *See also supra* footnote 1020 and accompanying text.

[1114] *See* LPL December 2018 Letter; Morgan Stanley Letter (which discuss the migration to open architecture platforms).

[1115] *See* Reuter (2015), *supra* footnote 1042; Sethi et al. (2019), *supra* footnote 1093. *See also* CFA August 2018 Letter; EPI Letter; Morningstar Letter; Morningstar Letter Supplement. We include recent studies provided by commenters to present the current baseline of empirical findings on potential investor harm stemming from conflicts of interest.

[1116] *See* Burke et al. (2015), *supra* footnote 1059. The DOL RIA, *supra* footnote 1002, and some commenters, however, have stated that no advice is a better alternative to advice subject to conflicts of interest. *See also* EPI Letter; Betterment Letter; PIABA Letter; CFA August 2018 Letter. The DOL RIA suggests that investors who obtain advice subject to conflicts of interest are worse off due to the costs associated with obtaining such advice (*e.g.*, underperformance) than had they not sought or received advice at all.

[1117] *See* AARP August 2018 Letter; CFA August 2018 Letter; FPC Letter; Rhoades December 2018 Letter; EPI Letter.

[1118] *See* Letter from Christine Lazaro, President, PIABA (Dec. 7, 2018) ("PIABA December 2018 Letter"). *See also, e.g.*, Rhoades December 2018 Letter; Gross Letter; Letter from William W. McGinnis, W. McGinnis Advisors (Aug. 7, 2018) ("McGinnis Letter"); EPI Letter; Betterment Letter; State Attorneys General Letter; Better Markets August 2018 Letter; OIAD/RAND (providing a survey on academic literature on trust). One survey notes, however, that approximately 15% of survey participants do not consult with financial professionals because they "don't trust them." *See* Cetera November 2018 Letter.

[1119] *See* CCMC Letters. *See also* Center for Capital Markets Competitiveness, *Working with Financial Professionals: Opinions of American Investors* (2018), *available at https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/CCMC_InvestorPolling_v5-1.pdf*.

[1120] *See* Jeremy Burke & Angela A. Hung, *Trust and Financial Advice* (RAND Labor & Population, Working Paper No. WR–1075, Jan. 2015), *available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/proposed-regulations/1210-AB32-2/trust-and-financial-advice.pdf*. This study indicates that increased financial trust is associated with higher levels of both seeking and following investment advice. *See also* AARP August 2018 Letter; FPC Letter; CFA August 2018 Letter.

[1121] *See* Luigi Guiso, Paola Sapienza, & Luigi Zingales, *Trusting in the Stock Market*, 63 J. Fin. 2557 (2008). Guiso et al. (2008) find that higher levels of trust in financial professionals by investors is associated with a 50% increase in the probability of buying stocks and a 3.4% increase in the proportion of equity investments in the aggregate portfolio. *See* Rhoades December 2018 Letter.

[1122] *See* Nicola Gennaioli, Andrei Shleifer, & Robert Vishny, *Money Doctors*, 70 J. Fin. 91 (2015). This study suggests that increased trust in financial professionals by investors alleviates anxiety in undertaking higher-risk investments (*e.g.*, equities) (included because they capture aspects of the benefits of higher levels of trust in financial professionals by retail investors that are not captured by the studies suggested by the commenters).

[1123] *See* Thomas Pauls, Oscar Stolper, & Adreas Walter, *Broad-Scope Trust and Financial Advice* (Working Paper, Nov. 17, 2016), *available at https://www.researchgate.net/publication/314235638_Broad-scope_trust_and_financial_advice;* David de

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financial professionals grows, investors may be more likely to delegate all investment decisions to the financial professional, irrespective of their level of financial education.[1124]

Several commenters stated that some financial professionals respond to the trust that retail investors place in them by acting on their conflicts of interest, which could benefit the financial professional at the expense of the investor.[1125] In addition, some studies have shown that higher levels of trust by retail investors can provide incentives for financial professionals to provide conflicted investment advice or undertake actions that benefit themselves at the expense of their customers. For example, one study found that because investors trust their financial professionals to provide higher ex ante expected returns on their risky investments, firms employing those professionals increased fees above levels that, in the author's view, were consistent with a competitive equilibrium, resulting in lower ex post net returns to investors.[1126] Further, this study documents that, although a relationship with a trusted professional can encourage investors to invest in financial markets when it is efficient for them to do so, in some cases financial professionals may instead provide more conflicted investment advice or inefficient advice in order to satisfy the desires of investors who trust them (*e.g.*, undertaking lottery-like behavior by investing in the riskiest securities).[1127] Although trust in financial professionals can help alleviate certain behavioral biases and encourage participation in the securities markets, one commenter stated that "[r]etail customers who place their trust in salespeople that market services as acting in their best interest can end up paying excessively high costs for higher risk or underperforming investments that only satisfy a suitability standard, not a fiduciary standard."[1128]

b. Financial Literacy and Investment Advice

As discussed above, financial literacy affects those who seek investment advice from financial professionals. One commenter noted that "[a]s consumers move closer to retirement, they may be more vulnerable to the negative impact of advice that is not in their best interest for three reasons: (1) The assets they have to invest are larger; (2) they may lack strong financial literacy skills; and (3) reduced cognition may affect financial decision making."[1129] A number of studies have shown that financial literacy is significantly related to retirement planning and wealth accumulation by retail investors.[1130] Generally, studies find that investors who are more financially literate or sophisticated are more likely to seek investment advice and are more likely to follow that advice than less financially sophisticated investors.[1131] Further, one study shows that investors with lower financial literacy who do not seek investment advice underperform investors with higher financial literacy who seek investment advice by more than 50 bps on average, and these losses are predominantly driven by under-diversification of their portfolios.[1132]

A number of studies link retail investor demographic characteristics to financial literacy and document that financial illiteracy, although widespread, is most significant among investors with lower levels of educational attainment, women, and minorities.[1133] Moreover, many studies have examined the relationship between age, cognition, and financial literacy, and have shown that older investors, on average, are the least likely to be financially literate, and that financial literacy degrades as investors age.[1134] A number of these studies show, however, that investors with low levels of financial literacy are likely to be over-confident in their financial abilities. For example, several studies that explore the relationship between age and financial literacy show that confidence in financial decision making does not decline with age, and potentially leads to poor decisions (*e.g.*, paying higher mortgage rates).[1135] Although over-confident investors with low levels of financial literacy could potentially benefit most from seeking and following investment advice, one study shows that over-confident investors are less likely to seek advice and perceive it as less valuable.[1136]

One potential problem, however, for investors with lower financial literacy is that they may not be able to distinguish the quality of their financial professional or the advice that they receive.[1137] One study documents that small traders, relative to large institutional investors, are unable to recognize biases in recommendations

Meza, Bernd Irlenbusch, & Diane Reyniers, *Disclosure, Trust and Persuasion in Insurance Markets* (IZA Discussion Paper Series, No. 5060, July 2010), *available at http://repec.iza.org/dp5060.pdf. See also* OIAD/RAND, which shows that investors most likely in need of investor protection (*e.g.*, financially unsophisticated) are most likely to place their trust in financial professionals. *See also* Letter from AFL–CIO et al. (Dec. 7, 2018) ("AFL–CIO December 2018 Letter").

1124 *See* Riccardo Calcagno, Maela Giofre, & Maria Cesira Urzi-Brancati, *To Trust is Good, but to Control is Better: How Investors Discipline Financial Advisors' Activity,* 140 J. Econ. Behav. & Org. 287 (2017). *See* OIAD/RAND.

1125 *See, e.g.,* Rhoades December 2018 Letter; EPI Letter; Better Markets August 2018 Letter.

1126 *See* Calcagno et al. (2017), *supra* footnote 1124.

1127 *See id.*

1128 *See* AARP August 2018 Letter. *See also* PIABA Letter; St. John's U. Letter. *See also* Joseph C. Peiffer & Christine Lazaro, *Major Investor Losses Due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty,* PIABA Report (Mar. 25, 2015), *available at https://piaba.org/sites/default/files/newsroom/2015-03/PIABA%20Conflicted%20Advice%20Report.pdf.*

1129 *See* AARP August 2018 Letter.

1130 *See, e.g.,* Jere R. Behrman et al., *Financial Literacy, Schooling, and Wealth Accumulation* (Nat'l Bureau of Econ. Research, Working Paper No. 16452, Oct. 2010), *available at https://www.nber.org/papers/w16452.pdf;* Hans-Martin von Gaudecker, *How Does Household Portfolio Diversification Vary with Financial Literacy and Financial Advice?,* 70 J. Fin. 489 (2015) (included in response to comment letters that expressed views about limited financial literacy by some retail investors).

1131 *See supra* Section III.B.3. *See also* Riccardo Calcagno & Chiara Monticone, *Financial Literacy and the Demand for Financial Advice,* 50 J. Banking & Fin. 363 (2015), who observe that investors with lower levels of financial literacy are less likely to consult advisers and avoid risky assets; however, when they do seek advice, they generally delegate investment decisions to their financial professionals. Lusardi & Mitchell (2011) indicate that investors who are more financially sophisticated are more likely to plan for wealth accumulation and be successful in their planning. *See* Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Planning: Implications for Retirement Wellbeing* (Nat'l Bureau of Econ. Research, Working Paper No. 17078, May 2011), *available at https://www.nber.org/papers/w17078.pdf. See* AARP August 2018 Letter.

1132 *See* von Gaudecker (2015), *supra* footnote 1130. This study finds that losses borne by investors with lower financial literacy are predominantly driven by under-diversification of their portfolios.

1133 *See* Lusardi & Mitchell (NBER 2011), *supra* footnote 1131. *See also* Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Retirement Planning in the United States,* 10 J. Pension Econ. & Fin. 509 (2011). *See* AARP August 2018 Letter.

1134 *See* Michael S. Finke, John Howe & Sandra J. Huston, *Old Age and Decline in Financial Literacy* (Working Paper, Aug. 24, 2011), who document that financial literacy scores decline by approximately 1% each year over the age of 60. *See also* Annamaria Lusardi, Olivia S. Mitchell, & Vilsa Curto, *Financial Literacy and Financial Sophistication Among Older Americans* (Nat'l Bureau of Econ. Research, Working Paper No. 15469, Nov. 2009), *available at https://www.nber.org/papers/w15469.pdf;* Keith Gamble et al., *Aging and Financial Decision Making,* 61 Mgmt. Sci. 2603 (2015). *See* AARP August 2018 Letter.

1135 *See* Finke et al. (2011) and Gamble et al. (2015), *supra* footnote 1134.

1136 *See* Marc M. Kramer, *Financial Literacy, Overconfidence and Financial Advice Seeking* (Working Paper, Dec. 19, 2014), *available at https://efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2015-Amsterdam/papers/EFMA2015_0067_fullpaper.pdf.*

1137 *See* Lauren E. Willis, *Against Financial-Literacy Education,* 94 Iowa L. Rev. 197 (2008). *See* AARP August 2018 Letter.

provided by securities analysts, and therefore follow analyst recommendations to buy and sell securities without considering other information produced by the analyst.[1138] Additionally, financial literacy may influence the quality of advice that financial professionals are willing to provide their clients. Some financial professionals appear to be more likely to provide superior information to more financially literate investors, who may be able to discern the quality of the advice, and more likely to provide inferior and potentially more conflicted information to investors who are less financially literate.[1139]

c. Evidence on the Effectiveness and Limitations of Disclosure

Regulation Best Interest relies in part on disclosure of certain material facts to retail customers.[1140] A number of commenters, however, stated that we failed to sufficiently account for limitations of disclosure in the Proposing Release of Regulation Best Interest.[1141] One commenter stated that "studies show that regulation by disclosure alone can actually undermine investor protection by emboldening advisers to ignore the client's best interest once they have 'checked the disclosure box,' and by rendering investors even more vulnerable to conflicted advice once they receive disclosures."[1142] Another commenter asserted that the ineffectiveness of disclosure arises because of investors' failure to understand the disclosure, inadequate time to read and process the information, cognitive dissonance, and trust in financial professionals' oral representations over written disclosures, among others.[1143] Below, we discuss studies that have identified characteristics that make disclosure effective as well as limitations to the effectiveness of disclosure to investors, in particular focusing on issues related to disclosure of conflicts of interest and how disclosure could inflate potential conflicts between financial professionals and investors.

Characteristics of effective disclosures include saliency of information, clear and concise information delivered in a transparent manner, and increased use of visual and interactive design, among others.[1144] One study, examining the effect of disclosure of fees and costs for mutual funds, observes that disclosures that prominently feature fees are more effective than others, but do not appear to reduce the importance that investors place on other fund characteristics, such as performance or risk.[1145] Other studies, however, have found that disclosures may be ineffective, particularly if the intended audience does not read the disclosure documents or does not understand the material presented to them. One study, for example, notes that as the length and complexity of the disclosure document increases, so does the time that it takes for investors to read and understand the material contained within; therefore, investors are more likely to prefer shorter, simpler, and more straightforward language in disclosures.[1146]

Many studies have explored the effect of revealing conflicts of interest to consumers and note that disclosure of conflicts may produce undesirable behavior by the disclosing party, or that receivers of the information provided by disclosures may fail to appropriately account for the implications.[1147] A series of studies documents that consumers do not account for conflicts of interest revealed through disclosures, and that such disclosures of conflicts can have the perverse effect of increasing bias and moral licensing in the provision of advice.[1148] Moral licensing arises when the discloser of information "take[s] an ethical action that validates [her] self-image as a good person" so she feels as though she "may well give [herself] permission to play fast and loose with the rules for a while."[1149] Disclosure may also lead to a decrease in trust of biased advice because consumers feel pressured to satisfy the discloser's self-interest ("panhandler effect");[1150] however, the panhandler effect can be mitigated if the disclosure is provided from an external source, the disclosure is not common knowledge between the discloser and the receiver of the information, the receiver can change his or her mind at a later date, and the receiver can change his or her mind in private.[1151] One

[1138] *See* Ulrike Malmendier & Devin Shanthikumar, *Are Small Investors Naive About Incentives?*, 85 J. Fin. Econ. 457 (2007). *See* AARP August 2018 Letter.

[1139] *See* Willis (2008), *supra* footnote 1137, and Calcagno & Monticone (2015), *supra* footnote 1131. *See also* John A. Turner, Bruce W. Klein, & Norman P. Stein, *Financial Illiteracy Meets Conflicted Advice: The Case of Thrift Savings Plan Rollovers* (Working Paper, Apr. 2015), *available at https://gflec.org/wp-content/uploads/2015/04/Turner-0408Assessing-the-Standard-for-Financial-Advice.pdf*, which documents that financial professionals often suggest rolling over from thrift savings plans to more expensive plans (*e.g.*, IRAs), and that such behavior is pervasive among both broker-dealers and investment advisers. *See* AARP August 2018 Letter.

[1140] *See supra* Section II.C.1.

[1141] *See* AARP August 2018 Letter; Better Markets August 2018 Letter; State Attorneys General Letter; EPI Letter; Morningstar Letter; Warren Letter; UVA Letter.

[1142] *See* Better Markets August 2018 Letter. *See infra* footnote 1148 for studies submitted by this commenter.

[1143] *See* State Attorneys General Letter. *See also* EPI Letter.

[1144] *See* Relationship Summary Adopting Release at Section IV, which also discusses the benefits and limitation of disclosure. *See also* Margaret Hagan, *Designing 21st Century Disclosure Methods for Financial Decision Making*, Stanford Law School Policy Lab (2016), *available at https://law.stanford.edu/publications/designing-21st-century-disclosures-for-financial-decision-making/*. One study finds that when fund expenses are bundled with brokerage commissions, reducing the transparency of various fees and costs, investors experience larger degrees of underperformance than when the fees are more transparent. *See* Roger M. Edelen, Richard B. Evans, & Gregory B. Kadlec, *Disclosure and Agency Conflict: Evidence from Mutual Fund Commission Bundling*, 103 J. Fin. Econ. 308 (2012). *See* AARP August 2018 Letter.

[1145] *See* Lucy Hayes, William Lee, & Anish Thakrar, *Now You See It: Drawing Attention to Charges in the Asset Management Industry* (Fin. Conduct Auth., Occasional Paper No. 32, Apr. 2018), *available at https://www.fca.org.uk/publication/occasional-papers/occasional-paper-32.pdf*. *See* Morningstar Letter. *See also* Anagol et al. (2015), *supra* footnote 1075.

[1146] *See* Tamar Frankel, *The Failure of Investor Protection by Disclosure*, 81 U. Cin. L. Rev. 421 (2013). *See* FPC. *See also* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647 (2011), which also questions the effectiveness of disclosures and finds mandated disclosures ineffective substitutes for more direct regulation. *See* AARP August 2018 Letter; Better Markets August 2018 Letter; State Attorneys General Letter.

[1147] *See also* Relationship Summary Adopting Release.

[1148] *See* Daylian M. Cain, George Loewenstein, & Don A. Moore, *When Sunlight Fails to Disinfect: Understanding the Perverse Effects of Disclosing Conflicts of Interest*, 37 J. Consumer Res. 836 (2011); Daylian M. Cain, George Loewenstein, & Don A. Moore, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. Legal Stud. 1 (2005); George Loewenstein, Daylian M. Cain & Sunita Sah, *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 Am. Econ. Rev. (Papers & Proc.) 423 (2011). These studies also note that, although disclosure is intended to help financially unsophisticated consumers, disclosure is most likely to be beneficial to sophisticated users of the information. One study, however, notes that disclosure can reduce biased advice if the disclosure acts as a deterrent against entering into conflicts, and may improve trust in advisers. *See* Sunita Sah & George Loewenstein, *Nothing to Declare: Mandatory and Voluntary Disclosure Leads Advisors to Avoid Conflicts of Interest*, 25 PSYCH. SCI. 575 (2014). *See also* Morningstar Letter; EPI Letter; Better Markets August 2018 Letter; Warren Letter; UVA Letter; AARP August 2018 Letter; Johnsen Letter.

[1149] *See* Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 Wis. L. Rev. 1059 (2011). *See* AARP August 2018 Letter; Better Markets August 2018 Letter; State Attorneys General Letter.

[1150] *See* Cain et al. (2011), *supra* footnote 1148; Sunita Sah, Prashant Malaviya, & Debora Thompson, *Conflict of Interest Disclosure as an Expertise Cue: Differential Effects of Automatic and Deliberative Processing*, 147 Organizational Behav. & Hum. Decision Processes 127 (2018), whereby disclosures of conflicts of interest act "as a heuristic cue to infer greater trust in advisors' expertise."

[1151] *See* Sunita Sah, George Loewenstein, & Daylian M. Cain, *The Burden of Disclosure: Increased Compliance With Distrusted Advice*, 104

Continued

study notes that, beyond conflicts disclosures, disclosures of actual bias lead to an improvement in performance of portfolios relative to investors who only receive conflict disclosures.[1152]

From the perspective of the investor, conflicts disclosures may lead to under- or over-reaction by investors. According to one study, investors may not know how to appropriately respond to information about conflicts (*e.g.*, estimating the effects on the quality of advice or knowing how to search for an unbiased second opinion) and therefore may fail to adequately adjust their behaviors when conflicts are disclosed.[1153] Alternatively, some investors may overreact to disclosures of conflicts of interest, and may instead forgo valuable investment advice.[1154]

C. Benefits and Costs

1. General

In formulating Regulation Best Interest, the Commission has considered the potential benefits of establishing a best interest standard of conduct for broker-dealers, as well as the potential costs.

Regulation Best Interest enhances the broker-dealer standard of conduct beyond existing suitability obligations, and aligns the standard of conduct with retail customers' reasonable expectations. Under Regulation Best Interest, broker-dealers and their associated persons will be required, among other things, to: (1) Act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the interests of the retail customer; and (2) address conflicts of interest by establishing, maintaining, and enforcing policies and procedures reasonably designed to identify and fully and fairly disclose material facts about conflicts of interest, and in instances where we have determined that disclosure is insufficient to reasonably address the conflict, to mitigate or, in certain instances, eliminate the conflict. As a result, Regulation Best Interest should enhance the efficiency of recommendations that broker-dealers provide to retail customers, help retail customers evaluate the recommendations received, and improve retail customer protection when receiving recommendations from broker-dealers. The four component obligations of Regulation Best Interest's work together to enhance the current standard of conduct for broker-dealers and improve disclosure of material facts relating to the scope and terms of the relationship and conflicts of interest. Both on its own and together with the other new rules and forms we are adopting,[1155] we anticipate that Regulation Best Interest will reduce the agency costs of the relationship between the associated persons of the broker-dealer and their retail customers, while preserving access to financial advice and choice in the scope of services and how to pay for them.

In this section, we discuss broader themes associated with the costs and benefits of Regulation Best Interest, including general comments we received on our analysis of the costs and benefits in the Proposing Release. Following this more general discussion, we discuss the specific costs and benefits associated with Regulation Best Interest's four component obligations.

While the Commission has considered the potential benefits and costs of Regulation Best Interest, the Commission notes that generally it is difficult to quantify such benefits and costs with meaningful precision.[1156] Where possible, the Commission has provided an estimate of specific costs; however, several factors make the quantification of many of the effects of Regulation Best Interest difficult. With respect to costs to broker-dealers, there is a lack of data on the extent to which broker-dealers with different business practices engage in disclosure and conflict mitigation activities to comply with existing requirements, and therefore how costly it would be to comply with the proposed requirements. Also, the final rule will provide broker-dealers flexibility in complying with Regulation Best Interest, and, as a result, there could be multiple ways in which broker-dealers will satisfy this obligation, although broker-dealers must comply with each of the elements of the obligation. In addition, Regulation Best Interest may affect broker-dealers differently depending on their business model (*e.g.*, full service broker-dealer, broker-dealer that uses independent contractors, insurance-affiliated broker-dealer) and size. More generally, estimates of the magnitude of such benefits and costs depend on assumptions about (1) the extent to which broker-dealers currently engage in disclosure and conflict mitigation activities, (2) how broker-dealers currently develop recommendations for their customers, (3) how broker-dealers choose to comply with Regulation Best Interest, (4) whether and how broker-dealers change investments and share classes offered as a result of Regulation Best Interest, (5) whether and how product manufacturers change their investment offerings as a result of Regulation Best Interest, (6) whether broker-dealers restrict access to brokerage accounts by raising minimum account sizes or adding additional qualification requirements, (7) whether broker-dealers try to shift customers to advisory accounts as a result of Regulation Best Interest, (8) how retail customers perceive the risk and return of their portfolios, (9) how likely retail investors are to act on a recommendation that complies with Regulation Best Interest, (10) how the risk and return of retail customer portfolios change as a result of how they act on the recommendation, and (11) how investment advisers, including dually registered advisers, react to the adoption of Regulation Best Interest and the other regulatory developments, including the rules we are adopting and interpretations we are issuing simultaneously with Regulation Best Interest. Because many of these factors are firm-specific and thus inherently difficult to quantify, even if it were possible to calculate a range of potential quantitative estimates, that range would be so wide as to not be informative about the magnitude of the

J. Personality & Soc. Psychol. 289 (2013). *See* Morningstar Letter; Better Markets August 2018 Letter; EPI Letter.

[1152] *See* Christopher Tarver Robertson, *Biased Advice*, 60 Emory L.J. 653 (2011). This study also suggests that obtaining an opinion from an unbiased adviser "is a much better remedy for biased advice than disclosure." *See* AARP August 2018 Letter.

[1153] *See* Angela A. Hung, Min Gong, & Jeremy Burke, *Effective Disclosures in Financial Decisionmaking*, RAND Labor and Population Report Prepared for the Department of Labor (2015), *available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR1200/RR1270/RAND_RR1270.pdf. See also* AARP August 2018 Letter; Better Markets August 2018 Letter; Warren Letter. *See also* James M. Lacko & Janis K. Pappalardo, *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment*, Federal Trade Commission, Bureau of Economics Staff Report (Feb. 2004), *available at https://www.ftc.gov/sites/default/files/documents/reports/effect-mortgage-broker-compensation-disclosures-consumers-and-competition-controlled-experiment/030123mortgagefullrpt.pdf*, which documents that when mortgage customers receive information about mortgage broker compensation through disclosures, such disclosures lead to an increase in more expensive loans and create a bias against broker-sold loans, even when the broker-sold loans are the more cost effective option. *See* EPI Letter.

[1154] *See* George Loewenstein, Cass R. Sunstein, & Russell Golman, *Disclosure: Psychology Changes Everything*, 6 Ann. Rev. Econ. 391 (2014). *See* IRI Letter.

[1155] *See, e.g.*, Relationship Summary Adopting Release.

[1156] *See supra* Section III.B.3.c for discussion of the wide range of estimates of the potential benefits of Regulation Best Interest stemming from a reduction in investor harm, and discussion surrounding *infra* footnotes 1165–1182 for other issues associated with these estimates.

benefits or costs associated with Regulation Best Interest.

Broader economic forces, beyond broker-dealer and retail customer behavioral responses to Regulation Best Interest, also make meaningful estimates of economic impacts difficult to develop. The market for investment advice and services is complex and vast, and as history demonstrates, is dynamic and affected by market-specific facts (including product developments and regulatory changes) as well as macroeconomic factors (including general economic conditions). For example, the introduction of indexation to the retail investment market and the subsequent increase in index products (and providers) and reduction in the costs of indexing for retail investors have had substantial effects on the market for retail investment advice and services. The more recent introduction of ETFs has had similar unanticipated and underestimated effects, including, in general, reducing investor costs and increasing tax efficiency, as well as increasing the array of product offerings. Developments such as the employer-driven shift from defined benefit plans to defined contribution plans also have had significant effects on the market for investment advice. We expect these and other factors, including factors not currently identified, will continue to affect the market and, accordingly, may change the economic effects of the rule. These sources of uncertainty and complexity make meaningfully quantifying many of the costs and benefits of the rule difficult and, particularly over long time periods, inherently speculative.

a. Broad Commenter Concerns With Respect to Costs and Benefits

We received many comments regarding our analysis in the Proposing Release of the benefits and costs. In this section, we discuss comments that address broader aspects of our analysis. Comments that address costs and benefits of more specific components of Regulation Best Interest are discussed in the corresponding sections for each rule component that follows.

Some commenters stated that our analysis in the Proposing Release did not properly incorporate current market practices into the baseline.[1157] As discussed above, we have revised the discussion to include those practices, which may reflect guidance by SROs such as FINRA, requirements and obligations under state laws, practices implemented by broker-dealers in response to the (now vacated) DOL Fiduciary Rule that have not been reversed, and any practices implemented by broker-dealers to fulfill their obligations under existing federal securities laws.[1158] While we acknowledged in the Proposing Release that variation in the extent to which broker-dealers with different business practices already engage in disclosure and conflict mitigation activities makes quantifying Regulation Best Interest's costs and benefits with meaningful precision difficult, we more explicitly emphasize how this variation in current market practices affects the costs and benefits of Regulation Best Interest in the discussion that follows.[1159] In general, to the extent that broker-dealer practices are already aligned with the requirements of Regulation Best Interest, the anticipated magnitude of both the costs and the benefits associated with a given component of Regulation Best Interest will be correspondingly reduced, and vice versa.

As discussed above,[1160] commenters noted the existence of fiduciary standards in various states. One commenter provided an overview of the fiduciary obligations of state-registered investment advisers, "typified by an expectation of undivided loyalty where the adviser acts primarily for the benefit of its clients."[1161] This commenter also stated that "[s]ome states also extend these fiduciary obligations beyond investment advisers to brokers, especially in dual-hatted scenarios," and that these fiduciary obligations were extended even when broker-dealers handled non-discretionary accounts.[1162] We recognize that there is substantial variation in the sources, scope, and application of state fiduciary law. And we acknowledge that such state-level obligations for broker-dealers mean that they may already engage in practices under the baseline that overlap with certain requirements under Regulation Best Interest. To the extent that state-level law incorporates fiduciary principles similar to those reflected in Regulation Best Interest, the magnitude of the costs and benefits discussed below that stem from the application of those principles to broker-dealers will be correspondingly reduced. However, costs and benefits that arise from obligations under Regulation Best Interest that differ from obligations under state law, such as the Conflict of Interest Obligation, will be maintained.[1163]

Some commenters suggested that certain types of costs should remain outside the scope of our analysis. Some stated that our analysis should not consider, for example, costs to broker-dealers resulting from lost revenues on securities they cease offering or costs associated with any potential increase in arbitration claims as a result of Regulation Best Interest, except to the extent that they are passed on to investors in the form of higher fees.[1164] These commenters suggested that because these types of costs are a direct result of policies that make investors better off, they should not factor into an assessment of Regulation Best Interest. The Commission has an obligation to consider the economic effect of Regulation Best Interest on affected parties, including broker-dealers, even when those costs are associated with benefits to investors. However, in the specific discussion of each rule component that follows, we highlight instances where a given cost is directly associated with a benefit to investors.

Commenters raised several issues related to the quantification of costs and benefits, or lack thereof, in the Proposing Release. They asserted that our analysis focused too much on Regulation Best Interest's costs and did not quantify any of the benefits, such as the reduction in investor harm.[1165] As discussed above, some studies present anecdotal evidence of behavior by certain broker-dealers, such as recommending investments that are inferior to available alternatives, that is harmful to investors.[1166] A potential

[1157] *See, e.g.*, CFA August 2018 Letter; CCMC Letters.

[1158] *See supra* Section III.B.2.

[1159] *See* Proposing Release at 21643.

[1160] *See supra* Section III.B.2.

[1161] *See* NASAA February 2019 Letter at 22 and footnote 40.

[1162] *Id.* at 23–24.

[1163] Whether Regulation Best Interest would have a preemptive effect on any state law would be determined in future judicial proceedings, and would depend on the language and operation of the particular state law at issue. We considered whether we could determine the economic impact of possible, future state-law preemption on retail customers, but concluded that we cannot analyze the economic effects of the possible preemption of state law at this point because the factors that will shape those judicial determinations are too speculative. Among the unknown factors are: (1) The final language in any proposed state legislation or regulation adopting a fiduciary or other standard for broker-dealers; (2) whether that language would constitute the type of law, rule, or regulation that is expressly preempted by the securities law or impliedly preempted under principles applied by courts; and (3) whether, if there was preemption, that preclusion of state law would have any positive or negative effects on investors when compared with the economic effects of Regulation Best Interest.

[1164] *See* AARP August 2018 Letter; EPI Letter; Better Markets August 2018 Letter; Cetera August 2018 Letter.

[1165] *See* AARP August 2018 Letter; Better Markets August 2018 Letter; CFA August 2018 Letter.

[1166] *See supra* footnotes 1068 and 1075.

benefit of Regulation Best Interest is therefore a reduction in that harm, as asserted by commenters. However, the anecdotal evidence of investor harm in these studies does not lend itself to aggregation.

Commenters also stated that we should have incorporated the approach used by the DOL RIA and the CEA to quantify aggregate investor harm.[1167] While both of these analyses surveyed a broad literature on the relative performance of broker-sold versus direct-sold mutual funds, they both relied on a particular study to estimate aggregate investor harm, extrapolating the effect of "excess loads" on the performance of broker-sold funds to total industry-wide AUM.[1168] We disagree with this approach because, as noted by commenters, we believe these analyses misapplied the particular study's results.[1169] When the results of the study are correctly applied, the aggregate estimate of investor harm obtained using this approach is negligible.[1170]

Another commenter advocated a similar approach, claiming that risk-adjusted returns net of fees, which calculate the excess return of an investment above a benchmark that matches the risk of the investment, are the only appropriate measure of whether a recommendation is in a retail customer's best interest.[1171] While there are studies showing that broker-sold mutual funds underperform direct-sold funds to varying degrees,[1172] we do not believe, for the reasons explained below, that applying estimates of this under-performance to industry-wide AUM produces a meaningful estimate of the aggregate investor harm attributable to recommendations made by broker-dealers that is sufficiently precise to inform our policy choices. First, as discussed above, these studies do not necessarily cleanly distinguish under-performance attributable to broker-dealers from under-performance attributable to investment advisers.[1173]

Second, interpreting the relative underperformance of broker-sold funds as a measure of investor harm due to conflicts of interest implicitly evaluates investor harm against a benchmark that does not include financial advice. However, that benchmark does not necessarily reflect the appropriate alternative available to investors in broker-sold funds. Extrapolating from these studies leads to the conclusion that investors would do better investing *on their own,* yet there are other studies showing that is not the case, at least not for all investors.[1174] We further note that calculating the investor harm against a benchmark that includes the fees retail customers would pay for equivalent advice could significantly reduce the magnitude of these estimates.[1175]

Finally, while risk-adjusted returns may be useful in comparing the performance of particular mutual funds, particularly when trying to evaluate fund manager skill, they do not necessarily reflect the utility that investors achieve from their investments.[1176] Heterogeneous investors value investments and the services provided by financial professionals differently depending on their investment profile and preferences, and risk-adjusted returns do not necessarily represent aggregate utility across all investors in a way that permits us to arrive at an aggregate measure of investor harm. For example, consumers invest in various forms of insurance products in order to hedge their exposure to bad outcomes (*e.g.,* home insurance policies), even though the expected returns on such investments are generally negative. The relative underperformance of broker-sold mutual funds also may not capture any intangible benefits investors derive from receiving tailored financial advice.[1177] Alternatively, the relative performance of mutual funds sold through these two channels may reflect other factors that are unrelated to conflicts of interest.[1178] Accordingly, while we do not dispute the existence of broker-dealer behavior under the baseline that is harmful to investors, based on our analysis, including our analysis of the comments received, we continue to believe that quantifying that harm, and therefore quantifying the benefits associated with reducing it, depends on many contingent factors that would render any estimates insufficiently precise to inform our policy choices.[1179]

With respect to the magnitude of the costs we assessed in the Proposing Release, some commenters asserted that our analysis underestimated the costs of complying with Regulation Best Interest, though only a few provided estimates of these costs.[1180] Where commenters provided estimates for a specific component of Regulation Best Interest, particularly the Disclosure Obligation, we discuss those estimates when discussing that component of Regulation Best Interest below. Based on its experience with the DOL Rule, one commenter provided a broad estimate of the compliance costs associated with the entire package of rules we proposed, including Regulation Best Interest and Form CRS, indicating that the rule package would entail initial costs of $20 million and ongoing costs of $5 million per year for their firm, but that these costs would be manageable.[1181] Another commenter stated that for a small broker-dealer with $500,000 in net capital, the compliance costs estimated in the Proposing Release could constitute 12% of that net capital, making compliance with Regulation Best Interest burdensome for such broker-dealers.[1182] We acknowledge that the costs of Regulation Best Interest could be more burdensome for small broker-dealers and discuss any corresponding competitive effects in Section III.D.1.

Although the majority of the industry studies provided by commenters focused on the effects of the DOL Fiduciary Rule on broker-dealers and their customers, one industry survey provided information about industry beliefs about potential effects of proposed Regulation Best Interest.[1183]

[1167] *See* Better Markets August 2018 Letter.

[1168] *See supra* footnotes 1081 and 1099.

[1169] *See, e.g.,* Lewis (2017), *supra* footnote 1099.

[1170] *See id.*

[1171] *See* EPI Letter. *See also* Former SEC Senior Economists Letter, stating that risk-adjusted returns are an appropriate measure of investor harm.

[1172] *See, e.g.,* Bergstresser et al. (2009), *supra* footnote 1048; Del Guercio & Reuter (2014), *supra* footnote 1081.

[1173] *See supra* footnote 1097.

[1174] *See supra* footnotes 1045–1048.

[1175] *See also supra* footnote 1103.

[1176] Even in the context of evaluating fund manager skill, there is debate about whether risk-adjusted returns are an appropriate measure of fund performance. *See e.g.,* Vincent Glode, *Why Mutual Funds "Under Perform"*, 99 J. Fin. Econ. 546 (2011); Jonathan B. Berk & Jules H. van Binsbergen, *Measuring Skill in the Mutual Fund Industry,* 118 J. Fin. Econ. 1 (2015).

[1177] *See, e.g.,* Bergstresser et al. (2009), *supra* footnote 1048, who note that "[o]ne possibility is that brokers provide other intangible benefits, which we cannot measure" when interpreting the relative performance of broker-sold versus direct-sold mutual funds.

[1178] *See, e.g.,* The DOL RIA, *supra* footnote 1002, at footnote 473, noting that the relative performance of broker-sold versus direct-sold funds ". . . is an imperfect measure of the impact of conflicts of interest; other factors, aside from conflicts of interest, affect the relative performance of mutual funds sold through the two distribution channels."

[1179] *See* Discussion following footnote 1156 for a discussion of these factors. *See also infra* Section III.C.7, where we have endeavored to estimate some of the potential benefits of Regulation Best Interest based on many assumptions.

[1180] *See* Schwab Letter; ICI Letter; Letter from James J. Angel, Associate Professor of Finance, Georgetown University (Aug. 7, 2018) ("Angel Letter"); LPL August 2018 Letter; NSCP Letter.

[1181] *See* Raymond James Letter.

[1182] *See* NSCP Letter.

[1183] *See* Center for Capital Markets Competitiveness, *SEC Regulation Best Interest Rule Proposals: Request for Information Analysis,* FTI Consulting Report Presented to the U.S. Chamber of Commerce (Jul. 25, 2018), *available at https://*

The survey consisted of approximately 30 individual financial professionals across a mix of 15 companies providing financial advisory services and products, including broker-dealers and dually registered firms, with $23 trillion in AUM and administration and nearly 79 million investment accounts. All of the participants surveyed stated that it was unlikely that they would reconsider their broker-dealer registration status, while nearly 40% stated that they may alter their investment choices and 35% could alter the services that they offer. With respect to the costs of Regulation Best Interest and Form CRS, approximately 36% of respondents stated that the implementation costs could be between 1% and 5% of annual profits; however, nearly 80% of respondents noted that costs are likely to decline over time.[1184] We note that one of the cost estimates provided by a commenter above is consistent with this range.[1185] One commenter suggested that for firms that offer access to thousands of unique securities, many of which likely have similar strategies (*e.g.*, index mutual funds or ETFs), requiring broker-dealers to "consider reasonably available alternatives offered by the broker-dealer as part of having a reasonable basis for making the recommendation" would make it cost prohibitive for broker-dealers and financial professionals to evaluate the costs associated with "every similar investment product available through the broker-dealer's platform." [1186] Many survey participants, although they believed that the Commission underestimated the aggregate costs of Regulation Best Interest and Form CRS, agreed that the benefits to investors were likely to justify the costs.

Other commenters stated that a number of elements of the Proposing Release potentially could increase litigation exposure for some broker-dealers. For example, one commenter discussed that, because proposed Regulation Best Interest did not "expressly define 'financial incentive'" for purposes of the proposed requirement of policies and procedures designed to disclose and mitigate, or eliminate, conflicts arising from financial incentives, broker-dealers could face challenges to "design and maintain effective compliance programs that appropriately address the conflicts inherent in their particular business models" thereby potentially increasing litigation risks.[1187] Another commenter indicated that, with respect to proprietary products, "[s]tate courts in enforcement actions and in review of such actions" may find it difficult to distinguish the best interest standard for broker-dealers from a fiduciary standard for investment advisers, and may cause certain associated persons of broker-dealers to "shy away from the risks of litigation in this regulatory environment, causing a substantial market contraction away from middle class investors." [1188]

In the Proposing Release, we were able to quantify costs for limited portions of Regulation Best Interest, particularly those stemming from requirements related to document creation for purposes of the Paperwork Reduction Act. While we have updated these estimates in Section IV.B, we continue to believe that it is not possible to meaningfully quantify the full costs and benefits of Regulation Best Interest because such analysis would depend on many contingent factors that render any estimate insufficiently precise to inform our policy choices.[1189] So while we acknowledge, for example, that Regulation Best Interest may impose costs that are a significant portion of the estimate of initial and ongoing costs of $20 million and $5 million by the commenter cited above, we cannot anticipate the associated costs for all firms because of the wide variation in size and scope of business practices across firms as well as the many unknown factors associated with the principles-based nature of Regulation Best Interest. In discussing Regulation Best Interest's component obligations below, we address any estimates provided by commenters where we can and otherwise explain the specific factors that preclude quantifying the costs of Regulation Best Interest with meaningful precision beyond our Paperwork Reduction Act estimates.

b. Broad Investor Protection Benefits

As discussed above, in addition to any enhancements provided above and beyond current requirements and market practices, each of the component obligations of Regulation Best Interest share features with market best practices under the baseline, as shaped by FINRA's guidance on relevant rules or as described in its Report on Conflicts of Interest. Given this overlap, FINRA, in response to a congressional request, enumerated the ways it believes Regulation Best Interest enhances existing broker-dealer obligations under current FINRA rules.[1190]

In addition to the enhancements that each of Regulation Best Interest's component obligations provide above and beyond existing broker-dealer obligations under the baseline, which we discuss below, Regulation Best Interest increases retail customer protections by establishing these obligations under the Exchange Act so that the Commission may enforce them directly and examine for compliance. Additionally, to the extent that market best practices may reflect some FINRA guidance that is not required by FINRA's rules, some broker-dealers may not currently implement these practices. To the extent that broker-dealers and their associated persons do not currently implement existing best practices that will be codified in Regulation Best Interest, retail customers will benefit because it will increase the implementation of these best practices throughout the industry.

2. Disclosure Obligation

As adopted, the Disclosure Obligation of Regulation Best Interest's requires a broker-dealer, prior to or at the time of the recommendation, to provide to the retail customer, in writing, full and fair disclosure of all material facts relating to the scope and terms of the relationship and all material facts relating to conflicts of interest that are associated with the recommendation. Regulation Best Interest explicitly requires disclosure of "all material facts relating to the scope and terms of the relationship with the retail customer" including: (i) That the broker, dealer, or such natural person is acting as a broker, dealer, or an associated person of a broker or dealer with respect to the recommendation; (ii) the material fees and costs that apply to the retail customer's transactions, holdings, and accounts; and (iii) the type and scope of

www.centerforcapitalmarkets.com/wp-content/uploads/2018/08/Reg-BI-Rule-Proposal-Research_8.7.18_FTI-Updated_final.pdf. See CCMC Letters. Survey participants also addressed questions related to beliefs regarding investor protection, choices for retail customers, and the standard of conduct for broker-dealers.

[1184] One commenter stated that the "costly" recordkeeping requirements described in the Proposing Release "are unnecessary as self-interest will lead firms to keep proof of compliance" and should be eliminated. *See* Angel Letter.

[1185] *See supra* footnote 1181. Relative to this commenter's 2018 fiscal year profits, its initial cost estimate of $20 million would represent approximately 2% of annual profits for this firm. *See https://www.sec.gov/Archives/edgar/data/720005/000072000518000083/rjf-20180930x10k.htm.*

[1186] *See* LPL December 2018 Letter.

[1187] *See* Primerica Letter.

[1188] *See* Letter from Douglas M. Ommen, Iowa Insurance Commissioner (Aug. 6, 2018) ("Iowa Insurance Commissioner Letter").

[1189] *See* Discussion following footnote 1156 for a discussion of these factors. *See also infra* Section III.C.7, where we have endeavored to estimate some of the potential benefits of Regulation Best Interest based on many assumptions.

[1190] *See* FINRA 2018 Letter.

services provided to the retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer; and all material facts relating to conflicts of interest that are associated with the recommendation.

Under the baseline, some disclosure obligations already exist, as do an array of market practices with respect to the disclosure of capacity, fees, services, and conflicts of interest.[1191] The Disclosure Obligation will enhance disclosure obligations that exist under the baseline and bring greater alignment to market practices by establishing an explicit and broad disclosure requirement under the Exchange Act that applies to all broker-dealers when they make a recommendation to a retail customer. We expect this change to improve the quality and consistency of disclosures and thus (1) reduce the information asymmetry that may exist between a retail customer and her broker-dealer, and (2) facilitate customer comparisons of different broker-dealers which we expect will, in turn, increase competition among broker-dealers, including with respect to fees and costs, as discussed below.[1192]

Relative to the baseline, the Disclosure Obligation will change how broker-dealers disclose information to their retail customers in several specific ways. First, under the baseline, a broker-dealer and its associated persons are not explicitly required to disclose that they are acting in a broker-dealer capacity when making a recommendation. We also clarify above that the use of the terms "adviser" or "advisor" in a name or title by (i) a broker-dealer that is not also registered as an investment adviser, or (ii) a financial professional that is not also a supervised person of an investment adviser would presumptively violate this particular disclosure requirement. Second, Regulation Best Interest requires that any disclosure made by a broker-dealer be "full and fair," meaning that the broker-dealer is required to provide sufficient information to enable a retail investor to make an informed decision with regard to the recommendation, even where this information is about aspects of the relationship between a retail customer and a broker-dealer that may already require disclosure, implicitly or explicitly, under the baseline. We expect the "full and fair" requirement to benefit retail customers in cases where it results in disclosures that are not currently required under broker-dealer antifraud provisions. Finally, Regulation Best Interest requires that broker-dealers provide these disclosures to retail customers in writing at or before the time of a recommendation. However, we are permitting oral disclosures prior to or at the time of a recommendation and written disclosures after a recommendation under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation*.[1193] We focus our discussion of both the benefits and costs of the Disclosure Obligation on these changes relative to the baseline.[1194]

Regulation Best Interest's Disclosure Obligation is different from the Proposing Release's Disclosure Obligation in two ways. First, while the Proposing Release required that a broker-dealer "reasonably disclose" material facts to retail customers, Regulation Best Interest requires that a broker-dealer provide retail customers with "full and fair" disclosure of material facts. As discussed above, this change from the Proposing Release does not have a substantive effect on the expected economic effect of the Disclosure Obligation. Specifically, in both the Proposing Release and Regulation Best Interest, the formulation of the Disclosure Obligation, as described in the release text, required that a broker-dealer provide sufficient information to enable a retail investor to make an informed decision with regard to a recommendation.[1195] Therefore, we do not expect this change to affect our assessment of Regulation Best Interest's costs and benefits. Second, whereas the Proposing Release's Disclosure Obligation did not explicitly require a broker-dealer to disclose particular types of material facts relating to the scope and terms of its relationship with a retail customer, Regulation Best Interest explicitly requires that these material facts include the capacity in which the broker-dealer is acting, fees and costs, and the type and scope of services provided, including material limitations on the securities or investment strategies that may be recommended. We include any economic effects associated with this change in our discussion of Regulation Best Interest's benefits and costs. Finally, while we discuss the direct benefits and costs of the Disclosure Obligation in this section, retail customers, broker-dealers, investment advisers, and their financial professionals may experience indirect benefits or costs due to competitive effects caused by the Disclosure Obligation. We discuss any competitive effects below in Section III.D.1.

a. Benefits

Regulation Best Interest requires that brokers, dealers, or natural persons associated with a broker-dealer disclose that they are acting as a broker, dealer, or an associated person of a broker-dealer prior to or at the time of a recommendation to a retail customer. Broker-dealers are not explicitly required to disclose this information prior to or at the time of a recommendation under the baseline, though they may disclose it to comply with other federal securities laws and SRO rules, or because they consider it to be a market best practice.[1196] This requirement is most likely to have economic effects when retail customers have both brokerage and advisory accounts with the same financial professional, as may be the case if the financial professional is dually-registered. It is designed to make all

[1191] For instance, broker-dealers are subject to a number of disclosure obligations under the Exchange Act when they effect certain customer transactions. These disclosure obligations include written disclosure about capacity, compensation, and third-party remuneration related to the transaction, and disclosures about whether the broker-dealer has any control, affiliation, or interest in the security or the issuer of the security being offered. Broker-dealers also face liability under the antifraud provisions of the federal securities laws for failure to provide disclosure, such as disclosure of "honest and complete information" or any material adverse facts or materials conflicts of interest, including any economic self-interest, when recommending a security (*see supra* footnote 988). In addition, broker-dealers must comply with a number of SRO disclosure obligations—such as FINRA Rule 2124 (Net Transactions with Customers), FINRA Rule 2262 (Disclosure of Control Relationship with Issuer), and FINRA Rule 2269 (Disclosure of Participation or Interest in Primary or Secondary Distribution). Finally, broker-dealers may also adjust their practices consistent with existing SRO guidance on specific disclosures—such as FINRA Regulatory Notice 13–23, Brokerage and Individual Retirement Account Fees (July 2013) on fee disclosure. *See* Proposing Release at footnotes 175, 176, 177, and 192; *supra* footnotes 303 and 985–988 for a more detailed discussion on existing disclosure practices.

[1192] *See supra* footnote 1072 for a discussion of potential information asymmetries between broker-dealers and retail customers.

[1193] For example, when oral disclosures are used prior to or at the time of a recommendation, broker-dealers must maintain a record of the fact that oral disclosure was provided. *See supra* footnotes 301 and 507–508 and surrounding discussion for more detail on when oral disclosure prior to or at the time of a recommendation and disclosure in writing after a recommendation are permitted.

[1194] *See supra* footnotes 1157–1159.

[1195] *See* Proposing Release at Section II.D.1.c.

[1196] For example, under the baseline, broker-dealers may decide that disclosing the capacity in which it is acting is necessary in order to meet its duty of fair dealing under the antifraud provisions of the federal securities laws. In addition, broker-dealers must disclose whether they effected the transaction as a principal or agent in the customer confirmation statement pursuant to Exchange Act Rule 10b–10, which a retail customer generally receives after the trade is completed.

retail customers aware of the capacity in which their broker-dealer is acting when a recommendation is made, which may help the retail customer better evaluate the advice they receive. For instance, the cost to the retail customer of acting on such advice will typically depend on whether the advice is tied to the retail customer's brokerage or advisory account. In addition, understanding the capacity in which a financial professional is acting may provide the retail customer with context for, and facilitate review of, other relevant disclosures by the broker-dealer. Knowing that she is receiving advice from a broker-dealer, or an associated person of a broker-dealer, may focus the retail customer's attention on any potential conflicts of interest specifically associated with receiving a recommendation from a broker-dealer. For example, a disclosure that a firm is acting in the capacity of a broker-dealer may encourage a retail customer to seek additional information about commissions, which could give the firm or its financial professional an incentive to recommend transactions that may be inconsistent with the client's most efficient investment strategy, such as a buy-and-hold strategy.

While the capacity disclosure requirement and the disclosures investors will receive in Form CRS will increase the likelihood that retail customers understand the nature of their relationship with a broker-dealer or financial professional, and hence how this relationship might affect the recommendations retail customers receive, some investors may form beliefs about the nature of their relationship with a broker-dealer or financial professional based on their use of particular names and titles such as "adviser" or "advisor," as well as how their services are marketed. In cases where these terms are used by (i) a broker-dealer that is not also registered as an investment adviser, or (ii) a financial professional that is not also a supervised person of an investment adviser, some retail customers may not fully understand that their broker-dealer or financial professional is not acting in the capacity of an investment adviser, even though investors receive some information about the capacity their broker-dealer or financial professional is acting in on Form CRS or other disclosures.[1197]

To the extent that, despite the disclosures provided on Form CRS, the use of the titles "adviser" and "advisor" causes investor confusion about the nature of the relationship retail investors have, or will have, with a broker-dealer or financial professional, the presumption that the use of these titles by (i) a broker-dealer that is not also registered as an investment adviser, or (ii) a financial professional that is not also a supervised person of an investment adviser would violate the capacity disclosure requirement will potentially benefit investors in two ways.[1198] First, certain investors may seek an advisory relationship and would be better off receiving advice from an investment adviser. In situations where confusion associated with titles might cause such an investor to mistakenly engage in a relationship with a broker-dealer or an associated person of a broker-dealer, the presumption should mitigate costs the investor might incur associated with receiving and, potentially, acting on recommendations from a broker-dealer, as well as costs associated with correcting this mismatch by switching to an investment adviser.[1199] Second, to the extent that, as a result of the use of the titles "advisor" or "adviser," any confusion might remain about the capacity in which a broker-dealer or its associated person is acting, the presumption should alleviate that confusion and thus increase the likelihood that retail customers focus their attention on any potential conflicts of interest specifically associated with receiving a recommendation from a broker-dealer. Any benefits associated with the presumption will apply for current and potential retail customers of the approximately 100 broker-dealers with retail customers that are not also investment advisers and use the terms "adviser" or "advisor" in their names, and for current and potential retail customers of the approximately 16% of all registered representatives that use these titles and are not dually registered.[1200] These benefits will be limited to the extent that broker-dealers and their financial professionals choose other names or titles that may indicate that they provide advisory services or use marketing materials that hold them out as providing advisory services but do not trigger the presumption or preclude application of the solely incidental prong of the broker-dealer exception to the definition of investment adviser.[1201]

As discussed above, under the baseline, broker-dealers may, in practice, already disclose information about the fees they charge, the type and scope of services they provide, and any conflicts of interest associated with their recommendations.[1202] However, Regulation Best Interest's explicit requirement that broker-dealers disclose all material facts related to the scope and terms of their relationship with a retail customer and all material facts relating to conflicts of interest that are associated with a recommendation may provide retail customers with useful information that they may not currently receive, enabling them to make more informed investment decisions. The magnitude and nature of this benefit will depend on the extent to which a broker-dealer already discloses these material facts and how broker-dealers choose to disclose this information. For example, if broker-dealers choose to disclose all material facts in one consolidated document, the disclosure may, depending on the facts and circumstances of the disclosure, be more informative to some retail customers than disclosures that are provided across many documents. In other cases, layered disclosures may allow broker-dealers to target their disclosures to their particular retail customer base at the relevant point in time, increasing

[1197] Investors may not fully understand this capacity disclosure because, for example, their financial professional is not a supervised person of an investment adviser but works for a dual-registrant, and they interpret Form CRS as suggesting the financial professional also provides both types of services. Alternatively, even if an investor's broker-dealer or financial professional solely offers services in a broker-dealer capacity, the use of the titles "adviser" or "advisor" may leave her confused about the nature of the services provided, despite the capacity disclosure on Form CRS. *See* Relationship Summary Proposal at footnotes 411–412.

[1198] Several commenters generally ascribed benefits to restricting the usage of the terms "adviser" and "advisor." *See supra* footnotes 326–330.

[1199] *See* Relationship Summary Proposal at footnote 674 for further discussion of the costs associated with a mismatch between an investor and their preferred type of investment advice provider.

[1200] Staff analysis found that 100 retail-facing broker-dealers as of December 2018 use either "adviser" or "advisor" in their firm names. *See* Relationship Summary Proposal at footnote 685 for more discussion of the estimate that approximately 16% of all registered representatives use these titles and are not dually registered.

[1201] *See supra* footnotes 336–340.

[1202] These disclosures may stem from implicit or explicit requirements under federal securities laws. For example, broker-dealers are explicitly required to disclose certain aspects of the fees their retail customers pay, directly and indirectly, under Exchange Act Rule 10b–10 (*see, e.g.*, 913 Study at footnotes 256–259). In other cases, courts have found that broker-dealers may implicitly be required to disclose conflicts of interest or other material facts related to the scope and terms of their relationship with retail customers (*see, e.g.*, 913 Study at footnotes 249–255). *See also* NASD Notice to Members 92–11.

the likelihood that investors read these disclosures.[1203]

While the Proposing Release's Disclosure Obligation did not explicitly require a broker-dealer to disclose particular types of material facts relating to the scope and terms of its relationship with a retail customer, Regulation Best Interest explicitly requires that these material facts include: (1) The capacity in which the broker-dealer is acting; (2) fees and costs; and (3) the type and scope of services provided, including material limitations on the securities or investment strategies that may be recommended. We generally anticipate greater benefits under Regulation Best Interest than under the Proposing Release. Specifically, to the extent that broker-dealers may not have disclosed the types of information we are requiring under Regulation Best Interest, Regulation Best Interest should increase the consistency of disclosure practices across broker-dealers, which may make it easier for investors to compare disclosures from and services offered by different broker-dealers or other firms. In addition, if some broker-dealers would not have disclosed the specific types of information required under Regulation Best Interest, and retail customers find that information useful, Regulation Best Interest may facilitate more informed decisions by retail customers when they are deciding whether or not to open an account or use a recommendation. For example, disclosures about the scope and terms of services offered by a broker-dealer or about their fees and costs may facilitate more informed decisions by retail customers as to which type of account is appropriate for them and whether they should open an account with a given broker-dealer. Alternatively, disclosures about conflicts of interest or fees and costs may facilitate more informed decisions by retail customers as to whether or not they should use a recommendation of a securities transaction or investment strategy.

Regulation Best Interest also explicitly requires that disclosures be "full and fair," and thus that a broker-dealer must provide sufficient information to enable a retail customer to make an informed decision with regard to a recommendation.[1204] Broker-dealers may disclose, for example, certain conflicts of interest associated with their recommendations under the baseline. However, under existing federal securities laws and SRO rules, they are not expressly required to provide full and fair disclosure in the manner required under Regulation Best Interest. As a result, existing disclosure practices may not be designed to specifically help retail customers make informed decisions about the recommendations they receive. By explicitly requiring that broker-dealers provide sufficient information to enable retail investors to make an informed decision with regard to a recommendation, Regulation Best Interest imposes a minimum standard on disclosures that may increase the consistency of disclosure practices across broker-dealers relative to the baseline. This may also cause such disclosures to be more useful to retail customers in evaluating the advice they receive, thereby enabling them to make more informed decisions about the recommendations they receive. To the extent that disclosure obligations under the baseline already result in broker-dealers providing sufficient information to enable a retail customer to make an informed decision with regard to a recommendation, the magnitude of the benefits from this component of the Disclosure Obligation is likely to be correspondingly reduced.[1205]

Regulation Best Interest's Disclosure Obligation also establishes a standard for the form and timing of disclosures by requiring that they be made in writing prior to or at the time of a recommendation. While broker-dealers may already disclose information on the fees they charge, the type and scope of services they provide, and any conflicts of interest associated with their recommendations under the baseline, federal securities laws and SRO rules may not explicitly specify the form and timing of such disclosures. In cases where these requirements are explicit, they may not require delivery at or prior to a retail customer's evaluation of the recommendations they receive and any corresponding investment decision. In contrast, while broker-dealers will have some flexibility regarding the form and timing of their disclosures under Regulation Best Interest, retail customers will receive standardized disclosures about the fees and costs, as well as any conflicts of interest, associated with a recommendation prior to or at the time of receiving the recommendation. The Disclosure Obligation should increase the consistency of disclosure practices across broker-dealers and across different types of information relative to the baseline, thereby increasing the likelihood that retail customers have the information they need to make a more informed and efficient investment decision at the time they receive a recommendation.

As noted above, we are permitting oral disclosure prior to or at the time of a recommendation and written disclosure after a recommendation has been made under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation*.[1206] Because oral disclosure is permitted in cases where written disclosure prior to or at the time of recommendation is not feasible or practical, investors may benefit by receiving information that otherwise may not have been available to them at the time they make an investment decision. In contrast, because written disclosure is permitted in instances where existing regulations permit disclosure after a recommendation, the benefits associated with the form and timing of disclosures under Regulation Best Interest may be reduced if the information in such disclosures would have been useful to investors in making an investment decision. However, for both oral disclosure prior to or at the time of a recommendation and written disclosure after a recommendation has been made as permitted under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation*, retail customers will still receive disclosures in writing prior to a recommendation regarding the circumstances under which oral disclosure or disclosure after a recommendation will occur and the material facts that will be disclosed under these circumstances.[1207]

Several commenters stated that there are limits to the effectiveness of disclosure and cited a number of studies suggesting that disclosure alone is unlikely to solve the issues surrounding, for example, the conflicts of interest between a broker-dealer or the associated person of a broker-dealer and a retail customer.[1208] Another commenter cited the 2008 RAND Study, concluding that investors do not have the education or background to understand financial disclosures and do not read long, formulaic documents.[1209] Other commenters claimed that

[1203] *See* the discussion of layered disclosure in *supra* Section II.C.1.c. *See also supra* footnote 540 on the potential benefits of layered disclosure.

[1204] *See* discussion at *supra* footnotes 463–469.

[1205] *See supra* footnote 1191 for more on disclosure obligations and requirements under the baseline.

[1206] *See supra* footnote 1193.

[1207] *See* discussion following *supra* footnote 301.

[1208] *See* Morningstar Letter; EPI Letter; Better Markets August 2018 Letter; St. John's U. Letter; Letter from Tom C.W. Lin, Professor of Law, Temple University Beasley School of Law (Jul. 11, 2018) ("Lin Letter").

[1209] *See* Galvin Letter and discussion of 2008 RAND Study.

numerous academic studies demonstrate that disclosing conflicts of interest does not adequately address the potential harm they cause to investors.[1210] Another commenter provided studies showing that disclosure can encourage better behavior by broker-dealers, improving investor welfare.[1211]

As discussed above, we acknowledge studies showing disclosure can vary in its effectiveness depending on the issue it is intended to address, its intended audience, and the format in which it is delivered.[1212] To the extent some retail customers are not able to understand the information disclosed by a broker-dealer regarding the scope of services it provides and the conflicts of interest associated with the recommendations it makes, the benefits of the Disclosure Obligation will not directly affect those investors, and may not increase the efficiency of their investment decisions. However, Regulation Best Interest is not limited to disclosure; rather, the Disclosure Obligation is just one component of Regulation Best Interest that as a whole will enhance the efficiency of recommendations that broker-dealers provide to retail customers, help retail customers evaluate the recommendations received, and improve retail customer protection when receiving recommendations from broker-dealers. In particular, in addition to the Disclosure Obligation, both the Care Obligation and the Conflict of Interest Obligation, discussed below, are designed to promote more efficient investment decisions by imposing affirmative obligations on the broker-dealer that cannot be fulfilled through disclosure alone, regardless of whether the retail customer fully incorporates disclosed information into its investment decisions.

Additionally, to the extent that the information disclosed by broker-dealers as a result of Regulation Best Interest increases the comparability of the securities and services offered by different broker-dealers, it may foster competition between broker-dealers that benefits even those retail customers who are not able to understand the information disclosed by broker-dealers.[1213] For example, if an increase in comparability promotes competition on the basis of recommendation quality, it may cause broker-dealers to mitigate or eliminate conflicts even in cases where the Conflict of Interest Obligation does not expressly require policies and procedures to mitigate or eliminate such conflicts. Because the Disclosure Obligation provides broker-dealers with some flexibility as to the form and timing of their disclosures, the magnitude of this benefit will depend on the extent to which these disclosures are comparable across broker-dealers or to which the disclosures made by one broker-dealer draw attention to practices at other broker-dealers that may not be in the best interest of retail customers.

The magnitude of the Disclosure Obligation's benefits will depend on a number of factors, including which facts about the scope and terms of their relationship with retail customers are material, the extent to which broker-dealers already disclose information in a manner that is consistent with the Disclosure Obligation under the baseline, the manner in which they choose to disclose this information, the extent to which retail customers understand such disclosures and would use them in making investment decisions, and the extent to which such disclosures would improve the efficiency of retail customers' investment decisions, which varies with the specific circumstances of each retail customer.

b. Costs

We expect broker-dealers and their financial professionals to incur costs as a result of Regulation Best Interest's Disclosure Obligation, and retail customers may incur indirect costs as well. In this section, we analyze these costs in terms of how Regulation Best Interest changes disclosure requirements for broker-dealers relative to the baseline.

The requirement that broker-dealers or their associated persons disclose the capacity in which they or their associated persons are acting prior to or at the time of making a recommendation may be fulfilled by delivering the Relationship Summary, depending on the facts and circumstances.[1214] For example, a standalone broker-dealer may satisfy this requirement of the Disclosure Obligation by delivering the Relationship Summary to the retail customer, as required pursuant to Form CRS. In contrast, for broker-dealers who are dually registered, and associated persons who are either dually registered or who are not dually registered but only offer broker-dealer services through a firm that is dually registered, delivering the Relationship Summary will not be sufficient to disclose the capacity in which they are acting. Thus, while standalone broker-dealers that deliver the Relationship Summary generally will not incur additional costs to comply with this requirement of the Disclosure Obligation, dual-registrants will incur additional costs, which could include the creation of disclosure materials as well as policies and procedures to assist their associated persons in determining when they are acting in a broker-dealer capacity. However, dual-registrants and their associated persons will have some flexibility with respect to the form, timing, or method of satisfying this requirement of the Disclosure Obligation when they or their associated persons make recommendations acting as brokers, dealers, or associated persons of a broker or dealer.[1215]

The presumption that the use of the titles "adviser" and "advisor" would violate the capacity disclosure requirement may impose costs on certain broker-dealers and their financial professionals, investors, and other affected parties. Broker-dealers and their associated persons currently using names and titles containing the terms "adviser" and "advisor" will incur direct costs, including those associated with changing firm names, written and/or electronic marketing materials, advertisements, and personal communication tools that use these titles, among other items, as well as any costs associated with voluntary outreach to customers to inform them of these changes.[1216] While commenters did not provide specific estimates of these costs, they described them as "very real costs,"[1217] "significant costs and disruption,"[1218] and "burdensome and

[1210] *See* State Treasurers Letter; Better Markets August 2018 Letter; PIABA Letter.

[1211] *See* Morningstar Letter.

[1212] *See supra* Section III.B.4.c.

[1213] *See* Relationship Summary Adopting Release at footnote 1035 for similar discussion of the potential benefits comparability can have on competition.

[1214] *See supra* footnotes 320–321 and surrounding discussion.

[1215] *See supra* footnote 306.

[1216] *See e.g.*, HD Vest Letter (stating that "[t]he term 'Advisor' permeates nearly every HD Vest disclosure, representative agreement, selling agreement, client agreement, client communication, marketing piece, and website" and noting that broker-dealers would need to develop compliance policies to ensure oversight of the names and titles used by their financial professionals); LPL August 2018 Letter (stating that "legal entities with so-called 'doing business as' (d/b/a) names containing the term 'advisor' or 'adviser'—through which many securities professionals operate their business practices—will be required to rename their businesses and incur significant costs and disruption in updating all marketing materials with the prior name."); SIFMA August 2018 Letter; Morgan Stanley Letter.

[1217] *See* HD Vest Letter.

[1218] *See* LPL August 2018 Letter. *See also* NAIFA Letter (noting the "significant costs to update all materials, marketing, signage, legally-required disclosure documents, etc. . . ."); SIFMA August 2018 Letter (noting the "significant costs and burdens" that would be involved with "[e]xtensive repapering.").

costly."[1219] To the extent that a broker-dealer's company name that includes "adviser" or "advisor" is recognized as a brand in the market and therefore represents a valuable intangible asset to the broker-dealer, the broker-dealer may also incur indirect costs if some of its "brand value" is lost following a company name change.[1220] Additionally to the extent that investors who have a preference for receiving advice from a broker-dealer or an associated person of a broker-dealer search exclusively for such advice using the terms "adviser" or "advisor," they may experience a reduction in the choice of service providers available to them (*e.g.,* they might only find dual-registrants).[1221] Finally, organizations that award credentials or certifications to broker-dealers and financial professionals that include the terms "adviser" or "advisor" may lose revenues associated with a reduction in future demand for these credentials and certifications, or lose revenues associated with the maintenance of current credentials or certifications by awardees.[1222] Relatedly, affected financial professionals may experience a loss associated with any value they currently derive from the use of these credentials or certifications.[1223] Rather than incur any of the costs associated with changing names and titles discussed above, some broker-dealers may choose to register as investment advisers if they determine it will be less costly, in which case these broker-dealers will incur any costs associated with dual registration. The potential costs associated with the presumption apply for the approximately 100 broker-dealers, as of December 2018, with retail customers that are not also investment advisers and use either "adviser" or "advisor" in their firm names, and for the approximately 16% of all registered representatives that use these titles and might be affected by the presumption.[1224]

The requirement that broker-dealers disclose material facts relating to the material fees and costs that apply to a retail customer's transactions, holdings, and accounts may also be partially fulfilled by delivering the Relationship Summary. Form CRS will require broker-dealers to provide retail investors a high-level summary of principal fees and costs, including transaction-based fees, as well as a narrative discussion of other fees that retail investors will pay directly or indirectly. However, while providing such high-level summaries partially complies with the Disclosure Obligation, the Relationship Summary is unlikely to provide retail customers with all of the material facts about the fees and costs that apply to a particular recommendation.[1225] As a result, Regulation Best Interest will impose costs on broker-dealers associated with assessing whether facts about the fees and costs that apply to a retail customer's transactions, holdings, and accounts are material and delivering those material facts to retail customers.

Broker-dealers will have some flexibility in how they comply with this requirement, which will allow them to tailor these disclosures to the needs of their retail customers and to implement them in a manner that is as cost efficient as possible, given their business models. In addition, the Disclosure Obligation may be satisfied by providing documents that broker-dealers are already required to produce or voluntarily produce under the baseline, such as prospectuses, in which case they may only incur costs associated with determining the timing and method by which they deliver these disclosures.[1226] For example, under the baseline, broker-dealers may currently deliver prospectuses to retail customers after the completion of a transaction under the baseline, but would need to deliver them prior to or at the time of a recommendation under Regulation Best Interest, unless made under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation,* allowing them to rely on delivery of information after the fact. In cases where required disclosures are already produced under the baseline, broker-dealers and their associated persons may still incur costs associated with delivering these disclosures prior to or at the time of a recommendation if they are not delivered by that time under the baseline.

Broker-dealers may also incur costs as a result of Regulation Best Interest's requirement that they disclose material facts about the type and scope of services provided to a retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer. As discussed above, some broker-dealers may be able to fulfill their obligation to disclose these material facts, such as those related to account monitoring, account minimums, or material limitations on the securities or investment strategies that may be recommended, by complying with Form CRS or by using disclosures included in account opening agreements or other customer disclosures.[1227] For these broker-dealers, this requirement of the Disclosure Obligation should not cause them to incur additional costs beyond an initial assessment of whether they can comply with the Disclosure Obligation using Form CRS or pre-existing disclosures. In cases where a broker-dealer is not able to disclose all material facts relating to the type and scope of services they provide by complying with Form CRS or in combination with existing disclosures, broker-dealers will incur costs associated with assessing which facts about the type and scope of services provided to retail customers are material and delivering written disclosure of those material facts to retail customers. As discussed above, broker-dealers will have some flexibility in how they comply with this requirement, allowing them to tailor these disclosures to the needs of their retail customers and to their business models and to implement these disclosures in a cost efficient manner.

While the Proposing Release's Disclosure Obligation did not explicitly require broker-dealers or their associated persons to disclose particular types of material facts relating to the scope and terms of their relationship with a retail customer, Regulation Best Interest explicitly requires that these material facts include the capacity in which the broker-dealer or its associated person is acting; material fees and costs; the type and scope of services provided, including material limitations on the securities or investment strategies that may be recommended; and all material facts relating to conflicts of interest that are associated with a recommendation. To the extent that broker-dealers are not disclosing this information or are not

[1219] *See* Morgan Stanley Letter.

[1220] Academic evidence suggest corporate brands are valuable intangible assets to firms. *See, e.g.,* Mary E. Barth et al., *Brand Values and Capital Market Valuation,* 3 Rev. Acct. Stud. 41 (1998).

[1221] The extent of this potential cost depends on how likely it is that investors rely on the titles "adviser" and "advisor" in finding a broker-dealer. For example, one survey suggests that 40–50% of investors find their financial professionals through personal recommendations, not via searches for these titles (*see supra* footnote 946 and discussion in Relationship Summary Adopting Release at Section IV.B.2.a).

[1222] *See* IWI Letter (noting that "Title Restrictions, as proposed, have a potential to impact the long-term growth of two of the Institute's registered marks."). This commenter did not provide specific data or estimates on the potential magnitude of this effect.

[1223] *See* NAIFA Letter. This commenter did not provide specific data or estimates on the potential magnitude of this effect.

[1224] *See supra* footnote 1200.

[1225] *See* the discussion following *supra* footnote 368.

[1226] *See* discussion at *supra* footnotes 495–496.

[1227] *See supra* footnote 1203.

disclosing it by the time of a recommendation, broker-dealers may incur higher costs associated with disclosing these material facts under Regulation Best Interest compared to the baseline.

In general, for any material facts relating to the scope and terms of its relationship with retail customers, a broker-dealer may have to determine how to disclose those facts in a manner that is "full and fair," as required by Regulation Best Interest, which will cause it to incur costs. Similarly, the requirement that broker-dealers disclose all material facts in writing prior to or at the time of a recommendation may also impose costs on broker-dealers. For example, even if a broker-dealer currently discloses some information about its fees under the baseline, it may not currently disclose that information prior to the time of a recommendation, and may incur costs updating systems and processes to ensure the information is disclosed in a manner that complies with Regulation Best Interest's requirements, including any costs associated with delivery of the information to retail customers.

Broker-dealers may incur costs associated with the full and fair disclosure of all material facts relating to conflicts of interest that are associated with a recommendation. As discussed below in our analysis of the Conflict of Interest Obligation, broker-dealers currently have obligations to disclose certain material conflicts of interest under the baseline.[1228] To the extent that broker-dealers will be required to disclose material facts about conflicts of interest that they do not currently disclose to retail customers under the baseline, broker-dealers will incur costs associated with assessing whether facts about these conflicts are material and delivering those facts to retail customers. They also may incur costs associated with identifying particular conflicts of interest to disclose.[1229]

As discussed above, there are circumstances where broker-dealers and their associated persons may make oral disclosures or written disclosures after the time of a recommendation under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation*. Where oral disclosures are made, broker-dealers and their associated persons may incur costs associated with subsequently documenting such disclosures. These costs may include the time spent documenting such disclosures, the development of systems and processes necessary to document such disclosures, training associated persons to use these systems and processes, and supervising the compliance by associated persons with this obligation. For both oral disclosures and written disclosures made after a recommendation, broker-dealers and their associated persons may incur costs associated with developing initial disclosures about the material facts subject to oral disclosures and written disclosures after a recommendation, the circumstances under which such disclosures will be made, as well as costs associated with training financial professionals to make such disclosures in a manner that complies with Regulation Best Interest.

While most of the costs associated with preparing and delivering disclosures are likely to be incurred by broker-dealers, their associated persons may incur costs as well. For example, when a financial professional is aware that the broker-dealer's disclosure is insufficient to describe "all material facts," the associated person must supplement that disclosure, and may incur costs in developing such disclosure on their own to ensure they are in compliance with the Disclosure Obligation.[1230] The magnitude of this cost will depend on the extent to which the financial professional cannot rely on the disclosure made by the broker-dealer.

As discussed above, while we are unable to quantify the full costs of Regulation Best Interest, including the Disclosure Obligation, we are able to estimate some of the costs associated with the Disclosure Obligation, specifically the costs related to information collection requirements as defined by the Paperwork Reduction Act. As discussed further below in Section IV.B.1, the Commission estimates that the preparation and delivery of standardized language, fee schedules, and standardized conflict disclosures that broker-dealers are required to provide to retail customers to comply with the Disclosure Obligation will impose on broker-dealers an initial aggregate burden of 6,216,125 hours and an additional initial aggregate cost of $42.84 million as well as an ongoing aggregate burden of 2,101,493 hours.[1231] Thus, the Disclosure Obligation will impose an estimated initial aggregate cost of at least $1,508.88 million and an ongoing aggregate annual cost of at least $499.59 million on broker-dealers.[1232] We note

[1228] *See infra* footnote 1261. *See also supra* footnotes 985–988.

[1229] *See infra* Section III.C.4 for a discussion of costs associated with identifying conflicts of interest as part of the Conflict of Interest Obligation.

[1230] *See* discussion following *supra* footnote 307 for an example of a case where an associated person of a broker-dealer may be required to provide her own disclosures in order to comply with the Disclosure Obligation.

[1231] The estimate of the initial aggregate burden is based on the following calculation: 5,630 hours + 7,560 hours + 40,200 hours + 2,040,000 hours + 3,780 hours + 20,100 hours + 2,040,000 hours + 3,780 hours + 15,075 hours + 2,040,000 hours = 6,216,125 hours. As discussed in more detail in *infra* Section IV.B.1, 5,630, 7,560, and 40,200 hours are estimates of the initial aggregate burden for the preparation of disclosure of capacity, type, and scope, for dual-registrants and small and large broker-dealers, respectively. 2,040,000 hours is the estimate of the initial aggregate burden for the delivery of the disclosure of capacity, type, and scope to retail customers. 3,780 and 20,100 hours are estimates of the initial aggregate burden for the preparation of disclosure of fees for small and large broker-dealers, respectively. 2,040,000 hours is the estimate of the initial aggregate burden for the delivery of the disclosure of fees to retail customers. 3,780 and 15,075 hours are estimates of the initial aggregate burden for the preparation of disclosure of material conflicts of interest for small and large broker-dealers, respectively. 2,040,000 hours is the estimate of the initial aggregate burden for the delivery of the disclosure of material conflicts of interest to retail customers. The estimate of the initial aggregate cost is based on the following calculation: $2.80 million + $3.80 million + $15.00 million + $1.88 million + $9.99 million + $1.88 million + $7.49 million = $42.84 million. As discussed in more detail in *supra* Section V.D, $2.80 million, $3.80 million, and $15.00 million are estimates of the initial aggregate cost for the preparation of disclosure of capacity, type, and scope, for dual-registrants and small and large broker-dealers, respectively. $1.88 million and $9.99 million are estimates of the initial aggregate cost for the preparation of disclosure of fees for small and large broker-dealers, respectively. $1.88 million and $7.49 million are estimates of the initial aggregate cost for the preparation of disclosure of material conflicts of interest for small and large broker-dealers, respectively. The estimate of the ongoing aggregate burden is based on the following calculation: 3,941 hours + 3,024 hours + 40,200 hours + 408,000 hours + 1,512 hours + 8,040 hours + 816,000 hours + 756 hours + 4,020 hours + 816,000 hours = 2,101,493 hours. As discussed in more detail in *supra* Section V.D, 3,941, 3,024, and 40,200 hours are estimates of the ongoing aggregate burden for the preparation of disclosure of capacity, type, and scope, for dual-registrants and small and large broker-dealers, respectively. 408,000 hours is the estimate of the ongoing aggregate burden for the delivery of the disclosure of capacity, type, and scope to retail customers. 1,512 and 8,040 hours are estimates of the ongoing aggregate burden for the preparation of disclosure of fees for small and large broker-dealers, respectively. 816,000 hours is the estimate of the ongoing aggregate burden for the delivery of the disclosure of fees to retail customers. 756 and 4,020 hours are estimates of the ongoing aggregate burden for the preparation of disclosure of material conflicts of interest for small and large broker-dealers, respectively. 816,000 hours is the estimate of the ongoing aggregate burden for the delivery of the disclosure of material conflicts of interest to retail customers.

[1232] These estimates are calculated as follows: (96,125 hours of in-house legal counsel) × ($415.72/hour for in-house counsel) + (6,120,000 hours for delivery for each customer account) × ($233.02/hour for registered representative) + (90,763 hours for outside legal counsel) × ($497/hour for outside legal counsel) = $1,508.88 million, and (35,056 hours of in-house legal counsel) × ($415.72/hour for

Continued

that these estimates assume broker-dealers are not currently producing and delivering documents associated with the Disclosure Obligation. To the extent that broker-dealers are already doing so, these estimates may overstate the costs associated with the information collection requirements as defined by the Paperwork Reduction Act.

Several commenters stated that we underestimated the compliance costs of Regulation Best Interest in the Proposing Release, particularly with respect to the potential transaction-based nature of the Disclosure Obligation and the resultant record-making and recordkeeping requirements.[1233] One commenter stated that if the Disclosure Obligation is a transaction-based requirement, its costs were significantly underestimated in the Proposing Release, citing an estimate that an earlier proposal of a point-of-sale disclosure requirement would cost between $1 million and $1.2 million per firm.[1234] We first note that, given that there are approximately 2,766 broker-dealers with retail-facing operations, the commenter's cited estimate implies initial costs of approximately $1.4 billion and ongoing costs of approximately $1.4 billion,[1235] so the commenter's implied estimate of $1.4 billion in initial costs associated with the Disclosure Obligation is consistent with our estimate of initial costs above.[1236] Second, we note that, as discussed in more detail above in Section II.C.1.d, the Disclosure Obligation only requires that certain disclosures be made prior to or at the time of a recommendation, and broker-dealers may use standardized disclosures at an earlier point than the time of a recommendation to the extent such disclosures satisfy the Disclosure Obligation. In this regard, while the commenter's estimate may be indicative for some firms, the cost per firm will vary widely depending on the scope and business model of each broker-dealer. Because Regulation Best Interest provides broker-dealers with some flexibility regarding both the form and timing of the Disclosure Obligation, its costs are likely to be lower than a pure point-of-sale requirement.[1237]

Beyond the estimates provided above for that are derived from estimates developed for purposes of the Paperwork Reduction Act in Section IV.B.1, the Commission is unable to fully quantify the costs of the Disclosure Obligation because the magnitude of these costs depend on firm-specific factors that are inherently difficult to quantify given the principles-based nature of Regulation Best Interest.[1238] These factors include the extent to which current disclosure practices under the baseline are different from the requirements of the Disclosure Obligation, the manner in which broker-dealers choose to comply with the Disclosure Obligation given the flexibility it provides, how broker-dealers assess whether facts relating to the scope and terms of their relationship with a retail customer are material, how they determine whether their disclosure of such material facts is full and fair, or the extent to which they will satisfy the Disclosure Obligation's requirements by delivering the Relationship Summary or pre-existing documents.

3. Care Obligation

Under the baseline, broker-dealers are subject to suitability obligations and requirements under the anti-fraud provisions of the federal securities laws and the Suitability Rule when making recommendations to retail customers. The Care Obligation incorporates and adds to existing suitability requirements applicable to broker-dealers, thereby reducing the incidence of inefficient recommendations to retail customers.

FINRA rules require broker-dealers making recommendations to have, based on a particular customer's investment profile, a reasonable basis to believe that the recommendation is suitable for that customer. In addition, FINRA guidance and Commission opinions interpret suitability as prohibiting a broker-dealer from placing its interests ahead of the customer's interest and requiring the recommendations to be consistent with the customer's best interest.[1239] However, this obligation is not explicitly required by FINRA's rule (or its supplementary material). Under the baseline, a recommendation by a broker-dealer or its associated persons may be consistent with a retail customer's best interest but broker-dealers and their associated persons are not required to make recommendations in the best interest of these customers, as will be required under Regulation Best Interest. Relative to the baseline, the Care Obligation will change how broker-dealers and their associated persons make recommendations to retail customers in several ways, some of which differ from the Proposing Release.

First, the Care Obligation explicitly includes cost as a factor for consideration when determining whether a recommendation is in a retail customer's best interest. In contrast, the Proposing Release emphasized cost as an important factor to consider and stated that broker-dealers may be required to consider cost as a factor when making recommendations, but did not explicitly require its consideration when making a recommendation.[1240] In addition, we clarify above in Section II.C.2 that, when determining whether a recommendation is in a retail customer's best interest with respect to cost or other relevant factors, broker-dealers and their associated persons should consider reasonably available alternatives. Conversely, under FINRA suitability obligations, broker-dealers and their associated persons are not required to consider reasonably available alternatives when determining whether a recommendation is suitable for a retail customer.[1241]

Second, under the baseline, FINRA rules require that a broker-dealer or associated person who has actual or *de facto* control over a customer's account must have a reasonable basis for believing that a series of recommended transactions, even if suitable when viewed in isolation, is not excessive and unsuitable for the customer when taken together in light of the customer's investment profile. In contrast, the Care Obligation requires that a broker-dealer or its associated person has a reasonable basis to believe that a series of recommended transactions is not excessive and is in that retail customer's best interest. This is the case at all times—when the broker-dealer or associated person has actual or *de facto*

in-house counsel) + (2,040,000 hours for delivery for each customer account) × ($233.02/hour for registered representative) + (26,437 hours for in-house compliance counsel) × ($365.39/hour for outside legal counsel) = $499.59 million. The hourly wages for in-house legal and compliance counsel and registered representatives are obtained from SIFMA. The hourly rates for outside legal counsel are discussed in *supra* Section V.D.

[1233] *See* Schwab Letter; ICI Letter; Angel Letter; Vanguard Letter; LPL August 2018 Letter; NSCP Letter.

[1234] *See* Schwab Letter, citing April 12, 2004 comment letter from George Kramer of the Securities Industry Association ("SIA"). This estimate is based on a point-of-sale disclosure requirement in proposed rule 15c2–3, for which SIA estimated that implementation costs would be in the order of $500,000 per firm, as would annual costs associated with maintaining and updated necessary systems and procedures. *See also* SIFMA August 2018 Letter at footnote 38 referencing the same estimate.

[1235] These estimates are calculated as follows: (2766 retail-facing broker-dealers) × ($500,000 per firm in initial costs) = $1.383 billion. Implied ongoing costs are calculated the same way.

[1236] *See supra* footnote 1232.

[1237] *See supra* footnotes 531–533 for a discussion of layered disclosure and footnotes 541–542 for a discussion of the Disclosure Obligation's requirements with respect to timing of disclosures.

[1238] *See supra* Section III.C.1.

[1239] *See supra* footnote 570 and 913 Study at footnote 270.

[1240] *See supra* footnote 572 and preceding text.

[1241] *See id.*

control over a customer's account as well as when no control exists (whether actual or de facto).

Finally, FINRA's suitability standard applies to recommendations of rollover decisions that involve securities transactions, but not necessarily in the absence of a securities transaction.[1242] In addition, FINRA's suitability standard does not explicitly apply to recommendations of account types and implicit hold recommendations resulting from agreed upon account monitoring.[1243] In contrast, Regulation Best Interest explicitly applies to account recommendations as an "investment strategy involving securities," including recommendations of securities account types, as well as rollovers or transfers of assets from one account to another. In addition, under Regulation Best Interest, implicit hold recommendations resulting from agreed upon account monitoring constitute recommendations of "any securities transaction or investment strategy involving securities," and are therefore within the scope of Regulation Best Interest. Moreover, recommendations to open an IRA or to roll over assets into an IRA are subject to Regulation Best Interest, including the Care Obligation, thereby requiring a broker-dealer or its associated persons to have a reasonable basis to believe that the IRA or IRA rollover is in the best interest of the retail customer at the time of the recommendation, taking into consideration the retail customer's investment profile and other relevant factors, as well as the potential risks, rewards, and costs of the IRA or IRA rollover compared to the retail customer's existing 401(k) or other retirement account. We focus our discussion of both the benefits and costs of the Care Obligation under Regulation Best Interest on these changes relative to the baseline.

Regulation Best Interest's Care Obligation differs from the Proposing Release's Care Obligation in two ways that respond to commenter concerns but that we do not expect to have significant economic effects.[1244] First, the general best interest standard of conduct from the Proposing Release is incorporated into Regulation Best Interest's Care Obligation, which, as adopted, also requires that a broker-dealer or its associated persons have a reasonable basis to believe that a recommendation, or series of recommendations, does not place the financial or other interest of the broker-dealer or its associated persons ahead of the interest of the particular retail customer. Broker-dealers and their associated persons can comply with Regulation Best Interest as a whole by complying with its four component obligations, which now explicitly include the Proposing Release's general best interest standard in elements of the Care Obligation. This change to the Care Obligation, as compared to the Proposing Release, is intended to emphasize the importance of determining that each recommendation is in the best interest of the retail customer and that it does not place the broker-dealer's interests ahead of the retail customer's interest; however, we do not believe there will be significant economic effects associated with this change from the Proposing Release.[1245] Second, Regulation Best Interest, as adopted, does not explicitly require broker-dealers or their associated persons to exercise "prudence" in making recommendations. Instead they must exercise reasonable diligence, care, and skill in making such recommendations. While we removed the term "prudence" to address commenter concerns that it might create legal confusion and uncertainty, this does not change the requirements or obligations under the Care Obligation as compared to the Proposing Release.[1246] Therefore, we do not expect this change to have a significant economic effect, as compared to the Proposing Release.

a. Benefits

As described in the Proposing Release, the Care Obligation did not explicitly require broker-dealers and their associated persons to consider the costs associated with a recommendation when determining whether it was in a retail customer's best interest, though the Proposing Release discussed cost as a relevant factor in making this determination, and noted that broker-dealers might be required to consider cost as a factor when making recommendations under the baseline.[1247] The Care Obligation under Regulation Best Interest includes an explicit requirement to consider the cost of a recommendation. If this causes broker-dealers and their associated persons to more carefully consider cost in relation to other factors, compared to the baseline, it should reduce the incidence of recommendations of higher cost investments from a set of reasonably available alternatives that achieve the retail customer's objective. If the explicit requirement to consider the cost of a recommendation encourages broker-dealers and their associated persons to more carefully consider cost, compared to the baseline, the final rule makes it less likely that a broker-dealer or its associated persons could have a reasonable basis to believe such investments are in the retail customer's best interest because it would be difficult to have such a belief for investments that are identical beyond their costs. Therefore, including cost as a required factor in Regulation Best Interest should enhance the efficiency of recommendations to retail customers relative to the baseline.[1248]

As discussed above, while a "quantitative suitability" requirement applies to series of recommended transactions under the baseline, it only applies in cases where a broker-dealer has "control" over a customer account. Relative to the baseline, broker-dealers and their associated persons will be required to have a reasonable basis to believe that *any* series of recommended transactions is in the retail customer's best interest, not just series of recommended transactions that occur in an account they control. This change relative to the baseline should enhance investor protection by reducing the incidence of cases where a broker-dealer or its associated persons recommend an excessively high rate of portfolio turnover, or "churn," for accounts that they do not control. In addition, the discussion above regarding the potential benefits from the increased standard of conduct required by the Care Obligation in the context of individual recommendations also applies to series of recommended transactions. Enhancing the standard of conduct that applies to series of recommended transactions and reducing the incidence of recommendations that result in excess portfolio turnover should result in more efficient recommendations, benefiting retail customers. We are unable to specifically quantify these potential benefits because, in addition to the reasons cited above, we do not have and cannot reasonably obtain comprehensive data on how often broker-dealers, for accounts they do not

[1242] *See* FINRA Regulatory Notice 13–45 and *supra* footnote 172.

[1243] *See supra* footnote 170.

[1244] *See* discussion at *supra* footnotes 147, 606, and 577–584.

[1245] If anything, to the extent that broker-dealers or their associated persons might have misunderstood the Proposing Release with respect to their obligation to provide recommendations that are in the best interest of retail customers, Regulation Best Interest, as adopted, emphasizes the importance of determining that each recommendation is in the best interest of the retail customer will benefit retail customers.

[1246] *See supra* footnotes 579–585 and surrounding discussion.

[1247] *See supra* footnote 572.

[1248] *See* discussion surrounding *supra* footnotes 563–565.

control, recommend series of transactions that result in excessive portfolio turnover and are therefore not in the best interest of their retail customers.

Regulation Best Interest applies to account recommendations, including recommendations to open an IRA or to participate in an IRA rollover. Accordingly, these types of recommendations are subject to the Care Obligation (as well as the other components of Regulation Best Interest). Several commenters highlighted the heightened risk of harm associated with IRA and IRA rollover recommendations because the amount of assets associated with such recommendations can be a significant portion of a retail customer's net worth, and one commenter cited academic and industry studies that identify activities that are particularly prone to conflicts of interest, including IRA rollovers.[1249] We acknowledge the heightened effect that recommendations to open an IRA or to participate in an IRA rollover can have on the financial well-being of retail customers.[1250] While FINRA's suitability standard under the baseline applies to rollover recommendations involving securities transactions, the suitability standard does not necessarily apply to a rollover recommendation if that recommendation does not involve a securities transaction.[1251] To the extent that broker-dealers and their associated persons currently make recommendations to open an IRA or to participate in an IRA rollover that do not involve securities transactions under the baseline, Regulation Best Interest should result in IRA and IRA rollover recommendations to retail customers that are more efficient because they will be in the retail customer's best interest regardless of whether or not they involve securities transactions.

Regulation Best Interest also applies to other account type recommendations. Broker-dealers may offer different types of brokerage accounts that include different levels of services and costs. The choice of account type can have a significant effect on the financial wellbeing of a retail customer. For example, a recommendation to open an advisory over a brokerage account, or vice versa, can have a substantial long-term effect on a retail customer's assets. This effect may depend on the costs the retail customer incurs through the particular account as well as the retail customer's investment profile.[1252] Regulation Best Interest should result in recommendations regarding account type that are in the best interest of the retail customer, particularly with respect to cost, increasing the efficiency of the account type recommendations retail customers receive relative to the baseline.

Finally, by clarifying that implicit hold recommendations resulting from agreed-upon account monitoring services constitute recommendations of "any securities transaction or investment strategy involving securities," the Care Obligation will apply at the point in time at which their broker-dealer or associated person performs the agreed-upon monitoring, regardless of whether the broker-dealer or an associated person communicates any recommendation. This should increase the efficiency of the implicit hold recommendations retail customers receive relative to the baseline.

b. Costs

We expect broker-dealers and their associated persons to incur costs as a result of the Care Obligation, and, to the extent broker-dealers pass these costs on to retail customers, these customers may incur costs as well. In this section, we analyze these costs in terms of how Regulation Best Interest, as adopted, changes the required standard of care broker-dealers owe their retail customers relative to the baseline. We also highlight any changes in our assessment of these costs as compared to the Proposing Release. We discuss the costs of complying with the Care Obligation, such as those associated with training employees or developing policies and procedures, in Section III.C.5.

To comply with the Care Obligation, some broker-dealers may stop offering certain securities to retail customers, or their associated persons may stop recommending certain securities to retail customers. These decisions may be based on determinations that offering or recommending those securities typically would not satisfy the Care Obligation. To the extent that they earn revenue from offering and recommending such securities, broker-dealers and their associated persons may incur costs associated with the determination to cease offering or recommending these products.

Commenters stated that our analysis should not consider lost revenue as a cost of complying with Regulation Best Interest, except to the extent that the lost revenue is passed on to investors in the form of higher fees, because these types of costs are a direct result of policies that make investors better off.[1253] As discussed above, our economic analysis must consider the costs Regulation Best Interest may impose on all affected parties, including broker-dealers. However, we believe that any loss of revenues associated with recommendations that would not satisfy the Care Obligation is compensated by the corresponding benefit to retail customers—namely the provision of more efficient recommendations by their financial professionals.[1254] In addition, even if broker-dealers or their associated persons have a reasonable basis to believe that a certain investment could be in the best interest of some retail customers, they may forgo offering or recommending the investment if, for example, they think that it may increase their exposure to regulatory enforcement risk over their compliance with Regulation Best Interest.[1255] This could result in costs to both the broker-dealer and any retail customers for whom the investment would be an efficient investment choice.

Because the Care Obligation holds broker-dealers and their associated persons to an enhanced standard of conduct, they may incur costs associated with increased legal exposure if, for example, Regulation Best Interest results in increased retail customer arbitrations or litigation. For example, one commenter stated that the lack of clarity in how to weight various factors associated with the potential risks and rewards of a recommendation could lead to arbitrary claims regarding other alternative recommendations that, *ex-post,* would have performed better.[1256] Similarly, because the Care Obligation also requires that a series of recommended transactions be in the best interest of a retail customer, regardless of whether a broker-dealer or an associated person controls the retail customer's account, a broker-dealer could incur the same types of costs associated with increased arbitration or litigation risk relative to the baseline. We cannot anticipate the extent to which Regulation Best Interest will increase retail customer claims, but many retail customer arbitrations are already predicated in whole or in part on facts alleging that a broker-dealer

[1249] *See* CFA August 2018 Letter; AARP August 2018 Letter; Morningstar Letter; CFA Institute Letter.

[1250] *See supra* footnotes 191–192. *See also* Fiduciary Benchmarks Letter.

[1251] *See supra* footnote 1242.

[1252] *See supra* footnote 191.

[1253] *See supra* footnote 1164.

[1254] *See supra* Section III.A.2 for a more detailed discussion of efficient recommendations.

[1255] *See, e.g.,* Iowa Insurance Commissioner Letter.

[1256] *See* CCMC Letters.

breached a fiduciary duty or its suitability obligations. Additionally, the clarity in the rule text and this release regarding the Care Obligation, as well as the other aspects of Regulation Best Interest that bring enhanced conduct and clarity (*e.g.,* the policies and procedures requirement and that Regulation Best Interest applies only at the time a recommendation is made) should mitigate against an increase in the likelihood and cost of such claims.

The Care Obligation explicitly requires that cost be considered as a factor when determining whether a recommendation is in the best interest of a retail customer. Several commenters stated that the Proposing Release's guidance emphasizing cost as a specific factor in the Care Obligation could create uncertainty around how the cost of a recommendation should be weighed with other factors.[1257] As discussed above, the inclusion of cost as a factor in the Care Obligation does not require that the "least expensive" recommendation be made by a broker-dealer or its associated person; cost is one factor, but not the only relevant factor. Nonetheless, to the extent that the inclusion of cost as a factor in the Care Obligation increases the arbitration or litigation risk to which broker-dealers or their associated persons are exposed, this change could impose additional costs on broker-dealers.

Regulation Best Interest also expressly applies to account recommendations, including recommendations of securities account types, as well as rollovers or transfers of assets from one account to another. We also clarify above that implicit hold recommendations resulting from agreed-upon account monitoring are within the scope of Regulation Best Interest and are therefore subject to the Care Obligation. Should they choose to discontinue offering certain services, as a result of Regulation Best Interest, broker-dealers could lose revenue associated with making recommendations for account types (including IRAs). They may also decide to cease offering monitoring services on retail customer accounts. However, as we discussed above with respect to recommendations more generally, we believe that any loss of revenues associated with recommendations that would not satisfy the Care Obligation is compensated by the corresponding benefits to retail customers associated with more efficient account recommendations.

The Commission is unable to fully quantify the costs that the Care Obligation will impose on broker-dealers, their associated persons, or their retail customers because the magnitude of these costs depends on firm-specific factors that are inherently difficult to quantify given the principles-based nature of Regulation Best Interest.[1258] These factors include the extent to which broker-dealers and their associated persons currently engage in practices under the baseline that would satisfy the Care Obligation, either of their own volition or as a result of complying with other regulations; the extent to which broker-dealers and their associated persons will cease recommending certain securities or investment strategies; the likelihood that retail customers file more arbitration or litigation claims; and the extent to which broker-dealers pass on any cost increases to their retail customers.[1259]

4. Conflict of Interest Obligation

The Conflict of Interest Obligation under Regulation Best Interest is intended to reduce the agency costs that arise when a broker-dealer and its associated persons provide a recommendation to a retail customer by addressing the effect of the associated person's or broker-dealer's conflicts of interest on the recommendation.

The Conflict of Interest Obligation would require that broker-dealers establish, maintain, and enforce written policies and procedures that are reasonably designed to address the effect of the broker-dealer's and the associated persons' conflicts of interest on a recommendation. At a minimum, a broker-dealer is required to address the effect of conflicts of interest on a recommendation. At a minimum, a broker-dealer is required to address the effect of an identified conflict on a recommendation by disclosing the material facts associated with that conflict and by disclosing material limitations of the menu of securities when the conflict stems from such limitations. In certain cases, a broker-dealer is required to address the effect of an identified conflict by either mitigating the conflict, or, in certain cases, by eliminating certain sales practices.

The Conflict of Interest Obligation is intended to reduce the information asymmetry between a retail customer and a broker-dealer and its associated persons with respect to the broker-dealer's conflicts of interest or those of its associated persons that may have an effect on the recommendations provided to the retail customer. This disclosure may help the retail customer form a better assessment of the efficiency of the recommendation received. Moreover, reducing this information asymmetry may discourage broker-dealers from acting on incentives that differ from retail customer objectives.

Similarly, by addressing the effect of certain conflicts of interest through mitigation, the Conflict of Interest Obligation is intended to reduce the effect incentives created by those conflicts may have on a recommendation provided to the retail customer. Depending on how effective the mitigation method is in reducing these incentives, the efficiency of the recommendation provided to the retail customer may increase.

Similarly, by addressing the effect of certain conflicts of interest through elimination, the Conflict of Interest Obligation is intended to neutralize the effect of incentives created by those conflicts may have on a recommendation provided to the retail customer. In this case, the efficiency of the recommendations provided to the retail customer may increase.

The conflicts of interest that the broker-dealer or its associated persons have, and the incentives that these conflicts create, arise from, among other things, the manner in which broker-dealers generate revenue and the manner in which broker-dealers compensate their associated persons with respect to their dealings with retail customers.

The compensation arrangement between a broker-dealer and its associated persons may reflect the amount of revenues that the associated persons generate for the broker-dealer from activities performed, including providing recommendations to retail customers. Such arrangements between the broker-dealer and its associated persons may create incentives for the associated person to take actions consistent with maximizing the broker-dealer's objectives (*e.g.,* expected profits). For instance, if an associated person's compensation from providing recommendations to retail customers is tied to the amount of revenues that the associated person generates for the broker-dealer, the associated person may have an incentive to recommend securities or investment strategies that would bring more revenue to the broker-dealer, relative to other comparable securities or investment strategies. Furthermore, even if the compensation arrangement does not create an explicit incentive for the associated person, the

[1257] *See* ICI Letter; CCMC Letters; LPL August 2018 Letter.

[1258] *See also supra* Section III.C.1.a.

[1259] *See* discussion following *infra* footnote 1329 for discussion of factors affecting whether broker-dealers pass on costs to their retail customers and the resultant competitive effects.

broker-dealer may direct the attention of the associated person to certain securities. For instance, even if the revenues that the broker-dealer receives when its associated persons provide recommendations to retail customers are not passed on to the associated persons, the broker-dealer's receipt of compensation from some securities or their sponsors may lead the broker-dealer to emphasize to its associated persons the securities that are the source of such compensation.

The revenues that a broker-dealer receives when a retail customer acts on an investment recommendation may depend on the broker-dealer's compensation arrangement with the product sponsor. The broker-dealer may receive different compensation from different product sponsors for distributing comparable securities or investment strategies. If the objectives of the broker-dealer are tied to the amount of revenues it receives from recommended securities or investment strategies, the broker-dealer may have an incentive to advise only, or predominantly, on securities or investment strategies that come with attractive compensation arrangements and less so, or not at all, on other comparable securities or investment strategies. Accordingly, the incentives created by the compensation arrangements with the product sponsors may cause a broker-dealer to limit the menu of securities from which the broker-dealer or its associated persons make recommendations.

The conflicts of interest that can arise from the compensation arrangement between the broker-dealer and its associated persons, and from the compensation arrangement between the broker-dealer and the product sponsors, can create incentives that may affect the broker-dealer's or its associated persons' recommendations to retail customers. In certain circumstances, a broker-dealer's conflicts of interest, or its associated persons' conflicts of interest, may result in recommendations that are not in the best interest of the retail customer.[1260]

As discussed above, in Section III.B.2, broker-dealers are currently subject to Commission and SRO regulations and rules that govern their business conduct. For example, with respect to the provision of advice, courts have found broker-dealers liable under the antifraud provisions of the federal securities laws for not giving "honest and complete information" or for not disclosing "material adverse facts of which it is aware" with regard to certain conflicts of interest, in certain circumstances.[1261] Furthermore, broker-dealers are generally prohibited from making an unsuitable recommendation to a customer.[1262]

In addition, broker-dealers may be liable under the Exchange Act for failure to supervise their associated persons when providing advice to retail customers.[1263] Broker-dealers are generally required to establish policies and procedures that are reasonably designed to prevent and detect violations of the federal securities laws and regulations, as well as applicable SRO rules. Broker-dealers are also required to establish and maintain systems for applying these procedures (*e.g.*, identifying and reviewing red flags with respect to the recommendations provided by their associated persons).[1264]

As discussed above, a number of studies and papers provide evidence suggesting that despite the current regulatory regime and observations that agency costs to retail customers from broker-dealer relationships may be trending downward, the effect of conflicts of interest on the provision of advice remains a concern.[1265] We also noted in Section III.A.2 above that, more generally, the conflicts of interest of the broker-dealer and its associated persons and the incentives that these conflicts create may result in agency costs for the retail customers that persist despite the current regulatory regime.

The Conflict of Interest Obligation in Regulation Best Interest is intended to reduce the agency costs associated with the conflicts of interest of the broker-dealers and its associated persons when they provide recommendations on securities transactions and investment strategies to retail customers. Below we discuss the economic implications of different requirements of this obligation, including their benefits and costs relative to the current regulatory regime.

a. Overarching Obligation Related to Conflicts of Interest

The overarching obligation of the Conflict of Interest Obligation states that broker-dealers must establish, maintain, and enforce written policies and procedures reasonably designed to identify and at a minimum disclose, or eliminate, all conflicts of interest associated with recommendations to retail customers.

The requirement to establish written policies and procedures reasonably designed to identify conflicts of interest is a new requirement relative to the current regulatory regime. This requirement may impose costs on those broker-dealers that currently do not implement such policies and procedures voluntarily. These costs stem from the resources that a broker-dealer would have to expend to identify existing and potential conflicts of interest and to design policies and procedures that can reasonably identify and manage circumstances when a conflict of interest arises within the broker-dealer. These circumstances would have to take into account, among other things, how the broker-dealer generates revenue from providing recommendations to retail customers and how associated persons of the broker-dealer are compensated for providing recommendations. In addition, these circumstances would have to account for the limitations of the menu of securities from which broker-dealers provide recommendations. Furthermore, broker-dealers may incur costs of reviewing and updating such policies and procedures as new conflicts of interest arise or as new circumstances develop that may cause the broker-dealer to identify an existing conflict of interest. The Commission is providing below a quantitative estimate of the cost to broker-dealers associated with designing and updating such policies and procedures under certain assumptions

The requirement to establish policies and procedures reasonably designed to identify conflicts of interest may also create benefits for retail customers. As noted above, the policies and procedures would require broker-dealers to: (1) Identify existing conflicts of interest and new circumstances in which an existing conflict of interest may arise, and (2) new conflicts of interest and the circumstances in which they may arise. Having a process in place to identify and address the conflicts of interest associated with a recommendation at the time the recommendation is made to a retail customer would reduce the likelihood

[1260] *See* FINRA Conflicts Report.

[1261] *See* the Suitability Rule; *see also* 913 Study at 55 for a detailed discussion of the broker-dealers' disclosure obligations and liabilities under the current regulatory regime.

[1262] *See* FINRA Rule 2111.03 (Recommended Strategies).

[1263] *See* 913 Study at 74.

[1264] *Id.* at 75. In addition, FINRA Rule 3010 requires broker-dealers to establish and maintain a system to supervise the activities of their associated persons that is reasonably designed to achieve compliance with the applicable securities laws and regulations and FINRA rules. FINRA Rule 3120 requires broker-dealers to have a system of supervisory control policies and procedures that tests and verifies supervisory procedures.

[1265] *See supra* Section III.B.3.c.

that a broker-dealer may fail to disclose material facts relating to conflicts of interest. Thus, the process a broker-dealer develops as a result of complying with the Conflict of Interest Obligation may improve the quality of the content of the disclosure of conflicts of interest that may affect a recommendation. To the extent such disclosure helps retail customers make a better assessment of the efficiency of the recommendation they receive, the requirement may benefit the retail customers.

The Commission continues to believe that it is not possible to meaningfully quantify the potential costs and benefits of the Conflict of Interest Obligations because such analysis would depend on many contingent factors that render any estimate insufficiently precise to inform our policy choices.[1266] For example, such an analysis of the Conflict of Interest Obligation would require strong assumptions about the circumstances under which a broker-dealer may fail to identify a given conflict of interest, and also about the extent to which the disclosure of the conflicts of interest may enhance decision making for retail customers.

The requirement to establish policies and procedures reasonably designed to, at a minimum, disclose identified conflicts of interest may help a retail customer evaluate the efficiency of the recommendation provided by a broker-dealer and its associated persons, and may affect the retail customer's decision of whether, and how, to act on the recommendation. As noted in Section III.A.2 above, reducing the information asymmetry between a retail customer and a broker-dealer and its associated persons may help the retail customer form a better assessment of the efficiency of the received recommendation.

Disclosure requirements generally are intended to reduce information asymmetries between transacting parties. Whether such a reduction is likely to occur depends largely on the effectiveness of the disclosure. If the disclosure provides new information, transacting parties may make more informed decisions than they would without this new information, and, from this perspective, the disclosure may be effective. However, disclosure can be effective even if no new information is provided, to the extent the form and manner in which a disclosure requirement reaches the transacting parties facilitates a more informed decision. There is extensive academic literature on the factors that contribute to disclosure effectiveness.[1267] Among these factors, those associated with bounded rationality, including financial literacy, are generally important.[1268] In particular, disclosure effectiveness generally increases with the level of financial literacy of the transacting party.[1269] It is also possible that if a broker-dealer's retail customers have different degrees of financial literacy, the potential anticipated reaction of the retail customers that are financially literate to the disclosure of conflicts of interest may cause the broker-dealer to choose to eliminate certain conflicts, which, in turn, would benefit the population of retail customers that are less financially literate. Specifically, the requirement to establish policies and procedures reasonably designed to, at a minimum, disclose identified conflicts of interest may have a deterrent effect on some broker-dealers to the extent that they anticipate that disclosing material facts about certain conflicts of interest may be effective in dissuading certain retail customers from seeking or accepting recommendations from their associated persons in the future. As noted above, such broker-dealers may choose to eliminate those conflicts instead.

i. Disclosing Conflicts of Interest

The requirement under the Conflict of Interest Obligation to develop reasonably designed policies and procedures to, at a minimum, disclose identified conflicts of interest would obligate a broker-dealer to provide information (*e.g.*, material facts) about its conflicts of interest and those that its associated persons have when making a recommendation to a retail customer. As discussed above, this information may already be disclosed under the regulatory baseline and by broker-dealers that adopt best practices. However, it is currently not clear in what form and what manner this disclosure reaches the retail customer.[1270] Under Regulation Best Interest, the Conflict of Interest Obligation is intended to require that such disclosure reach the retail customer more directly and in a more timely manner.[1271] In addition, the material facts disclosed may increase the salience of the conflicts of interest to retail customers as being a potential factor contributing to an associated person's recommendation. Salience detection is a key feature of human cognition allowing individuals to focus their limited mental resources on a subset of the available information and causing them to over-weight this information in their decision making processes.[1272] Limited attention among individuals increases the importance of focusing on salient disclosure signals. Research suggests that increasing signal salience is particularly helpful in reducing limited attention of consumers with lower education levels and financial literacy.[1273] To the extent that this manner of disclosure and the associated increase in salience results in more informed decisions with respect to whether to act on a received recommendation, the disclosure requirement resulting from the Conflict of Interest Obligation will benefit retail customers.

It is also possible that the disclosure of material facts about a broker-dealer's conflicts of interest or those of its associated persons related to a recommendation may not benefit the retail customer receiving that recommendation. As noted by one commenter, the academic literature on disclosure effectiveness notes that in certain circumstances, disclosure of financial information may induce a "panhandler effect", whereby disclosure increases the pressure to comply with the advice if the advisee (*e.g.*, the retail customer) feels obliged to satisfy the financial interest of the advice provider (*e.g.*, the associated person).[1274]

[1266] *See* discussion following *supra* footnote 1156 for a general discussion of these factors. *See also infra* Section III.C.7, where we have endeavored to quantify some of the potential benefits of Regulation Best Interest based on many assumptions.

[1267] *See supra* Section III.B.4.c for a detailed discussion of the academic literature on disclosure effectiveness.

[1268] *Id.*

[1269] *Id.*

[1270] *See e.g.*, 913 Study.

[1271] Broker-dealers satisfy their current disclosure obligations in the account opening agreement, account statements, and information made public on their websites.

[1272] *See* Daniel Kahneman, Thinking, Fast and Slow (2013); Susan T. Fiske & Shelley E. Taylor, Social Cognition: From Brains to Culture (3rd ed. 2017).

[1273] *See, e.g.*, Victor Stango & Jonathan Zinman, *Limited and Varying Consumer Attention: Evidence from Shocks to the Salience of Bank Overdraft Fees*, 27 Rev. Fin. Stud. 990 (2014).

[1274] *See, e.g.*, EPI Letter at 11, noting that "[a]s the SEC itself noted in its analysis of one of the proposed regulations, disclosure may even induce a 'panhandler effect,' whereby clients may go through with a transaction in response to social pressure to meet the professional's financial interests." The Commenter also notes that generally disclosure may not incentivize a financial professional to change her behavior: "The SEC also noted that disclosure could have an effect on the behavior of financial professionals through 'moral licensing'—the belief that they have already fulfilled their moral obligations through disclosure, and 'strategic biasing'—the desire to compensate for an anticipated loss of profit from disclosure." As discussed above, Regulation Best Interest recognizes that certain conflicts of interest cannot be reasonably addressed with disclosure alone. *See*

Continued

ii. Elimination of Conflicts of Interest

The policies and procedures that broker-dealers will need to maintain and implement to comply with the Conflict of Interest Obligation will also give them the option of addressing conflicts of interest associated with recommendations by eliminating such conflicts entirely, rather than just disclosing them to the retail customer. Depending on the effectiveness of the policies and procedures that a broker-dealer implements to comply with the Conflict of Interest Obligation, conflicts of interest that are not required to be eliminated and that remain may still have a significant effect on an associated person's recommendation. If a broker-dealer considers that the effect of a conflict of interest on the recommendations of its associated persons cannot be adequately addressed by the broker-dealer, as required by the Conflict of Interest Obligation (discussed further below), the broker-dealer may consider modifying its practices to eliminate that conflict. By eliminating a conflict, the broker-dealer would neutralize the effect of this conflict on the recommendations provided by the broker-dealer or its associated persons to retail customers. The absence of this conflict of interest when the associated person is considering reasonably available alternatives for a recommendation to a retail customer, as noted above in the discussion of the Care Obligation, would likely result in an increase in the efficiency of the customers. As discussed above in Section III.A.2, this outcome would be consistent with the goals of Regulation Best Interest by reducing the agency costs associated with an associated person's incentives created by these conflicts of interest, which would benefit the retail customer.

Furthermore, the option to address conflicts of interest through elimination allows broker-dealers to reduce the compliance costs associated with managing conflicts of interest. For example, if a broker-dealer determines it is too costly to just disclose a conflict of interest as required under the Conflict of Interest Obligation, the broker-dealer could choose to eliminate the conflict. On the other hand, by eliminating a conflict of interest, a broker-dealer may forgo the potential revenues associated with that conflict of interest.

also supra Section III.B.4.c, which discusses in more detail these effects.

b. Mitigation of Certain Incentives to the Associated Persons

The requirement to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate conflicts of interest that create an incentive for the associated person of the broker-dealer to place the interest of the broker-dealer or the associated person ahead of the interest of the retail customer will likely affect the relationship between the broker-dealer and its associated persons, the menu of securities that the broker-dealer makes available to its associated persons, and the recommendations that the broker-dealer and its associated persons provide to retail customers. In the employment relationship between a broker-dealer and its associated persons, the broker-dealer generally hires and compensates associated persons to perform certain services (*e.g.*, providing recommendations on securities transactions and investment strategies to retail customers) using the broker-dealer's framework (*e.g.*, policies and procedures to ensure compliance with applicable laws and rules, supervisory systems that monitor for potential violations of policies and procedures, etc.). The compensation that the associated person receives from the broker-dealer may reflect the level of effort that the broker-dealer expects the associated person to exert when performing a service, given the broker-dealer's infrastructure. As noted above, the broker-dealer may also structure the associated person's compensation to create incentives that are consistent with maximizing the broker-dealer's objectives.

The requirement to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate conflicts of interest that create an incentive for the associated person of the broker-dealer to put the interest of the broker-dealer or the associated person ahead of the interest of the retail customer may affect the employment relationship between the broker-dealer and the associated person in several ways. First, the requirement may change a broker-dealer's existing policies and procedures that are designed to achieve compliance with the regulatory baseline as well as the supervisory systems that allow the broker-dealer to monitor for potential violations by the associated persons of these policies and procedures. To this end, broker-dealers will need to consider the amount of time and level of resources to devote to design and establish policies and procedures that seek to reduce the likelihood of an associated person placing its interest or the interest of the broker-dealer ahead of the interests of a retail customer when providing recommendations to retail customers.

Another way that this requirement may affect the employment relationship between the broker-dealer and the associated person is by changing the level of effort that the associated person would have to exert to ensure that all recommendations supplied to retail customers are compliant with the Conflict of Interest Obligation. As a corollary, this requirement may also affect the level of effort that a supervisor would have to exert to ensure that the recommendations supplied by its associated persons to a retail customer comply with the obligations of Regulation Best Interest.

As discussed above in the context of the Care Obligation, an associated person would have to not only consider a number of factors when making a recommendation to a retail customer, but also ensure that the recommendation is in the best interest of the retail customer. The determination that a recommendation is in the retail customer's best interest may depend on the conflicts of interest that exist at the time the associated person makes the recommendation, and, importantly, on how the broker-dealer complies with the requirement to establish, maintain, and enforce policies and procedures reasonably designed to identify and mitigate or eliminate conflicts of interest that create an incentive for the associated person to put the interest of the broker-dealer or the associated person ahead of the interest of the retail customer. It is possible that more effective policies and procedures may lower the level of effort an associated person would have to exert to have a reasonable basis to believe that recommendations are compliant with Regulation Best Interest, in the sense that a supervisor or the broker-dealer would determine whether the effect of the associated person's or the broker-dealer's conflicts of interest is reduced to the point where the incentives created by these conflicts do not have a negative effect on the recommendations. However, the potential increase in the supervisor's level of effort may substitute for the potential decrease in the associated person's level of effort.

One commenter had concerns about the discussion in the Proposing Release about the effect of the compensation arrangements between the broker-dealer and the associated person on the effort exerted by the associated person when providing a recommendation.[1275] This commenter stated that if the compensation leads to lower effort, the associated person would not make recommendations that are in the retail customer's best interest. As discussed above, the Commission notes that the relationship between the effort exerted to make a recommendation and the efficiency of the recommendation is complex, and that lower effort may not necessarily be inconsistent with increasing the efficiency of the recommendation.

Finally, the Conflict of Interest Obligation may affect the compensation arrangement between the broker-dealer and its associated persons. Certain compensation arrangements may create incentives for an associated person to place his or her interest of the interest of the broker-dealer ahead of the interest of the customer, and therefore create conflicts of interest for the broker-dealer's associated persons. For example, as discussed above in Section III.B.1.f, broker-dealers commonly compensate their associated persons based on commissions and performance-based awards. These compensation arrangements create incentives for associated persons to recommend securities or investment strategies that generate more commissions to the broker-dealer and potentially themselves over other securities or investment strategies.

The Conflict of Interest Obligation requires a broker-dealer to have policies and procedures that are reasonably designed to identify and disclose and mitigate, or eliminate, any conflicts of interest associated with recommendations that create an incentive for the associated person or the firm to place the interest of the associated person or the firm ahead of the interest of the retail customer, including conflicts of interest that arise from compensation arrangements between broker-dealers and their associated persons. Depending on how a broker-dealer complies with the Conflict of Interest Obligation, compensation arrangements between broker-dealers and their associated persons may change as a result of establishing these policies and procedures. For example, as discussed above in Section III.B.2.e, in response to the DOL Fiduciary Rule, which among other things, was designed to restrict broker-dealer activities and reduce the conflicts of interest of a broker-dealer and those of its associated persons, some broker-dealers altered the compensation for their associated persons. Specifically, some broker-dealers chose to equalize commissions and deferred sales charges charged across similar securities or investment strategies. Others chose to restrict or eliminate sales quotas, contests, special awards, and bonuses, including deferred bonuses as part of the recruitment efforts.[1276] It is possible that some broker-dealers may choose to comply with the Conflict of Interest Obligation by establishing policies and procedures that would address conflicts using these or similar methods. It is also possible that some broker-dealers may rely on existing policies and procedures that address conflicts through methods such as compliance and supervisory systems that are consistent with the Conflict of Interest Obligation.

Some of these methods may reduce the overall compensation of the associated person from providing recommendations (*e.g.*, altering certain bonuses). The same methods or others (*e.g.*, altering deferred recruiting bonuses) may complicate a broker-dealer's hiring of new associated persons. However, to the extent that these methods address the conflicts of interest of a broker-dealer or those of its associated persons in an effective manner, these methods may enhance the efficiency of the recommendations provided by a broker-dealer and its associated persons, and, therefore benefit retail customers.

In general, if a broker-dealer implements policies and procedures pursuant to the Conflict of Interest Obligation that may result in a significant reduction in the overall compensation that an associated person receives from providing recommendations, the associated person may have an incentive to register as an investment adviser, if not already registered as one, and provide advice mostly or only in an investment adviser capacity.

To the extent broker-dealers establish, maintain, and enforce policies and procedures that are effective at reducing the incentives of an associated person to put the interest of the broker-dealer or the associated person ahead of the interest of the retail customer, the Conflict of Interest Obligation would reduce the effect of these conflicts on the recommendations provided by associated persons to retail customers. In this way, complying with the Conflict of Interest Obligation would increase the efficiency of the recommendations for retail customers, relative to the regulatory baseline. This, in turn, would reduce the agency costs associated with the broker-dealer's and its associated persons' incentives that are created by their conflicts of interest. Lower agency costs at these broker-dealers would benefit retail customers.

One commenter noted that the size of these benefits of Regulation Best Interest should be quantified relative to the baseline that includes the current regulatory regime as well as current practices.[1277] The Commission agrees with the commenter and notes that, as discussed in Section III.B, broker-dealers may already have compliance and supervisory systems in place that are effective at reducing to a reasonable extent the effect of an associated person's conflicts of interest on the recommendations provided to retail customers.[1278] Therefore, for the retail customers of these broker-dealers, the potential benefits above may be small. In contrast, for the retail customers of the broker-dealers that are not currently addressing conflicts of interest in a manner consistent with Regulation Best Interest, the potential benefits above may be large.

This commenter further stated that the economic analysis in the Proposing Release did not provide a thorough discussion of the relationship between the broker-dealer and its associated persons with a focus on the incentives of the associated persons.[1279] The Commission notes that the analysis above about the incentives of the associated persons expands the analysis in the Proposing Release and establishes a clear link between compensation and incentives.

As noted in the economic analysis of the Proposing Release,[1280] broker-dealers may also adjust their menus of securities in response to the requirement to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate conflicts of interest that create an incentive for the associated person to place his or her interest or the interest of the broker-dealer ahead of the interest of the retail customer. It is possible that some broker-dealers may decide to expand their offerings to better comply with the process required pursuant to the Conflict of Interest Obligation. For instance, broker-dealers that currently

[1275] *See* AARP August 2018 Letter.

[1276] However, we understand that following the decision by the Fifth Circuit to vacate the DOL Fiduciary Rule, some broker-dealers may have reverted back to compensation arrangements that they had in place prior to the DOL Fiduciary Rule. For instance, as discussed in Section III.B.2.e.ii, *supra*, some broker-dealers reinstated their deferred recruiting bonuses.

[1277] *See* CFA August 2018 Letter.

[1278] *See* FINRA Conflicts Report.

[1279] *See* CFA August 2018 Letter.

[1280] *See* Proposing Release at 21658.

offer advice only on a limited set of securities (*e.g.*, proprietary securities) would have to disclose and evaluate their menu of securities to ensure that their policies and procedures regarding their limited menus of securities and the disclosures of any conflicts associated with such limitations do not result in recommendations that place the interest of the broker-dealer or its associated persons ahead of the retail customer's interest.

Broker-dealers may also manage conflicts of interest by limiting their menu of securities on which they offer recommendations. Broker-dealers may prefer a limited menu of securities to better mitigate the potential costs associated with compliance of Regulation Best Interest. For instance, a limited menu of securities may result in more homogenous product fees across comparable securities or investment strategies, which would help reduce the effect of certain conflicts of interest on the recommendations provided to retail customers. Broker-dealers may also respond by limiting their menus of securities because they may have conflicts of interest due to variation in the compensation they receive from product sponsors, as discussed above.

It is possible that complying with the Conflict of Interest Obligation in this manner may result in securities menus that limit an associated person's choices of investments when providing a recommendation to a retail customer.[1281] However, as discussed below, the requirements of the Conflict of Interest Obligation and the Care Obligation are intended to reduce the likelihood that limitations on securities menus result in recommendations that are not in the best interest of the retail customer.[1282]

It is also possible that broker-dealers that limit their menus of securities in response to the Conflict of Interest Obligation may eliminate securities or investment strategies that are inferior relative to other securities or investment strategies in terms of performance and costs. Recommendations based on menus of securities that do not contain inferior securities or investment strategies are more likely to be efficient for the retail customer. To the extent broker-dealers eliminate inferior investments from their securities menus as a result of complying with the Conflict of Interest Obligation, Regulation Best Interest would provide a benefit for the retail customers of these broker-dealers.

Broker-dealers may pass on some of the compliance costs to their retail customers. For instance, broker-dealers may increase their fees on the services that they provide to retail customers as part of the relationship, or may adopt new fees. Alternatively, broker-dealers may seek to renegotiate their compensation arrangements with the product sponsors in the hopes of extracting greater compensation (*e.g.*, more attractive revenue-sharing agreements), relative to current practices. The likelihood of a favorable outcome for the broker-dealers may depend on whether product sponsors can charge their retail customers higher fees. However, it is likely that product sponsors are already charging fees that are privately optimal (*e.g.*, maximize their revenue net of costs), and thus any deviations from these fees would lead to a suboptimal outcome for the product sponsors. In other words, product sponsors may not have an incentive to increase their fees.

A number of commenters stated that policies and procedures that address how broker-dealers manage conflicts of interest relating to limited menus of securities could impose costs on a retail customer when all securities on the menu have high fees or create a benefit for retail customers if securities with high fees are eliminated.[1283] As noted in the Proposing Release and above, the Commission acknowledges the benefits to the retail customers of the broker-dealers that comply with Regulation Best Interest by eliminating inferior securities or investment strategies. The Commission also acknowledges the potential costs of limited menus of securities by expanding the Conflict of Interest Obligation to include requirements that would address specifically limited menus of securities and by providing a detailed analysis of the economic implications of these requirements, below.

c. Material Limitations on Recommendations to Retail Customers

The Conflict of Interest Obligation includes a requirement that specifically addresses material limitations on recommendations to retail customer (*e.g.*, offering only proprietary or other limited range of securities). This provision requires broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to identify and disclose any material limitations placed on securities or investment strategies that may be recommended to a retail investor and any conflicts of interest associated with such limitations in accordance with the Disclosure Obligation. It further requires such policies and procedures to be reasonably designed to prevent such limitations and associated conflicts of interest from causing the broker-dealer or its associated persons to make recommendations that place the interest of the broker-dealer or associated persons ahead of the interest of the retail customer.

As noted above, broker-dealers may limit their menus of securities in response to certain requirements of the Conflict of Interest Obligation. The requirements that address limited menus of securities are designed to help ensure that these limitations and associated conflicts of interest do not create incentives for the broker-dealer or its associated persons to make recommendations that are not in the best interest of the retail customer. The second aspect of the requirement would seek to ensure that the menu of securities is not limited to the point where it restricts a broker-dealer and its associated persons from complying with the Care Obligation, and in particular with the requirement to provide recommendations that are in the customer's best interest.[1284] To the extent these requirements reduce the effect of the limitations of the menu of securities and the associated conflicts of interest on the recommendations provided by a broker-dealer or its associated persons, the Conflict of Interest Obligation would result in recommendations that are more likely to be efficient, relative to the baseline.

The requirements that address limitations of the menu of securities may have additional implications for certain product markets, and ultimately, retail customers. To better understand these implications we focus the discussion on the market for mutual funds.

As discussed in Section III.B.3, academic literature has noted that in certain product markets, such as mutual funds, the different distribution channels that product sponsors use to reach the retail customer may cause these markets to fragment. In the market for mutual fund products, some products are sold to retail customers only through broker-dealers—the so-called "broker-sold" distribution channel—while other products are sold

[1281] *See supra* Section II.C.2.

[1282] For example, if none of the securities on the menu would be in the best interest of the retail customer in a given set of circumstances, the associated person may not recommend any of the securities on the menu to the retail customer.

[1283] *See, e.g.*, CFA August 2018 Letter; AARP August 2018 Letter; EPI Letter; Better Markets August 2018 Letter.

[1284] Broker-dealers that offer a limited menu of securities may not be able to offer recommendations to certain clients. *See also supra* footnote 1282.

directly to retail customers—the so-called "direct-sold" distribution channel.[1285] The products that are sold through the broker-sold channel usually carry higher fees relative to comparable products that are sold through the direct-sold channel.[1286] Higher fees on the broker-sold products reflect broker-dealers' compensation for distributing the product. In general, all transactions linked to the broker-sold distribution channel are triggered by a recommendation provided by an associated person of the broker-dealer. Most product sponsors currently rely on one of the two channels to distribute their products, but not on both.[1287]

A retail customer that has an account with a broker-dealer that provides advice is not necessarily constrained to accessing products only through the broker-sold channel. A retail customer could access products from the direct-sold channel to transact on his or her own (for example, if the broker-dealer may not provide recommendations on a particular product).[1288] A retail customer who has access to products from both distribution channels and who understands the effect of fees on a product's performance may prefer to access a product through the broker-sold channel if, for example, the combined cost of identifying (*e.g.*, search costs) and accessing comparable direct-sold products (*e.g.*, product fee) is higher than the total cost of the broker-sold product recommended by the associated person of the broker-dealer.[1289] As more direct-sold products enter the market,[1290] the retail customer's cost of identifying [1291] direct-sold products that are comparable alternatives to a broker-sold product recommended by an associated person of the broker-dealer may become lower.[1292] In turn, the retail customer's demand for broker-sold products may decline.[1293]

According to economic first principles, when enough retail customers exhibit a preference for direct-sold products over broker-sold products, the aggregate demand for broker-sold products should decline. To remain competitive, product sponsors that rely on the broker-sold channel to distribute their products would have to lower the fees on their products. Lower fees on broker-sold products may result in lower compensation for broker-dealers and their associated persons from providing recommendations on these products. Lower fees on broker-sold products would benefit retail customers who access mutual fund products through the broker-sold channel.

This market mechanism would allow retail customers' demand to affect how product sponsors compensate broker-dealers for recommending broker-sold products. While this mechanism is currently available to retail customers and is considered generally effective, it is not clear how effective this mechanism is in all aspects of the market, particularly in the short run.[1294] As noted by one commenter, the expense ratio for domestic equity mutual funds declined from 0.86 percent in 2007 to 0.59 percent in 2017, a 31% reduction over the ten year period.[1295] This commenter further notes that this downward trend in expense ratios reflects, among other things, a "long-running shift by investors toward lower-cost funds." Because the number of low-cost funds that enter the market over the period 2007–2017 has increased substantially, the assessment of this commenter would appear to be consistent with the market mechanism being effective in the long run.[1296]

As noted above, the effectiveness of the market mechanism may depend on a number of factors, including the retail customer's ability to understand the effect of fees on the performance of a product and willingness to shop around for comparable products, the product sponsor's ability to signal how its broker-sold products stand out among comparable products, and the broker-dealer's menu and the disclosure about potential limitations of this menu.[1297]

The Conflict of Interest Obligation may improve the effectiveness of this market mechanism through the requirement that broker-dealers establish, maintain, and implement written policies and procedures reasonably designed to identify and disclose all material limitations of products that may be recommended and any associated conflicts of interest. This requirement would result in disclosures that, while not necessarily new relative to the regulatory baseline, may increase the salience of the limitations of product menus and the associated conflicts of

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[1285] In this discussion, the broker-sold distribution channel includes sales that are the result of a recommendation provided by the broker-dealer but may also include sales that are solicited by the retail customer where no advice or recommendation was provided by the broker-dealer (*i.e.*, unadvised sales). The direct-sold distribution channel includes unadvised sales through broker-dealer open platforms as well as sales that the retail customer solicits directly from the product sponsor. Investment advisers may also access products through the direct-sold distribution channel.

[1286] *See, e.g.*, Del Guercio & Reuter (2014).

[1287] *See, e.g.*, Del Guercio & Reuter (2014), *supra* footnote 1081, and Reuter (2015), *supra* footnote 1095.

[1288] A retail customer could also access securities through financial professionals that are not broker-dealers, including investment advisers.

[1289] Some broker-dealers may offer securities to retail customers through both distribution channels, but these broker-dealers provide recommendations only on securities offered through the broker-sold channel. For example, some broker-dealers with open platforms may only provide recommendations on proprietary securities.

[1290] *See, e.g.*, ICI Letter, which shows an increasing trend in the number of mutual funds with no 12b-1 fees over the past 10 years. These funds are available through the direct-sold channel.

[1291] Broker-dealers with open platforms that allow retail customers to access securities on this platform without a recommendation from the broker-dealer and its associated persons generally provide extensive research and analytical tools. The Commission has recently adopted rule amendments that address research reports that broker-dealers make available to their retail customers. *See* Covered Investment Fund Research Reports, Release 33–10580 (Nov 30, 2018); 83 FR 64180 (Dec. 13, 2018).

[1292] *See, e.g.*, Ali Hortacsu & Chad Sylverson, *Product Differentiation, Search Costs, and Competition in the Mutual Fund Industry: A Case Study of S&P 500 Index Funds*, 119 Q. J. Econ. 403 (2004), who estimate an investor's search costs for S&P500 index funds and show that, as the number of S&P500 index funds increased over their sample period spanning 1995 to 2000, the investor's search costs generally declined. The authors further show that this downward trend was driven by funds that are in lower end of the search cost distribution and that these funds were mostly no-load funds. These no-load funds are usually available through the direct-sold channel.

[1293] However, a retail customer may value the services provided by a broker-dealer that extend beyond the provision of recommendations on securities transactions and investment strategies and continue to maintain an account with the broker-dealer. To counter the potential decline in the demand for broker-sold products, a broker-dealer may respond by offering more services and increasing the fee for the package of services or by trying to shift the retail customer to a potentially more profitable advisory account (to the extent that the broker-dealer offers this type of accounts).

[1294] Recent academic research questions the effectiveness of the market mechanism, at least in the short run. *See. e.g.*, Yang Sun, *Does Competition Protect Retail Investors? Role of Financial Advice* (Working Paper, Apr. 2017), *available at https://coller.tau.ac.il/sites/coller-english.tau.ac.il/files/media_server/Recanati/management/conferences/finance/2017/61.pdf*. This research shows that the sudden entry of several low-cost index funds caused direct-sold actively managed funds with similar investment objectives to cut their fees by 6.4 basis points. In contrast, broker-sold actively managed funds with similar investment objectives as the new entrant funds increased their fees by 12.2 basis points. The study further shows that while some of the fee increase in the broker-sold funds is accompanied by increased levels of active management, most of the fee increase (more than 60%) was passed on to broker-dealers. The author argues that the broker-sold actively managed funds are able to increase their fees only to the extent that they can signal to the market that they are not employing strategies that mimic index funds.

[1295] *See* ICI Letter.

[1296] *Id.* at 42.

[1297] As noted in *supra* footnote 1292, the effectiveness of this market mechanism may also depend on whether broker-dealers offer advisory accounts and whether these broker-dealers can convince retail customers to switch to an advisory account rather than to a self-directed account.

interest for the retail customers.[1298] The added focus on these limitations may cause some retail customers to question whether the recommendations that they are receiving are taking into consideration a reasonable set of alternatives. Thus, this disclosure may encourage retail customers to shop for comparable products that they may prefer (*e.g.*, based on cost factors) over the broker-sold products that are being recommended to them.

As an example, a broker-dealer that is providing recommendations only for proprietary products would have to disclose, the material limitation that the products on the menu are all proprietary, and the material fact of the conflict of interest that the broker-dealer and its associated persons are being compensated for selling these products. As discussed above in Section II.C.3.f, there are a number of other potential conflicts of interest associated with proprietary products. While broker-dealers may disclose this information under the regulatory baseline, it is not clear the manner in which this disclosure currently reaches the retail customer.[1299] The new required disclosure with respect to conflicts of interest (under the Disclosure Obligation) is intended to be more comprehensive and more specific, and is also intended to reach the retail customer more directly. From this perspective, the disclosure of the limitations of the product menu and its associated conflict of interest may better inform retail customers' choices and, therefore, may be more effective, compared to current disclosure forms of the same information. While, generally, the effectiveness of disclosure depends on many factors that are well known in the academic literature, the disclosure requirement of the Conflict of Interest Obligation may also depend on the range of material facts that the broker-dealer deems necessary to disclose in order to be in compliance with the obligation.[1300]

The Conflict of Interest Obligation addresses limited product menus by requiring that broker-dealers take measures through reasonably designed written policies and procedures to evaluate and prevent the limitations and the associated conflicts of interest from causing associated persons of the broker-dealer to make recommendations that are inconsistent with the requirements of Regulation Best Interest. The requirement seeks to address specific firm-level conflicts—namely, the conflicts associated with the establishment of a product menu—which are likely to affect recommendations made to retail customers and may result in recommendations that place the interest of the broker-dealer or its associated persons ahead of the interest of the retail customer.

This requirement may have a direct effect on the relationship between broker-dealers and product sponsors. To the extent that enough broker-dealers decide to no longer offer recommendations on certain types of products that carry higher fees (*i.e.*, exclude them from the menus), the aggregate demand for such products may decline. Product sponsors that face declining demand for some of their products may respond by lowering the fees on these products or by repackaging these products into new and more competitive products that may again draw the interest of the broker-dealers.

d. Elimination of Certain Sales Practices

As part of the Conflict of Interest Obligation in Regulation Best Interest, broker-dealers are required to establish, maintain, and enforce written policies and procedures reasonably designed to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time. The Commission believes that the conflicts of interest associated with these practices that may create high-pressure situations for the associated persons of the broker-dealer to recommend a specific security over another cannot be reasonably addressed through disclosure and mitigation and should be addressed through elimination in order to comply with the requirements of Regulation Best Interest.[1301]

Relative to the regulatory baseline, this requirement would provide benefits to retail customers. Conflicts of interest that create incentives for the associated persons to recommend a specific security (or specific types of securities) over another are likely to have a significant effect on an associated person's recommendation, even if such conflicts were disclosed and mitigated via policies and procedures established, maintained and enforced by the broker-dealer. By explicitly requiring policies and procedures reasonably designed to eliminate sales practices that may result in such conflicts, the requirement should neutralize the effect of these conflicts on the recommendations provided by associated persons to retail customers. The absence of these conflicts when the associated person is considering reasonably available alternatives for a recommendation to a retail customer, as noted in the discussion of the Care Obligation, may increase the efficiency of the recommendation for their retail customers. As discussed above in Section III.A.2, this outcome is consistent with Regulation Best Interest reducing the agency costs associated with a broker-dealer's incentives or the incentives of its associated persons created by these conflicts of interest, which, in turn, would benefit the retail customer.

The requirement to establish policies and procedures reasonably designed to eliminate certain sales practices may reduce the total compensation that a broker-dealer and its associated person receives from providing recommendations to retail customers. As discussed above, to the extent that the reduction in an associated person's total compensation is sufficiently large, the associated person may have an incentive to register as an investment adviser and provide investment advice only in his or her advisory capacity. Furthermore, the potential decline in the total compensation of an associated person of the broker-dealer due to this requirement may dissuade financial professionals from providing advice in the capacity of a broker-dealer, and as a result, broker-dealers may find it more difficult to hire new associated persons, relative to the baseline.

In addition, the types of sales practices that this requirement is meant to address generally create incentives for associated persons to recommend certain types of securities or investment strategies over certain time periods over other types of securities or investment strategies. By requiring broker-dealers to establish policies and procedures reasonably designed to eliminate certain sales practices that create these types of incentives, broker-dealers may experience a reduction in the revenue stream associated with certain securities or investment strategies. Thus, through this requirement, Regulation Best Interest may impose a cost on the broker-dealers that currently rely on these types of practices in order to incentivize sales. On the other hand, retail customers who have born costs associated with such practices will benefit from the cessation of these sales practices.

[1298] *See supra* footnote 1272 and accompanying text.

[1299] *See, e.g.*, 913 Study.

[1300] *See supra* Section III.B.4.c for a detailed discussion of the academic literature on disclosure effectiveness.

[1301] *See also* the discussion in Section II.C.3.g, *supra*.

As discussed above, while we are unable to quantify the full costs of Regulation Best Interest, including the Conflict of Interest Obligation, we are able to estimate some of the costs associated with the Conflict of Interest Obligation, specifically the costs related to information collection requirements as defined by the Paperwork Reduction Act. As discussed further in Section IV.B.1, the Commission believes that broker-dealers would update their policies and procedures to comply with this requirement and would incur an initial aggregate burden of approximately 128,160 hours and an additional initial aggregate cost of approximately $25 million, as well as an ongoing aggregate annualized burden of approximately 27,900 hours, and an ongoing aggregate annualized cost of approximately $2.91 million.[1302] Furthermore, the Commission believes that in order to identify conflicts of interest and determine whether the conflicts are material, broker-dealers would incur an initial aggregate burden of approximately 69,150 hours and an additional initial aggregate cost of approximately $15.71 million as well as an ongoing aggregate annualized burden of approximately 27,660 hours.[1303] Thus, we estimate the Conflict of Interest Obligation of proposed Regulation Best Interest would impose an initial aggregate cost of at least $110.73 million and an ongoing aggregate annual cost of at least $20.44 million on broker-dealers.[1304]

5. Compliance Obligation

The Compliance Obligation of Regulation Best Interest requires broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest.[1305] This obligation creates an affirmative obligation under the Exchange Act with respect to Regulation Best Interest as a whole, while providing sufficient flexibility to allow broker-dealers to establish compliance policies and procedures that accommodate a broad range of business models.[1306]

The Compliance Obligation is designed to ensure that broker-dealers have internal controls in place to prevent violations of Regulation Best Interest. The policies and procedures required to comply with this obligation would allow the Commission to identify and address potential compliance deficiencies or failures (such as inadequate or inaccurate policies and procedures, or failure to follow the policies and procedures) early on, reducing the chance of retail customer harm.[1307]

As discussed above in Section III.B.2.d, under the regulatory baseline, broker-dealers are subject to supervisory obligations that, among other things, require them to establish policies and procedures reasonably designed to prevent and detect violations of, and achieve compliance with, the federal securities laws and regulations,[1308] as well as applicable SRO rules.[1309] Broker-dealers would have the ability to update these policies and procedures to comply with the Compliance Obligation, rather than create new policies and procedures.

The obligation indirectly benefits retail customers by ensuring that broker-dealers have sufficient internal controls in place to support compliance with Regulation Best Interest.

The obligation will impose compliance costs on broker-dealers. However, these costs are likely to be smaller for those broker-dealers that already have effective compliance systems in place, including effective policies and procedures.

Broker-dealers may incur operational costs related to training their associated persons and developing policies and procedures to ensure compliance with the Care Obligation. For example, broker-dealers may have to provide training to their employees and other associated persons on how to make recommendations that do not place the interest of the broker-dealer or their associated persons ahead of the interest of the retail customer. In the Proposing Release, these training costs were discussed as part of a separate general best interest obligation, and our assessment of those costs has not changed.[1310] Broker-dealers also may incur costs related to training their associated persons on how to determine that they have a reasonable basis to believe that a recommendation is in a retail customer's best interest. This may include training on how to evaluate the potential risks, rewards, and costs associated with a recommendation as well as how a retail customer's investment profile affects this determination. Additionally, broker-dealers may incur costs related to training their associated persons on any relevant factors specific to making recommendations regarding IRAs, IRA rollovers, or other account types, as well as implicit hold recommendations resulting from agreed-upon account monitoring. These training costs will be lower for broker-dealers that already operate in a manner that is consistent with the requirements of the Care Obligation and higher for those that do not. Firms may already comply with the requirements of the Care Obligation, to varying degrees, either of their own volition or because they are already subject to and comply with similar obligations.

As discussed above, while we are unable to quantify the full costs of Regulation Best Interest, including the Compliance Obligation, we are able to estimate some of the costs associated with the Compliance Obligation, specifically the costs related to information collection requirements as defined by the Paperwork Reduction

[1302] These estimates are based on the following calculations: 120,600 hours + 7,560 hours = 128,160 hours; $10 million + $15 million = $25 million; and 24,120 hours + 3,780 hours = 27,900 hours. As discussed in more detail in *infra* Section V.D, 120,600 hours and 7,560 hours are preliminary estimates for the initial aggregate burdens for large and small broker-dealers, respectively, $10 million and $15 million are preliminary estimates for the initial aggregate costs for large and small broker-dealers, respectively, and 24,120 hours and 3,780 hours are preliminary estimates for the ongoing aggregate burdens for large and small broker-dealers, respectively.

[1303] The estimate of the initial aggregate burden is based on the following calculations: 13,830 hours + 55,320 hours = 69,150 hours, where, as discussed in more detail in Section V.D, 13,830 hours and 55,320 hours are estimates for the initial aggregate burdens for identifying conflicts of interest and determining whether the conflicts are material for all broker-dealers, respectively.

[1304] These estimates are calculated as follows: (90,450 hours of in-house legal counsel) × ($415.72/hour for in-house counsel) + (27,660 hours for in-house compliance counsel) × ($365.39/hour for in-house compliance counsel) + (27,660 hours for identifying conflicts of interest) × ($229.74/hour for business line personnel) + (51,540 hours for review of policies and procedures) × ($309.60/hour for in-house compliance manager) + (50,302 hours for outside legal counsel) × ($497/hour for outside legal counsel) + (55,317 hours for modifying existing technology) × ($284/hour for outside senior programmer) = $110.73 million, and (8,040 hours of in-house legal counsel) × ($415.72/hour for in-house counsel) + (21,870 hours for in-house compliance counsel) × ($365.39/hour for in-house compliance counsel) + (21,870 hours for identifying conflicts of interest) × ($229.74/hour for business line personnel) + (3,780 hours for review of policies and procedures) × ($309.60/hour for compliance manager) + (3,783 hours for outside legal counsel) × ($497/hour for outside legal counsel) + (3,773 hours for outside compliance services) × ($273/hour for outside compliance services) = $20.44 million. The hourly wages for in-house legal and compliance counsel, registered representatives, senior business analyst, compliance manager, and business-line personnel are obtained from SIFMA. The hourly rates for outside legal counsel, outside senior programmer, systems analyst or programmer and outside compliance services are discussed in *infra* Section V.D.

[1305] These policies and procedures are in addition to the policies and procedures required under the Conflict of Interest Obligation.

[1306] *See supra* Section II.C.4.

[1307] *See supra* Section II.C.4.

[1308] *See* Section 15(b)(4)(E) of the Exchange Act.

[1309] *See* FINRA Rule 3110 (Supervision).

[1310] *See* Proposing Release at Section IV.C.2.a.

Act. As discussed further in Section IV.B.1, the Commission believes that broker-dealers would update their policies and procedures to comply with this requirement. We estimate that broker-dealers would incur an initial aggregate burden of 524,404 hours and an additional initial aggregate cost of approximately $76.3 million, as well as an ongoing aggregate annualized burden of 452,524 hours, and an ongoing aggregate annualized cost of approximately $2.91 million.[1311] Thus, the Compliance Obligation of Regulation Best Interest would impose an initial aggregate cost of at least $214.66 million and an ongoing aggregate annual cost of at least $110.86 million on broker-dealers.[1312]

6. Record-Making and Recordkeeping

Regulation Best Interest will also impose record-making and recordkeeping requirements on broker-dealers with respect to certain information collected from, or provided to, retail customers. The Commission is amending Rules 17a–3 and 17a–4 of the Exchange Act, which specify minimum requirements with respect to the records that broker-dealers must make, and how long those records and other documents must be kept, respectively. We are amending Rule 17a–3 by adding a new paragraph (a)(35) that requires a record of all information collected from, and provided to, the retail customer pursuant to Regulation Best Interest, as well as the identity of each natural person who is an associated person of a broker or dealer, if any, responsible for the account. This requirement applies to each retail customer to whom a recommendation of any securities transaction or investment strategy involving securities is provided. The neglect, refusal, or inability of a retail customer to provide or update any information about the customer investment profile will, however, excuse the broker-dealer from obtaining that information. Rule 17a–4(e)(5) will be amended to require that broker-dealers retain all records of the information collected from or provided to each retail customer pursuant to Regulation Best Interest for at least six years after the earlier of the date the account was closed or the date on which the information was last replaced or updated.

The requirement to create certain written records of information collected from or provided to a retail customer under the Disclosure Obligation will trigger a record-making obligation under paragraph (a)(35) of Rule 17a–3 and a recordkeeping obligation under Rule 17a–4(e)(5) that may impose additional compliance costs on broker-dealers. In cases where broker-dealers choose to meet part of the Disclosure Obligation orally under the circumstances outlined above in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation*, the requirement to maintain a record of the fact that oral disclosure was provided to the retail customer will trigger a record-making obligation under paragraph (a)(35) of Rule 17a–3 and a recordkeeping obligation under Rule 17a–4(e)(5) that may impose additional compliance costs on broker-dealers. Furthermore, the Care Obligation may require creating new documents or modifying existing documents to reflect standardized questionnaires seeking customer investment profile information. These requirements will also trigger a record-making obligation under paragraph (a)(35) of Rule 17a–3 and a recordkeeping obligation under Rule 17a–4(e)(5) that will impose additional compliance costs on broker-dealers. Currently, under Rule 17a–3(a)(17), broker-dealers that make recommendations for accounts with a natural person as customer or owner are required to create, and periodically update, specified customer account information. However, the information collection requirements of Rule 17a–3(a)(17) do not cover all aspects of the "customer investment profile" that broker-dealers may attempt to obtain to make a customer-specific suitability determination under the Suitability Rule.

As noted above, the Conflict of Interest Obligation requires broker-dealers to establish policies and procedures that are reasonably designed to address conflicts of interest, including disclosing material facts associated with the conflicts. The disclosures will be made pursuant to the Disclosure Obligation and are not expected to trigger record-making or recordkeeping obligations outside the Disclosure Obligation.

The Commission is providing estimates of the initial and ongoing burden hours associated with the record-making and recordkeeping obligations of the Disclosure, Care, and Conflict of Interest Obligations, under certain assumptions. These estimates are discussed in Section IV.B.5. Based on these burden hours estimates, the Commission expects that the record-making and recordkeeping obligations of Regulation Best Interest will impose an initial aggregate burden of 17,684,020 hours and an additional initial aggregate cost of $375,732 as well as an ongoing aggregate annualized burden of 5,520,800 hours on broker-dealers.[1313]

[1311] These estimates are based on the following calculations: 80,400 hours + 4,536 hours + 11,064 hours + 428,404 hours= 524,404 hours; $6 million + $7.5 million + $62.8 million = $76.3 million; and 24,120 hours + 428,404 hours = 452,524 hours. As discussed in more detail in *infra* Section V.D, 80,400 hours, 4,536 hours, 11,064 hours and 428,404 hours are estimates for the initial aggregate burdens for large and small broker-dealers, updating training module, and training, respectively. In addition, $6 million, $7.5 million, and $62.8 million are estimates for the initial aggregate costs for large and small broker-dealers and updating training modules, respectively. Furthermore, 24,120 hours and 428,404 hours are estimates for the ongoing aggregate burdens for large broker-dealers and training, respectively. Finally, $2.91 million is the estimate of the ongoing aggregate cost for small broker-dealers.

[1312] These estimates are calculated as follows: (65,832 hours of in-house legal counsel) × ($415.72/hour for in-house counsel) + (4,536 hours for in-house compliance counsel) × ($365.39/hour for in-house compliance counsel) + (10,050 hours for reviewing policies and procedures) × ($446.04/hour for in-house general counsel) + (15,582 hours for reviewing policies and procedures and update existing training systems) × ($309.60/hour for in-house compliance manager) + (428,404 hours for training) × ($233.02/hour for registered representative) + (27,163 hours for outside legal counsel) × ($497/hour for outside legal counsel) + (221,127 hours for updating training module) × ($284/hour for outside senior programmer or systems analyst)= $214.66 million, and (8,040 hours of in-house legal counsel) × ($415.72/hour for in-house counsel) + (8,040 hours for in-house compliance counsel) × ($365.39/hour for in-house compliance counsel) + (8,040 hours for updating policies and procedures) × ($229.74/hour for business line personnel) + (8,040 hours for reviewing policies and procedures) × ($309.60/hour for compliance manager) + (3,783 hours for outside legal counsel) × ($497/hour for outside legal counsel) + (3,773 hours for outside compliance services) × ($273/hour for outside compliance services) + (428,404 hours of training) × ($233.02/hour for registered representative) = $110.86 million. The hourly wages for in-house legal and compliance counsel, registered representatives, senior business analyst, compliance manager, and business-line personnel are obtained from SIFMA. The hourly rates for outside legal counsel, outside senior programmer, systems analyst or programmer and outside compliance services are discussed in *infra* Section V.D.

[1313] These estimates are based on the Commission's estimates, discussed in Section IV.B.5, with respect to the initial and ongoing aggregate costs and burdens imposed on broker-dealers by the record-making obligation of proposed Rule 17a–3(a)(35) and the recordkeeping obligation of the proposed amendment to Rule 17a–4(e)(5) associated with all component obligations of Regulation Best Interest. The estimate of the initial aggregate burden is based on the following calculation: 4,020 hours + 4,080,000 hours + 13,600,000 hours = 17,684,020 hours, where, as discussed in more detail in Section IV.B.5, 4,020 hours is the estimate of amending the account disclosure agreement by large broker-dealers, 4,080,000 hours is the estimate of the burden associated with filling out the information disclosed pursuant to Regulation Best Interest in the account disclosure agreement, and 13,600,000 hours is the estimate of the burden to broker-dealers for adding new documents or modifying existing documents to the broker-dealer's existing retention system. $375,732 is the estimate of amending the account disclosure agreement by small broker-dealers pursuant to the record-making obligation of Rule 17a–3(a)(35). The estimate of the ongoing annual burden is 3,400,00 hours + 1,060,000 hours +

After monetizing the burden hours, the record-making and recordkeeping obligations will impose an initial aggregate cost of at least $4,121.73 million and an ongoing aggregate annual cost of at least $1,736.52 million on broker-dealers.[1314]

7. Approaches to Quantifying the Potential Benefits

As discussed above, several commenters suggested that we quantify the existing harm to investors under the baseline and the corresponding benefit resulting from Regulation Best Interest. We continue to believe that it is not possible to quantify, with meaningful precision, either the existing harm or the specific benefits we expect to flow from Regulation Best Interest. Such an analysis, including one that would produce ranges, depends on many contingent factors that render any estimate insufficiently precise to inform our policy choices.[1315] Nonetheless, the Commission has endeavored to estimate some of the potential benefits that may result from Regulation Best Interest using a variety of methodologies, which are explained below in more detail along with certain caveats and the principal assumptions relied on. Specifically, we have attempted to estimate the benefit that may result from a reduction in fees due to increased competition; we also consider the potential benefit arising from a reduction in the relative performance differences of broker-sold and direct-sold mutual funds.

The quantification exercise below provides an estimate for some of the potential benefits associated with Regulation Best Interest. For example, as discussed in more detail below, a potential reduction in fees can benefit retail customers in other ways beyond reducing the total dollar amount paid for investment services. Furthermore, as discussed elsewhere in this economic analysis, the rule is expected to generate other benefits for retail customers that we are not able to meaningfully quantify.

a. Benefit to Investors Due to a Potential Reduction in Fees

As discussed above, Regulation Best Interest may reduce the attractiveness of certain products to broker-dealers due to the Care Obligation (*e.g.*, the emphasis on the need to consider cost, among other things) and the Conflict of Interest Obligation (*e.g.*, addressing conflicts of interest, including product menu limitations) and/or may reduce retail customers' aggregate demand for certain products due to the Disclosure Obligation (*e.g.*, due to a reduction in any information asymmetry with respect to fees). To the extent that Regulation Best Interest produces these effects on certain products, the affected product sponsors may react by lowering the fees that they charge retail customers on these products to be more competitive, or by repackaging these products into new products that are more competitively priced. The increased competition generated by the lower fees for affected products may further incentivize other product sponsors (*i.e.*, those not directly affected by Regulation Best Interest) to lower their fees as well.[1316] Alternatively, a product sponsor may preempt the potential decline in the aggregate demand for its products by lowering the fees before other sponsors do.

For the purposes of calculation, we assume that this potential competition in prices results in a new long-run equilibrium in this product market, in which product sponsors charge fees that are close to or equal to their marginal costs. Lower fees translate into direct savings to retail customers. If a portion of fees collected from retail customers serves to compensate broker-dealers for selling certain investment products, then lowering those fees could also translate into less severe conflicts of interest. Thus, a reduction in fees may improve the efficiency of the recommendations that broker-dealers make to retail customers. This potential increase in the efficiency of the recommendations received also benefits retail customers.[1317]

The market for mutual fund products may illustrate the potential for attaining such a new long-run equilibrium as a result of Regulation Best Interest. We focus on mutual funds for this analysis because of the available data for mutual funds, but we expect the same or similar dynamics could apply to other financial products. As this market transitions toward this new long-run equilibrium, total fund expenses (*i.e.*, distribution expenses and management fees) that are in excess of the marginal cost of distributing and operating the fund may be reduced in a number of ways, including by lowering fees, reliance on alternative distribution channels, or exiting the market in whole or in part (*i.e.*, by limitations on offerings). Below we attempt to quantify the benefits associated with this potential long-run equilibrium in the market for mutual fund products as a result of such reduction in fees, relative to the baseline, assuming all funds reduced fees to marginal costs. To this end, we start with the current distribution of fees of funds within each Center for Research in Security Prices (CRSP) objective class.[1318] We focus on funds that have reported this information in 2018 in CRSP. We perform the analysis using total fees (*i.e.*, fund expense ratios). As an alternative, we also perform the analysis using the component of the total fees that are allocated toward distribution and

1,060,000 hours = 5,520,800 hours where 3,400,00 hours is the estimate of complying with the recordkeeping obligation of the amendment to Rule 17a–4(e)(5) and 1,060,000 hours are estimates of both the record-making and recordkeeping obligations associated with oral disclosure.

[1314] These estimates are calculated as follows: (2,010 hours of in-house legal counsel) × ($415.72/hour for in-house counsel) + (17,680,000 hours for entering and adding new or modifying existing documents in each customer account) × ($233.02/hour for registered representative) + (2,010 hours for in-house compliance counsel) × ($365.39/hour for in-house compliance counsel) + (756 hours for outside legal counsel) × ($497/hour for outside legal counsel) = $4,121.73 million, and (3,400,000 hours for recordkeeping) × ($365.39/hour for in-house compliance counsel) + (1,060,000 hours for record-making associated with oral disclosure) × ($233.02/hour for registered representative) + (1,060,000 hours for record-keeping associated with oral disclosure) × ($233.02/hour for registered representative) = $1,736.52 million. The hourly wages for in-house legal and compliance counsel and registered representatives are obtained from SIFMA. The hourly rates for outside legal counsel are discussed in *infra* Section IV.B.5.

[1315] *See supra* footnote 1156 and subsequent text for a discussion of these factors. For these reasons and because we believe that quantification of the costs and benefits of the alternatives discussed in *infra* Section III.E would require still further assumptions, lead to additional imprecision, and yield less meaningful results, we have not included quantified estimates of the economic effects of these alternatives.

[1316] A product sponsor that does not lower its fees on a given product may risk experiencing low retail customer aggregate demand or low demand from broker-dealers as a result of Regulation Best Interest. To stay competitive this product sponsor may have to lower the fees on its product.

[1317] For purposes of this analysis, we assume that product sponsors respond to competitive pressures by lowering their fees. However, competition may affect quality in addition to price. For example, product sponsors may choose to offer higher quality products which may be costlier to produce (*e.g.*, because they must hire more skilled managers or apply more costly technology) and as such require higher fees. Alternatively, product sponsors may lower fees by reducing the quality of their product (*e.g.*, hiring fewer skilled managers) and, as a result, offering lower fee products that may produce lower average returns. Competition along both of these dimensions may allow retail customers to choose different combinations of quality and price, depending on their individual preferences.

[1318] Calculated based on data from the Center for Research in Security Prices (CRSP), University of Chicago Booth School of Business. Funds with different objectives may incur different marginal costs due to the frequency of trading in the markets that are reflective of the objective of the fund, advertising to reach a certain clientele, distribution costs, etc. The CRSP Mutual Fund dataset includes a breakdown of mutual funds by their objective types.

marketing expenses, and that we can observe, namely 12b–1 fees.[1319]

We estimate the marginal cost of distributing and operating a non-index fund in a given CRSP objective class (*i.e.,* strategy) as the minimum total fee of the funds in that class, after excluding index funds. Similarly, we estimate the marginal cost of operating an index fund in a given CRSP objective class as the minimum total fee of the index funds in that class. We then calculate the maximum "excess fee" for a fund (index or non-index) as the difference between the actual total fee of the fund and the marginal cost of the CRSP objective class that contains the fund. By construction, the excess fee cannot be negative.

We obtain an aggregate amount of reduced fees of approximatively $22.2 billion for non-index funds and $1.4 billion for index funds annually at the new potential equilibrium.[1320] The aggregate amount of saved fees across index and non-index funds becomes approximatively $23.6 billion. Similarly, if we focus on 12b–1 fees only, the aggregate amount of saved fees are $9.13 billion for non-index funds and $0.32 billion for index funds, or $9.45 billion across both index and non-index funds.

Using certain assumptions to calculate the present value of this potential fee reduction,[1321] we calculate the net benefit of the new equilibrium as the difference between the two present values of declining perpetuities that pay the dollar value associated with excess fees under the baseline equilibrium and the new equilibrium, respectively, for each of the three scenarios. When using the total fees, we obtain an expected net benefit of $35.21 billion in the moderate decay scenario, $59.15 billion in the accelerated decay scenario, and $76.49 billion in the rapid decay scenario. Similarly, when using 12b–1 fees only, we obtain an expected net benefit of $14.10 billion in moderate decay scenario, $23.69 billion in the accelerated decay scenario, and $30.63 billion in the rapid decay scenario.

b. Benefits to Investors Due to a Potential Reduction in the Relative Underperformance of Broker-Versus Direct Sold Mutual Funds

Another way to estimate the potential benefits of Regulation Best Interest is to use aspects of the approach used in the CEA Study and the DOL RIA, as suggested by several commenters.[1322] Specifically, we rely on academic literature claiming that, to varying degrees, broker-sold mutual funds underperform direct-sold mutual funds and assume that underperformance reflects agency costs associated with the conflicts of interest that may be present in recommendations provided by broker-dealers. Although this literature addresses only a portion of the AUM affected by Regulation Best Interest, we use methods from these studies to estimate the monetary effect the final rule might produce by reducing the effect that conflicts of interest have on the recommendations provided by broker-dealers.

Total AUM of load and no-load long-term mutual funds in the U.S. as of the end of 2018 are approximately $12.4 trillion, with $10.4 trillion attributable to no-load funds and $2.1 trillion attributable to load funds.[1323] To estimate the monetary effect of potential conflicts of interest as they pertain to mutual funds, we use estimates of the difference in net returns (gross returns on a fund's performance less fees and other expenses associated with the fund) between broker-sold funds and funds that are direct-sold from Reuter (2015).[1324] We then apply this difference to the aggregate market capitalization of load funds, which we assume are sold with a recommendation from a broker-dealer because we cannot identify the channel through which mutual funds are sold or whether each sale through the broker-sold channel involves a recommendation. To the extent that no-load funds are also sold by broker-dealers, this assumption may cause us to underestimate the portion of mutual fund AUM that are sold with a recommendation from a broker-dealer.[1325] Because the data in Reuter (2015) ends in 2012, for the purposes of this approach we assume that the relative underperformance of broker-sold funds, and hence our application of this underperformance to load funds as a proxy for funds sold with a recommendation from a broker-dealer, remains unchanged from 2012.[1326]

Reuter (2015) employs a variety of methods in computing the difference in net returns between broker-sold and direct-sold actively managed funds, including different ways of computing net returns (*e.g.,* net return, net return plus 12b–1 fees, net alphas, and ordinary least-squares and weighted least-squares regression methods), different samples (*e.g.* "non-specialized domestic equity"), and different weighting schemes (*e.g.* equally weighted or value weighted returns). Reuter concludes by noting that the performance difference between broker-sold and direct-sold actively managed mutual funds is likely to fall between 0.20% and 0.47%, depending whether or not 12b–1 fees are included in the estimation. Given that the underperformance only affects broker-sold funds, and applying these underperformance estimates to load funds, the estimated monetized underperformance of broker-sold funds

[1319] 12b–1 fees are paid out of fund assets to cover the costs of marketing and selling fund shares. "Distribution fees" include fees to compensate brokers and others who sell fund shares, and to pay for advertising and printing and mailing prospectuses to new investors. "Shareholder service fees" are fees that cover the cost of responding to investor inquiries and providing investors with information. This analysis excludes loads because, unlike 12b–1 fees, loads cannot be separately broken out.

[1320] We calculate the dollar value associated with these excess fees by multiplying the excess fees of a fund with total net assets (TNA) of the fund and then aggregating across funds. This amount represents the capital that would be reallocated towards more efficient funds and can be thought of as "fees saved" by retail customer as this product market shifts from the baseline equilibrium to the new equilibrium.

[1321] First, we note that expense ratios for equity mutual funds have declined at a rate of about 3% per year since 2000. This rate doubles to 6% if we focus on the period following FINRA's adoption of the Suitability Rule in 2011. We assume that under the current equilibrium, or "baseline equilibrium," excess fees—as defined above—would continue to decline at the rate of 3% per year. This rate of decay corresponds to a half-life of approximatively 23 years. We further assume that as the product market shifts towards the new equilibrium, excess fees decline at a rate that is at least as high as the post-2011 rate. Because Regulation Best Interest enhances the broker-dealer standard of conduct established by the Suitability Rule—particularly with respect to the disclosure, mitigation, or elimination of conflicts of interest, which is not addressed by the Suitability Rule—and the federal securities laws, we believe that a rate of decay that is at least as large as the one observed in the post-2011 period is not unreasonable. Under this assumption, we consider three scenarios: (1) Moderate decay at 6%; (2) accelerated decay at 9%; and (3) rapid decay at 12%. The half-life for each of these scenarios is 11.5 years, 7.7 years, and 5.8 years, respectively. Finally, we assume that the opportunity cost of the excess fees is equal to the expected rate of return on the value-weighted market portfolio, as defined in CRSP, as these fees encumber capital that would have otherwise been invested in efficient funds. To estimate the expected return on the market portfolio, we assume that the discount rate is the geometric average of the annual rate of return on the market portfolio over the period 1927–2018, namely 9.76%.

[1322] *See supra* footnote 1167.

[1323] *See* Investment Company Institute 2019 Fact Book, Figure 6.12.

[1324] *See* Reuter (2015), *supra* footnote 1095. In contrast to the DOL RIA, we do not base our analysis on excess loads, as estimated in Christoffersen et al. (2013), *supra* footnote 1081. Prior commenters noted that the average excess load, by definition, is zero and would likely yield a much lower estimate of aggregate harm, than the estimate published by the CEA and include in the DOL RIA. *See, e.g.,* Lewis (2017), *supra* footnote 1099. *See also supra* footnotes 1169 and 1170.

[1325] Brokers may still be compensated for selling no-load funds by 12b–1 fees, revenue sharing, or other arrangements.

[1326] *See supra* footnote 1102 for discussion of how trends in the relative performance of load funds may have changed in more recent years.

ranges from $4.1 billion per year to $9.7 billion per year.

As discussed elsewhere in this release, we expect Regulation Best Interest will reduce the severity of conflicts of interest that may contribute to the underperformance between broker-sold and direct-sold mutual funds. However, the range noted above most likely overestimates the expected reduction in harm associated with broker-sold mutual funds due to Regulation Best Interest for a number of reasons. First, as discussed by Bergstresser et al. (2009), broker-sold funds can be sold by both broker-dealers and investment advisers (*e.g.*, dually registered investment advisers), and the data these studies relied upon is not sufficiently granular to identify the fraction of broker-sold funds sold by each type of financial professional.[1327] Because Regulation Best Interest applies to registered broker-dealers, this range would need to be narrowed to reflect the proportion of broker-sold funds sold by registered broker-dealers.

Second, the estimated range fully attributes the differences between direct-sold funds and broker-sold funds to conflicts of interest between retail customers and broker-dealers. This might over-estimate the benefits of Regulation Best Interest because there might be other unobservable systematic differences between investors who choose direct-sold funds versus those who choose to employ a financial professional. For example, retail customers that buy broker-sold funds might be willing to pay more for those funds if they receive intangible benefits from a broker-dealer's recommendation that are not reflected in the relative performance between funds sold through these two channels. Furthermore, not all sales in the broker-sold channel are triggered by recommendations provided by broker-dealers or their associated persons. For example, customer-directed transactions may not involve a recommendation at all.

Third, measuring a fund's performance using its net return relative to a benchmark might not be the most accurate measure of a fund manager's skill or the value created by a fund to an investor.[1328] Therefore, estimating investor harm assuming this definition of the value created by a fund might potentially overstate or understate this harm.

Taking into account these caveats,[1329] to the extent that Regulation Best Interest mitigates, and in the limit, eliminates the adverse effects of conflicts of interest on broker-dealers' recommendations, we estimate that the benefits attributable to Regulation Best Interest could be as large as $4.1 billion per year to $9.7 billion per year when estimated assuming that the relative underperformance of broker-sold mutual funds estimated in the academic literature reflects conflicts of interest that will eventually be eliminated.

As with our other estimates of the benefits above, we assume that there is already a decreasing trend in the underperformance gap under the baseline that is consistent with the decreasing trend in mutual fund expense ratios of 3%, and that Regulation Best Interest will accelerate this trend to a decay rate under three scenarios: (1) Moderate decay at 6%; (2) accelerated decay at 9%; and (3) rapid decay at 12%. Similarly, we assume a discount rate of 9.76% as above to value these cash flows. Under these assumptions, the present value of the potential benefits of Regulation Best Interest in the mutual fund sector, relative to the baseline, from limiting or eliminating the adverse effects of conflicts of interest could be as large as approximately $6.8 to $16 billion in the moderate decay scenario, $11.4 to $26.7 billion in the accelerated decay scenario, and $14.7 to $34.5 billion in the rapid decay scenario.

Finally, we can obtain an approximate estimate of the present value of the costs associated with Regulation Best Interest using the costs estimated in Section IV for purposes of the Paperwork Reduction Act, which imply aggregate initial costs of approximately $5.96 billion and ongoing costs of $2.37 billion. Assuming the initial costs are incurred one year from the rule's enactment, and using a discount rate of 9.76% as above, the present value of these costs is approximately $27.5 billion. Note that this cost estimate cannot be directly compared with the benefit estimates above as the benefits estimates are with respect to mutual funds only.

D. Efficiency, Competition, and Capital Formation

As discussed above, Regulation Best Interest is designed to address the agency costs that arise when an associated person of the broker-dealer provides a recommendation to a retail customer that may not be fully addressed by the regulatory baseline. Regulation Best Interest is intended to reduce agency costs and other costs by enhancing the standard of conduct of broker-dealers, increasing the effectiveness of disclosure to allow retail customers to make a more informed decision with respect to the recommendation they receive and by requiring broker-dealers to implement policies and procedures reasonably designed to reduce the effect of conflicts of interest on recommendations to retail customers. Specifically, the Disclosure Obligation and Conflict of Interest Obligation require broker-dealers to disclose information that, while not necessarily new in all instances, will reach retail customers more directly and more timely than under the regulatory baseline. In addition, the disclosed information would raise a retail customer's salience of fees, scope of the relationship, conflicts of interest, and limitations of the menu of securities from which the retail customer receives recommendations as potential factors affecting the recommendations of a broker-dealer or its associated persons. The content and form of disclosure may help some retail customers make more informed decisions with regards to whether to act on a recommendation provided by an associated person of the broker-dealer. Regulation Best Interest may also reduce the agency costs faced by these retail customers.

The Conflict of Interest Obligation also requires broker-dealers to implement policies and procedures to reduce the effect of conflicts of interest and securities menu limitations on recommendations to retail customers. For broker-dealers that implement more effective policies and procedures, the obligation may increase the efficiency of the recommendations for their retail customers. As a result, Regulation Best Interest may reduce the agency costs faced by these retail customers.

The Care Obligation requires a broker-dealer and its associated persons to have a reasonable basis to believe that a recommendation provided to a retail customer is in the customer's best interest. This reasonable basis should include factors similar to those identified by the Suitability Rule of the current regulatory regime as well as additional factors. For example, relative to the regulatory baseline, the Care Obligation requires that a broker-dealer and its associated persons consider costs, among other factors, and establish a direct link between the attributes of a security or investment strategy and the retail customer's best interest. By

[1327] *See* Bergstresser et al. (2009), *supra* footnote 1048.

[1328] *See supra* footnote 1176.

[1329] *See supra* footnotes 1172–1178 for further discussion of the limitations that apply in using the relative underperformance of broker-sold mutual funds as an estimate of investor harm and, therefore, the benefits of Regulation Best Interest.

requiring consideration of costs and by including an explicit link between the investment-related factors and the best interest, the obligation may increase the efficiency of the recommendations for the retail customer. As a result, Regulation Best Interest may reduce the agency costs faced by these retail customers.

Through these effects, as discussed below, Regulation Best Interest may have an effect on competition, capital formation, and efficiency.

1. Competition

Regulation Best Interest may have competitive effects for the market for investment advice and may affect how broker-dealers compete with each for retail customers. As discussed in Section III.C, the brokerage industry currently recognizes that broker-dealers and their associated persons may have conflicts of interest that create incentives for broker-dealers or their associated persons to make recommendations that, while suitable for their retail customers, may not be in the best interest of (and may not be the most efficient recommendations for) such customers. As noted above in Section III.B.2.c, a FINRA survey suggested that broker-dealers currently employ different methods for managing conflicts of interest, with some methods being more effective than others at reducing the effect of conflicts of interest on recommendations. These methods generally depend on the size and complexity of a broker-dealer's business model. Against this backdrop, the cost of complying with Regulation Best Interest, scaled by the size and complexity of a broker-dealer's business activities, may be higher for broker-dealers that currently employ less effective methods for managing conflicts of interest.

Relative to broker-dealers that face lower compliance costs, broker-dealers that face higher compliance costs may be at a disadvantage when competing for retail customers and may not be able to fully pass on these costs to their retail customers. For example, the presumption related to the titles "adviser" and "advisor" may impose higher costs on broker-dealers that use these terms in their names or titles, but that are not dual-registrants.[1330] The extent to which broker-dealers are able to pass on costs to their retail customers depends on a number of factors that include the availability of close substitutes for the services provided by broker-dealers and the cost to retail customers of switching accounts to a competing broker-dealer, investment adviser, or other financial services provider. If broker-dealers are unable to pass costs through to customers, it is possible that some of the broker-dealers that face high compliance costs may decide to exit the market for investment advice in the capacity of a broker-dealer.

The potential competitive effects associated with compliance costs could be further exacerbated by how broker-dealers choose to comply with the component obligations of Regulation Best Interest. As discussed in Section III.C.4, broker-dealers are given flexibility when addressing conflicts of interest through policies and procedures. Because Regulation Best Interest and the component obligations are generally principles-based, a broker-dealer would have to determine what constitutes effective means of addressing a given conflict of interest, and how it should relate to the size and complexity of a broker-dealer's business model. For a broker-dealer that is dually registered or for a broker-dealer that is affiliated with an investment adviser, the overall costs of complying with Regulation Best Interest may encourage the broker-dealer to exit the market for providing investment advice in the capacity of a broker-dealer and, instead, provide advice only in the capacity of an investment adviser. Whereas broker-dealers have explicit requirements to establish written policies and procedures reasonably designed to disclose, mitigate or eliminate identified conflicts of interest that create an incentive for the associated persons to place their interest ahead of the retail customer, the fiduciary standard for investment advisers relies on full and fair disclosure and informed consent to address conflicts of interest.[1331] Investment advisers must also adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act, including violations related to undisclosed conflicts of interest.[1332] More generally, compliance costs may drive such firms to no longer offer advice in the capacity of a broker-dealer if firms anticipate the profitability of their broker-dealer business under Regulation Best Interest to be lower than the profitability of their advisory business.

Similar concern over costs of complying with Regulation Best Interest may deter some broker-dealers from entering the market for investment advice. Higher entry costs may have long-run competitive effects on prices paid by retail customers, as incumbents adjust their strategic behavior to reflect a lower threat of competition from new entrants, relative to the baseline.[1333] Regulation Best Interest may also encourage competition for retail customers to the extent that the Disclosure Obligation increases the retail customers' salience to variables such as fees and conflicts of interest that would facilitate comparability across broker-dealers. For example, retail customers may form preferences over some or all of the disclosed variables, such as fees, securities or service offerings, and range of conflicts of interest, and may choose one broker-dealer over another or over an investment adviser based on these preferences. In turn, if firms anticipate that there is a possibility that retail customers may use the disclosed variables for comparability purposes, broker-dealers may compete over some or all of these variables to attract more retail customers. This potential competition may result in greater securities or service offerings, or lower fees for retail customers.

Regulation Best Interest may also affect how broker-dealers compete with each other when negotiating with investment sponsors for access to securities. The findings of the aforementioned FINRA survey suggest that broker-dealers may face different degrees of competition when negotiating with product sponsors for access to certain securities. For instance, the survey observed that some product sponsors rate the broker-dealers that are interested in distributing their securities based on criteria such as product expertise and experience, the quality of the control environment, and the strength of their sales practices. Broker-dealers that have higher ratings, based on these criteria may be given access to a broader range of securities, including more complex securities. In contrast, broker-dealers that have lower ratings may be given access to a narrower range of securities. To the extent Regulation Best Interest has the effect of increasing and homogenizing the product expertise and experience (*e.g.*, the Care Obligation) and the quality of the

[1330] *See supra* footnotes 1216–1220.

[1331] As discussed in *supra* Section I.C, some broker-dealer commenters also expressed the view that by requiring mitigation of financial incentives, Regulation Best Interest would require more of broker-dealers than what is required of investment advisers under their fiduciary duty, which could create a competitive issue for broker-dealers that could further encourage migration from the broker-dealer to investment adviser model and result in a loss of choice for retail customers. Because of this competitive issue, dually registered financial professionals could be incentivized to recommend advisory accounts through compensation.

[1332] *See* Advisers Act Rule 206(4)–7.

[1333] *See, e.g.*, Mas-Colell et al. (1995).

control environment (*e.g.,* the Conflict of Interest Obligation) across the complying broker-dealers, the final rule may increase the competition across firms when negotiating with product sponsors. This increased competition may allow product sponsors to economize on the distribution costs, and may result in lower fees for retail customers.

Regulation Best Interest may also have competitive effects for the market for investment advice, more generally. Regulation Best Interest may affect how broker-dealers compete with firms that provide advice in a capacity other than as a broker-dealer, such as an investment adviser. Under the regulatory baseline, investment advisers owe a fiduciary duty to their clients. Some commenters describe this standard of conduct as a "higher" standard compared to the standard of conduct applies to broker-dealers under the regulatory baseline.[1334]

For some retail customers the duty owed to them by their firm or financial professional may be a determining factor when deciding which type of firm or financial professional they want to use. As previously noted, key elements of the standard of conduct that applies to broker-dealers, at the time a recommendation is made, under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act. As such, the standard of conduct under Regulation Best Interest may make broker-dealers more attractive to certain retail customers who seek recommendations for securities transactions or investment strategies in a more cost effective manner, but worry about the duties owed to them by their financial professional. As a result, Regulation Best Interest may increase the competition between broker-dealers and investment advisers for retail customers interested in obtaining investment advice. In competing for business, broker-dealers and investment advisers may lower their fees, resulting in retail customers paying less for obtaining investment advice. To the extent that this potential lower cost causes an increase in the demand for investment advice in the capacity of a broker-dealer, this positive competitive effect may offset some of the negative potential competitive effects of Regulation Best Interest, such as higher cost of entry in the market for investment advice in the capacity of a broker-dealer relative to the baseline, as discussed above.

The Disclosure Obligation may also encourage competition for retail customers across broker-dealers and investment advisers. As noted above, the Disclosure Obligation would require broker-dealers to make full and fair disclosure of all material facts relating to the scope and terms of the relationship with the retail customer and all material facts relating to conflicts of interest that are associated with a recommendation. Investment advisers are also required to provide full and fair disclosure of material facts about similar elements under the current regulatory regime. To the extent that the Disclosure Obligation raises the salience of variables that may facilitate comparison across broker-dealers and investment advisers, Regulation Best Interest may encourage competition between broker-dealers and investment advisers.

Regulation Best Interest may also have competitive effects for financial professionals that offer investment advice in a capacity other than that of a broker-dealer (*e.g.,* investment advisers and other financial professionals that are not registered with the Commission, such as insurance companies, banks, and trust companies). As discussed above in Section III.C.4, depending on the effectiveness of disclosure and the effectiveness of policies and procedures that address securities menu limitations (*e.g.,* the Disclosure Obligation and Conflict of Interest Obligation), Regulation Best Interest may reduce the retail customers' aggregate demand for certain securities that are distributed by broker-dealers and securities on which broker-dealers or their associated persons provide recommendations. Instead, retail customers may access some of these or comparable securities from other financial professionals. For example, a retail customer may access certain securities offered by broker-dealers through corporate fiduciaries such as commercial banks or trust companies. Alternatively, a retail customer may open an advisory account and access securities that are comparable to those offered by the broker-dealer. To the extent that Regulation Best Interest causes a potential reduction in the retail customers' aggregate demand for securities offered by broker-dealers, retail customers' aggregate demand may increase for securities offered by non-broker-dealers. Regulation Best Interest may also affect how product sponsors compete for flows from retail customers. As discussed above in Section III.C.4, depending on the effectiveness of disclosure and the effectiveness of policies and procedures that address limitations of the menu of securities (*e.g.,* Disclosure and Conflict of Interest Obligations), Regulation Best Interest may reduce the aggregate demand for certain sponsors' securities. To remain competitive, product sponsors that face decreased demand as a result of Regulation Best Interest may reprice their securities (*e.g.,* by offering different share classes), lower their fees, or seek alternative distribution channels that are not affected by Regulation Best Interest. For example, product sponsors may choose to distribute their securities through investment advisers or through commercial banks to the extent that the banks can engage in limited broker-dealer activity, subject to certain conditions, without having to register as broker-dealers.[1335] Finally, product sponsors may choose to distribute their securities directly to retail investors rather than indirectly, through broker-dealers. The potential competitive effect of Regulation Best Interest on product sponsors may manifest itself in lower product fees for retail customers.

2. Capital Formation and Efficiency

Regulation Best Interest is designed to reduce the agency and other costs to retail customers associated with obtaining recommendations from broker-dealers. As discussed above, to reduce these costs, Regulation Best Interest would impose obligations on broker-dealers that are designed to increase the efficiency of the recommendations to retail customers relative to the recommendations that broker-dealers and their associated persons provide to retail customers under the regulatory baseline.

To the extent retail customers receive recommendations that are more efficient relative to the baseline, Regulation Best Interest would increase the efficiency of the portfolio allocation that a retail customer makes as a result of the recommendation received. As discussed above in Sections III.A.2 and III.C, this would occur when a retail customer increases the allocative efficiency of his or her portfolio when the recommendation leads to a reallocation of resources across time and market and economic conditions that generate a higher net benefit to the retail customer, relative to the baseline. Thus, to the extent that Regulation Best Interest

[1334] *See* Letter from Ken Fisher, Fisher Investments (Jul. 31, 2018) ("Fisher Letter"); PIABA Letter; FPC Letter; NASAA August 2018 Letter; U. of Miami Letter; Rhoades August 2018 Letter.

[1335] *See* Exchange Act Sections 3(a)(4)(B) and 3(a)(5)(B) and rules thereunder (providing banks exceptions from "broker" and "dealer" status for specified securities activities).

increases the efficiency of the associated persons' recommendations to retail customers, the final rule would have a positive effect on the retail customers' allocative efficiency.

Regulation Best Interest may also increase the efficiency of the recommendations involving rollovers or transfers of assets from retirement accounts to other taxable or non-taxable accounts, relative to the baseline. As noted above, the incentives associated with this type of recommendation are particularly acute because of the size of the transaction and the importance to the retail customer (*e.g.,* given that the amount of assets associated with such recommendations can be a significant portion of a retail customer's net worth). The potential increase in the efficiency of this type of recommendation may improve the allocative efficiency of assets held in retirement accounts, and may encourage retail customers to consider a rollover or transfer of assets recommendation to potentially increase the efficiency of their retirement asset allocation.

Similarly, Regulation Best Interest may increase the efficiency of the recommendations regarding account types. As discussed above, currently, a dual-registrant may have an incentive to recommend the account type that benefits the dual-registrant at the expense of the retail customer. The potential increase in the efficiency of this type of recommendation under Regulation Best Interest relative to a similar recommendation that the dual-registrant may provide under the baseline may improve the allocative efficiency of the retail customer's assets held in this account.

The possibility that Regulation Best Interest may increase the efficiency of the recommendations provided by the associated persons of the broker-dealer may enhance the attractiveness of broker-dealer services for those investors who currently do not invest through broker-dealers. Although there are costs associated with these requirements, the protections deriving from these requirements may benefit investors, issuers, and intermediaries by helping to create a marketplace where a higher number of retail customers invest through broker-dealers, relative to the current regulatory regime. If retail customers are more willing to participate in the securities markets through broker-dealers, Regulation Best Interest would have a positive effect on capital formation.

E. Reasonable Alternatives

Regulation Best Interest establishes a new standard of conduct for broker-dealers under the Exchange Act that is intended to address the agency costs that retail customers face when obtaining recommendations of securities transactions and investment strategies from broker-dealers and their associated persons. This new standard is intended to enhance investor protection, while preserving, to the extent possible, retail investor access (in terms of choice and cost) to differing types of investment services and securities. As noted above, the Commission considered several reasonable alternative policy choices, including (1) applying the fiduciary standard under the Advisers Act to broker-dealers, and (2) adopting a "new" uniform fiduciary standard of conduct applicable to both broker-dealers and investment advisers, such as that recommended by the staff in the 913 Study. The Commission also considered adopting similar standards to those the DOL had provided under its fiduciary rule to broker-dealers and investment advisers.[1336] We examine the effects of these primary alternatives, as well as several other alternatives that we considered both in the Proposing Release and in response to comments.

1. Fiduciary Standard for Broker-Dealers

As discussed in the Proposing Release and as raised by commenters, instead of adopting our approach in Regulation Best Interest, the Commission could have alternatively imposed a form of fiduciary standard on broker-dealers providing recommendations to retail customers. The Commission recognized that fiduciary standards vary among investment advisers, banks acting as trustees or fiduciaries, or ERISA plan providers, but fiduciaries are generally required to act in the best interest of their clients.[1337]

Under any of the options considered, the Commission would have to craft a mechanism to apply a uniform standard of conduct to all financial professionals regardless of how they engage with their retail customers. This approach was advocated by certain commenters, many of whom asserted that it would reduce retail investor confusion as it would ensure that investors are provided the same standard of care and loyalty regardless of what type of financial professional they engage.[1338] As discussed above and in detail further below we believe, in practice, that such uniformity would be difficult to implement and disruptive to pursue as a result of various factors, including the key differences in the ways broker-dealers and investment advisers engage with retail clients. Achieving such uniformity could require narrowing the type and scope of services permitted to be provided by various types of financial professionals. If we were to pursue such an approach, it could reduce retail customers' confusion with respect to the duties owed to them by the broker-dealers and investment advisers and could reduce potential costs to some investors associated with choosing a type of relationship that is not well suited to them, because under a uniform standard, retail customers of each type of financial professional would be subject to the same standard of conduct.

However, this uniformity could come at a cost to both investors and financial service providers. Such an approach could result in a standard of conduct for broker-dealers that is not appropriately tailored to the structure and characteristics of the broker-dealer model (*i.e.,* transaction specific recommendations and compensation), and might not properly take into account, or build upon, existing obligations that apply to broker-dealers, including under FINRA rules.[1339] A potential implication of this paradigm shift would be that broker-dealers would face significant compliance costs, at least in the short run, relative to the regulatory baseline. Potentially higher compliance costs could increase the incentive to offer investment advice in the capacity of investment adviser and could decrease the incentive to offer investment advice in the capacity of broker-dealer. To the extent broker-dealers act on the increased incentives and decide to participate in the market for investment advice only in the capacity of investment advisers, retail customers could experience an increase in the cost of obtaining investment advice, relative to the baseline. Furthermore, as noted above, the potential exit of broker-dealers from the market for investment advice in the broker-dealer capacity could limit how retail customers would access certain securities or investment strategies and how they would pay for investment advice, which, in turn, could increase

[1336] We had additionally discussed in the Proposing Release an alternative of a principles-based best interest standard. *See* Proposing Release at 21663. Some of the economic effects of this alternative would be similar to the economic effects of any of the fiduciary alternatives, which would also be principles-based.

[1337] *See* Proposing Release at footnotes 328–329. For example, an investment adviser's fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the "best interest" of its client at all times. *See* Fiduciary Interpretation.

[1338] *See, e.g.,* Better Markets Letter at 24.

[1339] *See also* 913 Study at 139–143.

their costs of obtaining investment advice, relative to the baseline.[1340] To the extent broker-dealers decide to continue to participate in the market for investment advice in the capacity of broker-dealers, they could pass on increased compliance costs, in full or in part, to their retail customers. As a result, retail customers could experience an increase in the cost of obtaining investment advice, relative to the baseline. The potential increase in the cost of accessing investment advice could push some retail customers outside the market for investment advice from Commission-registered broker-dealers and investment advisers.[1341]

We discuss each of the three options for applying a uniform fiduciary standard in more detail below. We compare each of the three alternatives against the regulatory baseline, which is the current broker-dealer regulatory regime. In addition, we briefly discuss the differences between the standard of conduct imposed by Regulation Best Interest and the fiduciary standard under the Advisers Act. As discussed above in Section I, we believe that our approach in adopting Regulation Best Interest will best achieve the Commission's important goals of enhancing retail investor protection and decision making, while preserving, to the extent possible, retail investor access (in terms of choice and cost) to differing types of investment services and securities.

a. Fiduciary Standard Under the Advisers Act Applied to Broker-Dealers

A number of commenters discussed the viability of this alternative and stated that it would provide superior investor protection benefits relative to the standard that the Commission proposed.[1342] At the outset, we note that, at the time a recommendation is made, key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act. Both standards of conduct require that, when making a recommendation or providing advice, firms and financial professionals act in the best interest of the retail investor and not place the financial professionals' interests ahead of the retail investor.[1343] Both standards provide methods for addressing conflicts of interest, although the mechanics of those methods and their outcomes may be different,[1344] and both standards require full and fair disclosure of material facts that affect the relationship, including costs. Both standards allow each type of financial professional to agree to provide account monitoring services to retail investor accounts, although continuous monitoring is embedded in the regulatory regime and market practices for investment advisers, whereas a broker-dealer may agree to provide account monitoring services only to the extent that it is solely incidental to the primary brokerage business.[1345]

We recognize that there are certain notable differences between the Advisers Act fiduciary standard and the Regulation Best Interest standard we are adopting. In particular, the investment adviser fiduciary duty is generally principles-based, in keeping with the regulatory tradition and market practices for advisers,[1346] whereas Regulation Best Interest, while also largely principles-based, establishes minimum, obligations that are generally more prescriptive than the fiduciary obligations under Advisers Act. Further, advisers are able to address conflicts of interest through full and fair disclosure and informed consent,[1347] while broker-dealers must have policies and procedures that are reasonably designed to identify and disclose and mitigate, or eliminate, any conflicts of interest associated with recommendations that create an incentive for the broker-dealer or its associated persons to place the interest of the broker-dealer or its associated persons ahead of the interest of the retail customer. With regard to the substance of both standards, the investment adviser fiduciary duty generally is broader and applies to the entire relationship between adviser and client, including providing non-securities advice,[1348] whereas Regulation Best Interest only applies at the time of a recommendation of any securities transaction or investment strategy by a broker-dealer to its retail customers.[1349] Where application of the Advisers Act fiduciary standard to broker-dealers would impose on broker-dealers obligations similar to those of Regulation Best Interest, we anticipate similar economic effects; in contrast, where this alternative would result in different obligations, it would generate economic effects distinct from those of Regulation Best Interest.

i. Fiduciary Standard Under the Advisers Act Relative to the Baseline

Relative to the regulatory baseline, the fiduciary standard of this alternative applied to broker-dealers could benefit retail customers in some circumstances by extending the obligations of all firms and financial professionals to act in the best interest of retail customers (and to not place the interest of the firm or the interest of the financial professionals ahead of those of the retail customers) to aspects of the relationship other than providing personalized investment advice through recommendations. For example, retail customers might benefit if broker-dealers were required (as advisers are under their current fiduciary standard) to disclose any material conflicts related to their execution of trades for retail customers in the case when the broker-dealer has not provided a recommendation regarding the transaction (*e.g.*, self-directed trade). In addition, under the fiduciary standard that applies to investment advisers, if an investment adviser cannot fully and fairly disclose a material conflict of interest to a client such that the client could reasonably be expected to provide informed consent, the investment adviser would be expected to either eliminate the conflict or adequately mitigate (*i.e.*, modify its practices to reduce) the conflict to the point where full and fair disclosure of the conflict to the client and informed

[1340] *See supra* Section III.D.1.

[1341] *See supra* Section I.A for a discussion of access to investment advice in the context of the DOL Fiduciary Rule.

[1342] *See* Betterment Letter; Warren Letter; Fein Letter; State Treasurers Letter; AARP August 2018 Letter; ACLI Letter; Schwab Letter.

[1343] *See supra* Section I.A.

[1344] Whereas, pursuant to Regulation Best Interest, broker-dealers are required to (i) to establish written policies and procedures reasonably designed to identify and at a minimum, disclose, or eliminate, all conflicts of interest; and (ii) to establish written policies and procedures reasonably designed to mitigate or eliminate identified conflicts of interest, the fiduciary standard for investment adviser relies on full and fair disclosure and informed consent.

[1345] *See* Solely Incidental Interpretation. *See also supra* Section II.B.2.b.

[1346] *See* Fiduciary Interpretation.

[1347] *See id.*

[1348] For example, an investment adviser may consider both securities annuity products (*e.g.*, variable annuities) and non-securities annuity products (*e.g.*, fixed annuities) when providing advice on annuity products to a client with an advisory retirement account.

[1349] However, under the current legal and regulatory regime, broker-dealers are subject to other rules that apply outside the context of a recommendation, including rules regarding how broker-dealers market securities and services (communications with the public), how they execute trades (best execution), and the fees that they charge (fair and reasonable compensation obligations). Moreover, broker-dealers always a have a duty of fair dealing with their retail customers under SRO rules. In addition, broker-dealers are subject to a number of obligations that attach when a broker-dealer makes a recommendation to a customer, as well as general and specific requirements aimed at addressing certain conflicts of interest, including requirements to eliminate, mitigate, or disclose certain conflicts of interest. *See* Proposing Release Section I.A.1.

consent is possible.[1350] To the extent that this approach of addressing conflicts of interest would extend to the fiduciary standard in this alternative, a broker-dealer would also have to eliminate or modify a conflict of interest to the point where full and fair disclosure and informed consent is possible. The potential reduction in the effect of conflicts of interest on recommendations and the potential reduction in the information asymmetry between a retail customer and a broker-dealer would likely increase the efficiency of the recommendation provided by the firm to the retail customer, relative to the baseline. Thus, this alternative may reduce the agency costs of the relationship between a broker-dealer and a retail customer, which would benefit retail customers, relative to the baseline.

However, any such benefits would come at a cost. As an initial matter, the fiduciary standard under this alternative is a principles-based regime and shaped by decades of case law specific to investment advisory model. In contrast, the standard of conduct that applies to broker-dealers under the baseline is more prescriptive, and governed by detailed SRO rules. Therefore, if this alternative were adopted, broker-dealers would face increased compliance costs resulting from having to conform their advice models to a regulatory regime that was not formed for a transaction-based model governed by detailed SRO rules.

The potential increased compliance costs associated with applying the fiduciary standard in this alternative to broker-dealers would likely increase the broker-dealers' incentives to offer investment advice in the capacity of investment adviser and may decrease their incentive to continue offering investment advice in the capacity of broker-dealer dealer (on a transaction-by-transaction basis), relative to the baseline.[1351] For example, if this alternative were to create situations where the compensation to a broker-dealer for providing a recommendation in a commission-based brokerage account would be less than the compensation under a fee-based advisory account and/or where the perceived regulatory burden for an investment adviser is lower, relative to the baseline, a broker-dealer's incentive to offer advice in the capacity of investment adviser would likely increase, relative to the baseline.[1352]

To the extent broker-dealers act on the increased incentives and decide to participate in the market for investment advice only in the capacity of investment advisers—for example, dual-registrants may prefer to offer investment advice only in the capacity of investment adviser—retail customers may experience an increase in the cost of obtaining investment advice, relative to the baseline. Furthermore, as noted above, the potential exit of broker-dealers from the market for investment advice in the capacity of broker-dealer may limit how retail customers can access certain securities or investment strategies and how they can pay for investment advice, which, in turn, may further increase the cost of obtaining investment advice, relative to the baseline.[1353] Alternatively, to the extent broker-dealers decide to continue to participate in the market for investment advice in the capacity of broker-dealers, they may pass on the increased compliance costs, in full or in part, to their retail customers in the form of higher prices for services rendered. In particular, retail customers may experience an increase in the cost of obtaining investment advice, relative to the baseline.

It is also possible that the fiduciary standard of this alternative may result in a different menu of choices that allows retail customers to access investment advice in a more cost-efficient manner relative to the baseline. For example, if more financial professionals decide to participate in the market for investment advice in the capacity of investment advisers, competitive pressure may result in investment advisers providing better pricing and/or more choices of accessing investment advice for retail customers.

To the extent that the cost of accessing investment advice increases under the fiduciary standard of this alternative, some retail customers may be pushed outside the market for investment advice. For example, currently, a retail customer that prefers to receive recommendations from a broker-dealer or its associated persons to implement a buy-and-hold strategy may find a brokerage account to be better suited to his or her needs compared to an advisory account.[1354] Under the fiduciary standard in this alternative, this retail customer may have to pay more for the broker-dealer services that come with his or her account, including obtaining investment advice, relative to the baseline. If this increase in the cost for broker-dealer services outweighs the benefits of the potential improved efficiency of the recommendations provided by the

[1350] *See* Fiduciary Interpretation.

[1351] *See* Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice* (Working Paper, Apr. 2019) for a recent paper providing an empirical analysis on the effect of state-level standards of conduct on the structure of the market for investment advice in the context of variable annuities. The study finds differences in broker-dealer behavior when comparing states with and without a fiduciary obligation for broker-dealers. The states with the obligation are associated with fewer variable annuity sales and are also associated with some broker-dealers exiting the industry. Specifically, the paper observes, among other things, that a state-level obligation reduces the number of broker-dealers that are not dually registered by about 16% but has no meaningful effect on the number of dual-registrants. The authors argue that this compositional shift in the number of broker-dealers is due to firms exiting the market. The paper also observes that a state-level obligation on broker-dealers may cause a compositional shift in the pool of variable annuities sold by broker-dealers toward annuities that offer a larger and more diverse set of investment options, which, in certain circumstances, may also generate higher expected returns for retail customers. The paper also observes that under certain circumstances a state-level obligation on broker-dealers may increase the quality of the variable annuities sold by broker-dealers. "Quality" is defined by the authors as "the return on variable annuities assuming optimal allocation." The authors interpret these results as suggesting that a state-level obligation on broker-dealers may (i) cause some broker-dealers to exit the market, and (ii) cause a compositional shift in the variable annuities sold by the broker-dealers that do not exit the market toward annuities of higher quality as defined in the paper. However, the limitations of the data sample and of the empirical methodology make it difficult to (i) generalize these results to the entire market of annuities sold by broker-dealers, (ii) extrapolate these results to the entire universe of securities that broker-dealers offer advice on, (iii) extrapolate the results to the population of broker-dealers not captured by the data sample, or (iv) use the results as a basis for comparing the investor protections offered by state-level standards of conduct, SRO rules, existing federal standards of conduct, and Regulation Best Interest. *See also supra* footnote 1163 and surrounding discussion noting that there is substantial variation in the sources, scope, and application of state fiduciary law.

[1352] Broker-dealers that choose to deregister would eliminate the costs of complying with FINRA rules, which are broader than retail customer sales practice obligations, and submitting to FINRA examinations as well as compliance with other specific rules, which do not apply to advisers.

[1353] *See supra* Section III.D.1.

[1354] For example, Del Guercio & Reuter (2014), *supra* footnote 1081, document (Table 1 on page 1682) that retail customers can access index funds through both broker-dealers (*i.e.*, the broker-sold channel, as discussed above) and directly from the fund sponsor (*i.e.*, the direct-sold channel). Furthermore, in their sample, the average expense ratio for an index fund is 0.86 if sold through the broker-sold channel and 0.44 if sold through the direct channel. Assuming that a retail customer is interested in implementing a buy-and-hold strategy using index funds that carry no loads, the cost to the retail customer of implementing this strategy through a broker-dealer would be on average 86 basis points of the assets invested per year. In contrast, the cost to the retail customer of implementing the same strategy through an investment adviser would be on average 44 basis points plus the investment adviser's AUM-based fee per year. Assuming that in the investment adviser's fee is 100 basis points of AUM per year, the cost to the retail customer of implementing his or her strategy with an investment adviser would be on average 144 basis points.

broker-dealer for this retail customer, as noted above, the retail customer may prefer to switch to a more-limited brokerage account that does not come with personalized investment advice (*e.g.*, an execution-only brokerage account).[1355] Alternatively, and as noted by one commenter, the retail customer may switch to a light version of an advisory account that implements automated investment strategies tailored around a retail customer's goals.[1356] However, this type of advisory account may not offer the flexibility of personalized investment advice to the evolving needs of the customer and may not be as responsive to market movements not anticipated by the automated investment strategies.

b. Uniform Fiduciary Standard Under 913(g)

Another alternative approach to the standard of conduct imposed by Regulation Best interest is a "new" uniform fiduciary standard of conduct applicable to both broker-dealers and investment advisers, such as that recommended by the staff in the 913 Study.[1357] The fiduciary standard under this alternative would require firms "to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice." Based on the Commission staff's recommendations about ways in which the fiduciary standard proposed by the 913 study could be implemented, the fiduciary standard under this alternative could have imposed any or all of the following requirements: (1) Eliminate or disclose conflicts of interest; (2) prohibit certain conflicts of interest by requiring firms to mitigate conflicts through specific action, or to impose specific disclosure and consent requirements; and (3) specify the basis a broker-dealer or investment adviser has in making a recommendation to a retail customer by referring to and expanding upon broker-dealers' existing suitability requirements.

Some of the benefits of the investment advisers' fiduciary standard of the previous alternative would carry over to the new uniform standard of this alternative. In particular, relative to the baseline, the new fiduciary standard of this alternative applied to broker-dealers could benefit retail customers in some circumstances by extending the obligations of all firms and financial professionals to act in the best interest of retail customers (and to not place the interest of the firm or those of the financial professionals ahead of the interest of the retail customer) to aspects of the relationship other than providing personalized investment advice through recommendations.

In addition, the new fiduciary standard of this alternative applied to broker-dealers may create additional benefits for their retail customers, relative to the baseline. For example, requirements (1) and (2) may enhance the obligations under the baseline by requiring broker-dealers to disclose conflicts of interest and to take actions to mitigate or eliminate certain conflicts of interest. To the extent that these requirements reduce of the effect of the conflicts of interest on the recommendation provided by a broker-dealer or its associated persons and reduce the information asymmetry between retail customers and broker-dealers, the new fiduciary standard of this alternative may increase, relative to the baseline, the efficiency of the recommendations made by broker-dealers and their associated persons. Furthermore, requirement (3) may enhance the existing suitability requirements that apply to broker-dealers and, to the extent that this requirement results in recommendations that are better aligned with the objectives of the retail customers, the new fiduciary standard of conduct of this alternative may further increase, relative to the baseline, the efficiency of the recommendations provided by broker-dealers and their associated persons. The potential increase in the efficiency of the recommendations provided by broker-dealers and their associated persons under the new fiduciary standard of this alternative would benefit retail customers, relative to the baseline.

Similarly, the new fiduciary standard of this alternative applied to investment advisers may create benefits for their clients, relative to the baseline. Requirements (1) and (2) would enhance the obligations of the investment advisers under the current fiduciary standard that applies to investment advisers by requiring investment advisers to take actions to mitigate or eliminate certain conflicts of interest. To the extent that these requirements reduce of the effect of the conflicts of interest on the recommendation provided by an investment adviser or its associated persons and reduce the information asymmetry between retail customers and investment advisers, the new fiduciary standard under this alternative may increase the efficiency of the recommendations made by investment advisers and their associated persons, relative to the baseline.

The new fiduciary duty of this alternative may also result in increased competition across financial professionals for retail customers or clients, relative to the baseline. This potential increase in competition, relative to the baseline, may benefit retail customers of broker-dealers and clients of investment advisers in the form of lower prices for investment advice.

Turning to the potential costs imposed by this alternative, we note that some of the costs of the investment advisers' fiduciary standard of the previous alternative carry over to the new fiduciary standard of this alternative. As noted above, this alternative would impose a new regulatory paradigm on broker-dealers relative to the baseline. The fiduciary standard of this alternative would be principles-based and shaped by common law. In contrast, the standard of conduct that applies to broker-dealers under the baseline is more prescriptive and governed by detailed SRO rules. A paradigm shift from the standards of conduct under the current baseline to the uniform standard in this alternative may increase compliance costs relative to the baseline.[1358]

Furthermore, the potential increased compliance costs associated with applying the fiduciary standard of this alternative to broker-dealers may increase, relative to the baseline, a broker-dealer's incentives to offer investment advice in the capacity of an

[1355] Relative to a brokerage account that offers personalized investment advice, execution-only brokerage accounts may also come with enhanced research tools, more investment choices, and, potentially, other forms of impersonal advice.

[1356] *See, e.g.*, CFA August 2018 Letter at 79, noting that "[f]or example, Vanguard charges 0.30% for its Personal Advisor Services, Schwab charges 0.28% for its Intelligent Advisory Services, and Betterment charges 0.25% for its Digital offering and 0.40% for its Premium offering."

[1357] One of the staff's primary recommendations was that the Commission engage in rulemaking to adopt and implement a uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers. The staff's recommended standard would require firms "to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice." The staff made a number of specific recommendations for implementing the uniform fiduciary standard of conduct, including that the Commission should: (1) Require firms to eliminate or disclose conflicts of interest; (2) consider whether rulemaking would be appropriate to prohibit certain conflicts, to require firms to mitigate conflicts through specific action, or to impose specific disclosure and consent requirements; and (3) consider specifying uniform standards for the duty of care owed to retail customers, such as specifying what basis a broker-dealer or investment adviser should have in making a recommendation to a retail customer by referring to and expanding upon broker-dealers' existing suitability requirements. *See* 913 Study.

[1358] *See also* 913 Study at 156–159.

investment adviser and may decrease their incentive to offer investment advice in the capacity of broker-dealer. For example, if this alternative creates situations where the compensation to a broker-dealer for providing a recommendation in a commission-based brokerage account would be less than the compensation under a fee-based advisory account while the perceived regulatory burden is equal to that of an investment adviser, a broker-dealer's incentive to offer advice in the capacity of investment adviser may increase, relative to the baseline.[1359]

To the extent broker-dealers act on the increased incentives and decide to participate in the market for investment advice only in the capacity of investment advisers—for example, dual-registrants may prefer to offer investment advice only in the capacity of investment adviser—retail customers may experience an increase in the cost of obtaining investment advice, relative to the baseline. Alternatively, to the extent broker-dealers decide to continue to participate in the market for investment advice in the capacity of broker-dealers, they may pass on the increased compliance costs, in full or in part, to their retail customers in the form of higher prices for services rendered, relative to the baseline. In particular, retail customers may experience an increase in the cost of obtaining investment advice, relative to the baseline.[1360]

Similarly, the new fiduciary standard of this alternative may also impose additional compliance costs for investment advisers relative to the baseline.[1361] For example, to the extent that investment advisers currently provide investment advice to their clients in a manner that is not fully consistent with the requirements (2) and (3), investment advisers may incur compliance costs in adhering to these potentially more stringent requirements.

Investment advisers would likely pass on the potential increase in the costs of complying with the new fiduciary standard of this alternative to their clients. In turn, under the new fiduciary standard of this alternative, clients may experience an increase in the cost of obtaining investment advice, relative to the baseline.

It is also possible that the new fiduciary standard of this alternative may result in a different menu of choices that allows retail customers and clients to access investment advice in a more cost-efficient manner relative to the baseline. For example, if more financial professionals decide to participate in the market for investment advice as investment advisers, competitive pressure may result in better pricing and/or greater choice in accessing investment advice for retail customers and clients that choose to use an investment adviser.

However, to the extent that the cost of accessing investment advice increases under the new fiduciary standard of this alternative, some retail customers may be pushed outside the market for investment advice, relative to the baseline. For example, currently, a retail customer who prefers to receive recommendations from a broker-dealer or its associated persons to implement a buy-and-hold strategy may find a brokerage account to be better suited to his or her needs than an advisory account. Under the new fiduciary standard of this alternative, this retail customer may have to pay more for the broker-dealer services that come with his or her account, including obtaining investment advice, relative to the baseline. If, from the perspective of a retail customer, this increase in the cost for broker-dealer services outweighs the expected benefits of the potential improved efficiency of the recommendations provided by the broker-dealer, the retail customer may prefer to switch to a more limited brokerage account that does not come with personalized investment advice (*e.g.*, an execution-only brokerage account).[1362]

Alternatively, and as noted by one commenter, the retail customer may switch to an advisory account that implements automated investment strategies.[1363] However, this type of advisory account may not offer the flexibility of personalized investment advice to the evolving needs of the customer, the level of contact a retail customer seeks from a relationship with a financial professional, and may not be as responsive to market movements not anticipated by the automated investment strategies.

Similarly, under the new fiduciary standard of this alternative, clients of investment advisers may experience an increase in the cost of obtaining investment advice. Some of these clients may not be able to afford the additional cost and may be pushed outside the market for investment advice, relative to the baseline. As noted above, the options available to these clients may not offer the flexibility of tailored investment advice that may benefit a client with evolving needs.

c. Fiduciary Standard Under the DOL Rule and BIC Exemption

A third alternative approach to addressing the agency costs associated with obtaining advice from broker-dealers is a fiduciary standard coupled with a series of disclosures and other requirements akin to the full complement of conditions of the DOL's BIC Exemption adopted in connection with the DOL Fiduciary Rule. This alternative would mirror the key conditions that apply to an "adviser" under the BIC Exemption.[1364] This alternative approach would apply to broker-dealers when providing recommendations to retail customer for all types of retail accounts rather than retirement accounts only. At least one commenter signaled support for this alternative.[1365]

Unlike other alternatives considered in this section, or Regulation Best Interest, this alternative can be analyzed, at least in part, based upon its previous adoption by the DOL and partial implementation. Because this alternative was already partly implemented, the market for investment advice, the securities market, and, ultimately investors have had an opportunity to partially adjust to it. Section III.B.2.e.ii summarizes the evidence about the response of firms, investors and product markets in response to the DOL Fiduciary Rule.

The requirements of the standard of conduct in this alternative would enhance the obligations under the baseline by requiring broker-dealers to adhere to the impartial conduct standard, which included requirements to act in their retail customers' best interest, disclose material conflicts of interest and designate a person responsible for addressing material conflicts of interest and monitoring the adherence of the associated persons of the broker-dealer to the impartial conduct standard. To the extent that

[1359] *See supra* footnote 1351.

[1360] *See also* 913 Study at 159–162.

[1361] *See id.* at 159.

[1362] Relative to a brokerage account that offers personalized investment advice, execution-only brokerage accounts may also come with enhanced research tools, more investment choices, and, potentially, other forms of impersonal advice.

[1363] *See, e.g.*, CFA August 2018 Letter at 79, noting that "[f]or example, Vanguard charges 0.30% for its Personal Advisor Services, Schwab charges 0.28% for its Intelligent Advisory Services, and Betterment charges 0.25% for its Digital offering and 0.40% for its Premium offering."

[1364] For a discussion of key conditions of the BIC Exemption, *see* Section I.A.2 of the Proposing Release at 21581. As discussed above, the DOL Fiduciary Rule—including the BIC Exemption—was vacated by the United States Court of Appeals for the Fifth Circuit on March 15, 2018, although some firms may continue to seek comply with certain of its conditions under a DOL temporary enforcement policy. *See also supra* Section III.B.2.e. *See also supra* footnote 32.

[1365] *See* Galvin Letter.

these requirements reduce the effect of the conflicts of interest on the recommendation provided by a broker-dealer or its associated persons and reduce the information asymmetry between retail customers and broker-dealers, the new standard of conduct in this alternative would increase the efficiency of the recommendations made by broker-dealers and their associated persons, relative to the regulatory baseline. Furthermore, the requirement to act in the retail customers' best interest would enhance the existing suitability standard that applies to broker-dealers and, to the extent that the new standard of conduct of this alternative would result in recommendations that are better aligned with the objectives of the retail customers, this new standard would further increase the efficiency of the recommendations provided by broker-dealers and their associated persons, relative to the regulatory baseline. The potential increase in the efficiency of the recommendations provided by broker-dealers and their associated persons under the new standard in this alternative would benefit retail customers, relative to the baseline.

This alternative may also affect product markets. As discussed above in Section III.B.2.ii, certain product sponsors introduced new products in the market for mutual funds, such as clean and T shares that were designed to facilitate compliance with various anticipated regulations, including the DOL Fiduciary Rule. In certain circumstances, these products may come with lower fees for retail customers. To the extent that this alternative would enhance this trend in product innovation, retail customers may benefit from this trend.

However this alternative would also impose costs on broker-dealers and retail customers.

Compliance costs would include costs associated with the contract provision, and the disclosure, policies and procedure, and record-making and recordkeeping requirements. It is possible that broker-dealers would pass on these direct compliance costs, in part or in full, to retail customers.

In addition to these costs, this alternative would likely cause some broker-dealers to change their current practices, which, in turn, may impose further costs on them or their retail customers. As discussed above in Section III.B.2.e.ii some studies find evidence suggesting that firms have adjusted their practices, at least in the short-run, in response to the DOL fiduciary Rule. In particular, certain of these studies observe that in certain cases some broker-dealers have either eliminated or reduced access to brokerage advice services. Other studies observe that some broker-dealers migrated toward fee-based advisory services or limited brokerage services (*i.e.*, no provision of advice) and, in the process, offered their retail customers the option to shift from commission-based brokerage accounts to fee-based accounts, automated investment accounts or self-directed accounts. Some of their customers chose to not move to a fee-based account.

Certain studies provide evidence suggesting that some broker-dealers adjusted the range of their offerings.[1366] Specifically, according to these studies, some of the respondents reduced or eliminated access to certain assets or share classes, such as certain mutual funds or mutual fund share classes, and or annuity securities offered.

Finally, there is some anecdotal evidence that suggests that certain firms changed the compensation structure for their associated persons.[1367] Specifically, some firms equalize commissions and deferred sales charges across similar securities, while other firms banned sales quotas, contests, and certain bonuses.

To the extent that the fiduciary standard in this alternative would result in similar responses by broker-dealers, the alternative would impose cost on retail customers relative to the baseline. For example, switching a retail customer from a commission-based brokerage account to a different type of account, such as fee-based advisory account, may leave a customer worse off in certain circumstances. For instance, a retail customer who is a buy-and-hold investor may overpay for the advice typically associated with this type of investment strategy if the retail customer were to shift from a brokerage account to a fee-based account.[1368] As another example, a retail customer would lose access to occasional personalized advice if he or she were to shift from his or her brokerage account to a self-directed account.

The cost to retail customers from switching to a suboptimal account is particularly important in the context of IRA brokerage accounts, because of the larger size of these accounts and the importance of these accounts for retail investors to meet their retirement needs. These costs may also be higher for IRA brokerage accounts than for other account types to the extent that these accounts include long-term, buy-and-hold investments. As discussed in Section III.B.2.e.ii, one study provided an estimate for this potential cost.[1369] However, as discussed above, the estimates provided by various studies, including this one, or by commenters are generally subject to assumptions or methodological limitations which may affect the inferences based on such estimates.

In addition to the evidence discussed above, there are other potential economic implications of this alternative. For instance, this alternative may exclude from the market for investment advice those retail customers that have account balances that are below the account minimum for typical advisory accounts. The investment advisory industry might adjust to a lack of supply by accommodating lower account balances. However, because investment advisers have a fiduciary duty to all their clients, and because they have limited time and resources, there is likely a limit to how much an investment adviser can lower his or her account minimum to accommodate more advisory clients. Similarly, the product market may adjust by innovating new products to accommodate retail customers with account balances that are below the typical advisory account minimum. For example, hybrid products that implement automated investment strategies tailored to a retail customer's goals may substitute for the services of an investment adviser for customers with lower account balances.

2. Prescribed Format for Disclosure

Although Regulation Best Interest specifies the required content of disclosure necessary to meet a broker-dealer's Disclosure Obligation, it does not prescribe a specific format for that disclosure. As an alternative, and as suggested by commenters,[1370] we

[1366] *See supra* Section III.B.2.e.ii.

[1367] *See id.*

[1368] *See supra* footnote 1354.

[1369] *See* SIFMA Study.

[1370] *See, e.g.*, LPL August 2018 Letter that notes that "all investors should be provided with general disclosures somewhat akin to those contained in Form ADV Part 2A—*e.g.*, which set forth the ranges of remuneration payable to a broker-dealer in connection with its recommendations of different products . . . [W]e believe that detailed product-specific disclosures should be required prior to or at the time of a recommendation only in instances where the remuneration associated with the recommendation exceeds the previously disclosed range or where the recommendation implicates a conflict of interest that has not previously been disclosed. In all other cases, a broker-dealer should be permitted to satisfy its Disclosure Obligation by directing an investor in writing to review the recommended product's offering documents and providing hyperlinks to those documents (or providing a hyperlink to a central page on the broker-dealer's website that contains hyperlinks to the product documents), either prior to the

Continued

considered requiring broker-dealers to use a specific form similar to, for example, Form ADV.

Because this alternative would still impose all the obligations of Regulation Best Interest, all the benefits and the costs identified in Regulation Best Interest would carry over to this alternative as well. However, by changing the way broker-dealers would meet the Disclosure Obligation, this alternative may create additional benefits and impose additional costs.

The requirement to use a form similar to Form ADV to meet the Disclosure Obligation would put more structure on the disclosure of material facts relating to the scope and terms of the relationship with the retail customer and material facts relating to conflicts of interest that are associated with a recommendation. This added structure would facilitate retail customers' comparison of multiple broker-dealers, which would benefit retail customers. For example, the evidence provided by the investor testing surveys suggests that retail customers form preference over various variables that are being disclosed.[1371] On the backdrop of this evidence, the structured disclosure provided by a specific form may enhance a retail customer's ability to select a broker-dealer in a manner consistent with his or her preferences. In addition, the structured disclosure provided by a form may allow a third party to collect the information disclosed by firms, process it, and present it to retail customers in a way that would make it easier for the retail customer to select a broker-dealer. To the extent the format of disclosure under this alternative would result in this potential outcome, the alternative would further benefit retail customers.

However, the requirement to use a form similar to Form ADV to meet the Disclosure Obligation may also impose costs on broker-dealers, at least in the short run, to the extent that this form of disclosure is different from the form of disclosure that firms employ currently to satisfy their disclosure obligations and liabilities under the baseline. In general it may be difficult to design a form that, while comprehensive in terms of capturing the diversity of business practices that broker-dealers employ, remains easy to understand for retail customers. In general, given that there is a wide variety of business models and practices, there is value in providing broker-dealers with flexibility to enable them to better tailor disclosure and information that their retail customers can understand and may be more likely to read at relevant points in time, rather than, for example, mandating a standardized all-inclusive (and likely lengthy) disclosure. Depending on the specific form that is eventually mandated, some firms may incur more costs than others. To the extent firms pass on those costs to retail customers, the alternative would impose a cost on retail customers.

3. Disclosure-Only

Another potential alternative to addressing the agency costs of obtaining advice from broker-dealers is a disclosure-only alternative, which would require that broker-dealers satisfy only the Disclosure Obligation of Regulation Best Interest. In other words, broker-dealers would be required to provide the retail customer, in writing, full and fair disclosure of all material facts relating to the scope of the relationship with the retail customer and all material facts relating to the conflicts of interest associated with the recommendations to the retail customer, prior to or at the time of the recommendation. However, this alternative would not impose either the Care Obligation or the Conflict of Interest Obligation.

As discussed in Sections III.C.2 and III.C.4, there may be substantial overlap between the disclosure requirements of Regulation Best Interest and the disclosure requirements under the regulatory baseline. From this perspective, relative to the regulatory baseline, the cost of this alternative to the broker-dealers may be small, at least for some broker-dealers. However, as pointed out above, a disclosure-only alternative is not likely to address the agency costs associated with obtaining advice from broker-dealers. As a result, the Commission believes both specific disclosure and mitigation requirements are needed to address those conflicts. Also, we noted above that sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities within a limited period of time create high-pressure situations for associated persons to increase the sales of specific securities by compromising the best interest of their customers; the Commission does not believe such conflicts of interest can be reasonably mitigated, let alone disclosed, in a manner that adequately prevents harm to retail customers and, accordingly, believes that these conflicts must be eliminated in their entirety.

Finally, as we discussed earlier, commenters noted that there are limits to the effectiveness of disclosure and cited a number of studies suggesting that disclosure alone is unlikely to solve the issues surrounding, for example, the conflicts of interest between a broker-dealer (or their associated persons) and a retail customer.[1372]

IV. Paperwork Reduction Act

Certain provisions of Regulation Best Interest and the rule amendments that we are adopting today contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[1373] The Commission submitted Regulation Best Interest and the rule amendments to the Office of Management and Budget ("OMB") for review and approval in accordance with the PRA.[1374] The Commission's earlier PRA assessments have been revised to reflect the modifications to the rule and amendments from the Proposing Release, as well as additional information and data provided to the Commission by commenters. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The titles and OMB control numbers for the collections of information are:

recommendation via a general Form ADV Part 2A-like disclosure document or shortly thereafter via a trade confirmation." *See also* Morningstar Letter, noting "publicly available disclosures with a standard taxonomy work best because they empower third parties such as 'fintech' and 'reg-tech' firms to analyze and contextualize critical information and amplify a call to action for ordinary investors." *See also* Letter from Peter J. Chepucavage (May 31, 2018) ("Chepucavage Letter"), noting that "[c]osts for the small bd's however can be reduced with a commission approved standard disclosure which would add certainty and ought to be considered especially for the small investor. [. . .] A standard disclosure document would also be useful for the small bd that cannot afford the legal assistance needed to evaluate this 1,000 page proposal and draft appropriate documents. [. . .] The Commission should therefore reconsider the impact of its proposal on small investors and small bd's with the assumption that retirement accounts are significantly more important than regular brokerage accounts especially for small and elderly investors. A standard disclosure for small firms would reduce costs for the firms and their customers."

[1371] *See* Relationship Summary Adopting Release for a discussion of the evidence provided by the investor testing surveys.

[1372] *See supra* footnote 1208 and accompanying text. *See also supra* Section III.B.4.c for a discussion of the literature on the effectiveness of disclosure.

[1373] 44 U.S.C. 3501 *et seq.*

[1374] *See* 44 U.S.C. 3507(d); 5 CFR 1320.11.

[1375] *See* 17 CFR 240.17a–3. The addition of paragraph (a)(35) to Rule 17a–3 would amend the existing PRA for Rule 17a–3.

[1376] *See* 17 CFR 240.17a–4. The amendment to Rule 17a–4(e)(5) would amend the existing PRA for Rule 17a–4.

Rule	Rule title	OMB control No.
Rule 15l–1	Regulation Best Interest.	
Rule 17a–3	Records to be made by certain exchange members, brokers and dealers[1375]	3235–0033
Rule 17a–4	Records to be preserved by certain exchange members, brokers and dealers[1376]	3235–0279

Regulation Best Interest enhances the broker-dealer standard of conduct beyond existing suitability obligations, and aligns the standard of conduct with retail customers' reasonable expectations by requiring broker-dealers, among other things, to: (1) Comply with specific obligations to make recommendations that are in the best interest of the retail customer, and that do not place the broker-dealer's interests ahead of the interests of the retail customer; and (2) address conflicts of interest by fully and fairly disclosing material facts about conflicts of interest, and in instances where we believe disclosure is insufficient to reasonably address the conflict, establish, maintain and enforce policies and procedures reasonably designed to mitigate or, in certain instances, eliminate the conflict. Generally, in crafting Regulation Best Interest, we aimed to provide broker-dealers flexibility in determining how to satisfy the component obligations. For purposes of this analysis, we have made assumptions regarding how a broker-dealer would comply with the obligations of Regulation Best Interest, as well as the amendments under Rule 17a–3(a)(35) and Rule 17a–4(e)(5).

In the Proposing Release, we requested comment on the matters discussed in the PRA, including our estimates for the new and recurring burdens and associated costs described in connection with Regulation Best Interest and the amendments under Rule 17a–3(a)(35) and Rule 17a–4(e)(5).[1377] In particular, we sought comment on estimates as to: (1) The number of natural persons who are associated persons; (2) the number of broker-dealers that make securities-related recommendations to retail customers; (3) the number of natural persons who are associated persons that make securities-related recommendations to retail customers; and (4) any other costs or burdens[1378] associated with proposed Regulation Best Interest that had not been identified in the Proposing Release.

As discussed in Sections I, II, and III, we received comments that addressed whether we could minimize the burden of the proposed collections of information. We received several comments suggesting that our estimated burdens and costs for the rule as a whole were too low.[1379] In addition, the Commission received some comments specifically addressing the costs to smaller broker-dealers.[1380] Also, as discussed in the Economic Analysis section above, we received comments regarding the potential costs and burdens of proposed Regulation Best Interest on broker-dealers.[1381] In response, we have modified several substantive requirements to the rule by, among other things, providing more specificity in the rule text in the Disclosure and Conflict of Interest Obligations, which we believe will mitigate some of these burdens and costs relative to the Proposing Release.[1382] At the same time, certain modifications, such as maintaining a written record of oral disclosure, resulted in new burdens and costs, relative to those addressed in the Proposing Release, which are reflected below.

A. Respondents Subject to Regulation Best Interest and Amendments to Rule 17a–3(a)(35) and Rule 17a–4(e)(5)

1. Broker-Dealers

Regulation Best Interest imposes a best interest obligation on a broker-dealer when making recommendations of any securities transaction or investment strategy involving securities to retail customers. Except where noted, we have assumed that a dually registered firm, already subject to the Advisers Act, would be subject to new, distinct burdens under Regulation Best Interest.

As of December 31, 2018, 3,764 broker-dealers were registered with the Commission, either as standalone broker-dealers or as dually registered entities.[1383] Based on data obtained from Form BR, the Commission believes that approximately 73.5% of this population, or 2,766 broker-dealers, have retail customers and therefore would be subject to Regulation Best Interest and the amendments under Rules 17a–3(a)(35) and 17a–4(e)(5).[1384] Further, based on FOCUS Report data,[1385] the Commission estimates that as of December 31, 2018, approximately 985 broker-dealers may be deemed small entities under the Regulatory Flexibility Act.[1386] Of these,

[1377] The Proposing Release proposed to add new paragraph (a)(25) of Rule 17a–3. As noted above, we are adopting the provision substantially as proposed but redesignating it as new paragraph (a)(35) of Rule 17a–3. *See supra* footnote 820 and accompanying text.

[1378] Throughout the PRA analysis in the Proposing Release, the burdens on in-house personnel were measured in terms of burden hours, and external costs were expressed in dollar terms.

[1379] *See, e.g.,* NSCP Letter; *see also* CCMC Letters (costs to implement the proposal were underestimated and greater than 40% of firms surveyed anticipate having to spend a moderate or substantial amount to implement Regulation Best Interest and Form CRS); Raymond James Letter (noting the significant implementation costs of Regulation Best Interest and Form CRS for the industry); SIFMA August 2018 Letter (stating that implementation costs of Regulation Best Interest and Form CRS would be significant).

[1380] *See, e.g.,* Chepucavage Letter (finding that the estimates in the proposal are severely understated unless they are excluding time needed for review of the proposal and final rule and suggesting the Commission reconsider the impact on small investors and small broker-dealers); NSCP Letter (requesting the Commission to consider the financial and operational impacts of the proposed rule, particularly on small firms, and to minimize those impacts, given that small firms do not have compliance departments adequate to deal with increasing regulatory demands). *See also, e.g.,* Iowa Insurance Commissioner Letter; Letter from David S. Addington, National Federation of Independent Business (May 30, 2018) ("NFIB Letter").

[1381] *See supra* Section III.

[1382] Throughout this PRA analysis, the burdens on in-house personnel are measured in terms of burden hours, and external costs are expressed in dollar terms.

[1383] The Commission estimated the number of respondents in the Proposing Release as of December 31, 2017. The Commission is updating its estimated number of broker-dealers to reflect the number of broker-dealers registered with the Commission as of December 31, 2018.

[1384] As of December 31, 2018, 3,764 broker-dealers filed Form BD. Retail sales by broker-dealers were obtained from Form BR. As discussed above in Section III.B.1.a, the number of broker-dealers that serve retail customers (*i.e.,* 2,766) likely overstates the number of broker-dealers that will be subject to Regulation Best Interest, because not all broker-dealers that serve retail investors provide recommendations to retail investors. We do not have reliable data to determine the precise number of broker-dealers that provide recommendations, and as a result, we have assumed, for purposes of this analysis that 2,766 broker-dealers will be subject to Regulation Best Interest.

[1385] FOCUS Reports, or "Financial and Operational Combined Uniform Single" Reports, are monthly, quarterly, and annual reports that broker-dealers are generally required to file with the Commission and/or SROs pursuant to Exchange Act Rule 17a–5. *See* 17 CFR 240.17a–5.

[1386] *See infra* Section V for an explanation of which brokers-dealers, subject to Regulation Best Interest, are "small entities," for purposes of the Regulatory Flexibility Act analysis.

Continued

approximately 756 have retail business.[1387] Therefore, we estimate that 2,010 broker-dealers would qualify as large broker-dealers with retail customers for purposes of this analysis.[1388]

2. Natural Persons Who Are Associated Persons of Broker-Dealers

As with broker-dealers, Regulation Best Interest imposes a best interest obligation on natural persons who are associated persons of broker-dealers when making recommendations of any securities transaction or investment strategy involving securities to retail customers.

The Commission believes that approximately 428,404 natural persons would qualify as retail-facing, registered representatives at standalone broker-dealers or dually registered firms,[1389] and would therefore be subject to Regulation Best Interest.[1390]

B. Summary of Collections of Information

Regulation Best Interest requires broker-dealers and their associated persons[1391] when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer to act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the interest of the retail customer. As discussed above, Regulation Best Interest specifically provides that this best interest obligation shall be satisfied if the broker-dealer complies with the specific Disclosure, Care, Conflict of Interest, and Compliance Obligations.

Rule 17a–3 requires a broker-dealer to make and keep current certain records. The Commission is amending this rule by adding new paragraph (a)(35) to impose new record-making obligations on broker-dealers subject to Regulation Best Interest. Rule 17a–4 requires a broker-dealer to preserve certain records if it makes or receives them. The Commission is amending Rule 17a–4(e)(5) to impose new record retention obligations on broker-dealers subject to Regulation Best Interest.

The obligations arising under Regulation Best Interest and the amendments under Rule 17a–3(a)(35) and Rule 17a–4(e)(5) would give rise to distinct collections of information and associated costs and burdens for broker-dealers subject to the rules. The collections of information associated with Regulation Best Interest and rule amendments are described below.

1. Disclosure Obligation

The Disclosure Obligation under Regulation Best Interest requires a broker, dealer, or natural person who is an associated person of a broker or dealer, prior to or at the time of recommending a securities transaction or strategy involving securities to a retail customer, to provide the retail customer, in writing, full and fair disclosure of: (1) All material facts relating to the scope and terms of the relationship with the retail customer, including (a) that the broker, dealer, or such natural person is acting as a broker, dealer, or an associated person of a broker or dealer with respect to the recommendation, (b) the fees and costs that apply to the retail customer's transactions, holdings, and accounts, and (c) the type and scope of services provided to the retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer; and (2) all material facts relating to conflicts of interest that are associated with the recommendation. The Commission believes that requiring broker-dealers to disclose to a retail customer, in writing, all material facts relating to the scope and terms of the relationship with the retail customer would facilitate the retail customer's understanding of the nature of his or her account, the broker-dealer's fees and costs, as well as the nature of services that the broker-dealer provides, as well as any limitations to those services. It would also provide retail customers with information to better understand the differences among certain financial service providers, such as broker-dealers, investment advisers, and dually registered firms and dually registered financial professionals. In addition, the obligation to disclose all material facts relating to conflicts of interest that are associated with a recommendation would raise retail customers' awareness of the potential effects of conflicts of interest, and increase the likelihood that broker-dealers would make recommendations that are in the retail customer's best interest.

We are explicitly requiring in the rule text of Regulation Best Interest, items that the Proposing Release had only provided as examples of "material facts relating to the scope and terms of the relationship with the retail customer" that must be disclosed, namely: (1) That the broker, dealer or such natural person is acting as a broker, dealer or an associated person of a broker-dealer with respect to the recommendation; (2) the material fees and costs that apply to the retail customer's transactions, holdings, and accounts; and (3) the type and scope of services provided to the retail customer, including: any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer. We generally believe the proposed burdens and costs identified in the Proposing Release were accurate but have updated estimates to reflect changes in the number of broker-dealers and costs of certain services since the last estimate. The collections of information associated with the Disclosure Obligation, as well as the associated record-making and recordkeeping obligations are addressed below.

a. Obligation To Provide to the Retail Customer Full and Fair Disclosure, in Writing, of all Material Facts Relating to the Scope and Terms of the Relationship With the Retail Customer

The Commission assumes for purposes of this analysis that broker-dealers would meet the obligation to disclose to the retail customer, in writing, the material facts related to the scope and terms of the relationship with the retail customer through a

The Commission's estimate is obtained from Form BD filings. Although Form BD filings are updated on a more frequent basis than annually, FOCUS data, which also informs this baseline with respect to broker-dealers, is only sparsely updated throughout the year. Moreover, instead, broker-dealers tend to make their most complete updates in the fourth calendar quarter of each year. Therefore, in order to minimize discrepancies in the broker-dealer data between Form BD and FOCUS data, we have normalized all of the data to the most recently complete FOCUS data, which is for December 2018.

[1387] *Id.*

[1388] This calculation was made as follows: (2,766 total retail broker-dealers) − (756 total small retail broker-dealers) = 2,010 large retail broker-dealers.

[1389] *See supra* Section III.B.1 at Table 5. This estimate is based on the following calculation: (504,005 total licensed representatives (including representatives of investment advisers)) × (15% (the percentage of total licensed representatives who are standalone investment adviser representatives)) = approximately 75,601 representatives at standalone investment advisers. To isolate the number of representatives at standalone broker-dealers and dually registered firms, we have subtracted 75,601 from 504,005, for a total of 428,404 retail-facing, licensed representatives at standalone broker-dealers or dually registered firms.

[1390] Unless otherwise noted, for purposes of the PRA, we use the term "registered representatives" to refer to associated persons of broker-dealers who are registered, have series 6 or 7 licenses, and are retail-facing, and we use the term "dually registered representatives of broker-dealers" to refer to registered representatives who are dually registered and are associated persons of a standalone broker-dealer (who may be associated with an unaffiliated investment adviser) or a dually registered broker-dealer.

[1391] However, in certain instances, as described more fully below, the Commission assumes that broker-dealers will undertake certain Disclosure Obligations on behalf of their registered representatives. *See, e.g., infra* footnote 1396.

combination of delivery of the Relationship Summary, creating account disclosures to include standardized language related to capacity and type and scope of services, and the development of fee schedules.

(1) Disclosure of Capacity

As discussed above, the Commission believes that a standalone broker-dealer would be able to satisfy its obligation to disclose that it is acting in a broker-dealer capacity by providing the retail customer with the Relationship Summary in the manner prescribed by the rules and guidance in the Relationship Summary Adopting Release.[1392]

We assume, for purposes of this PRA analysis, that a dually registered broker-dealer would satisfy its obligation to disclose it is acting in a broker-dealer capacity by creating an account disclosure with standardized language, and by providing it to the retail customer at the beginning of the relationship. The account disclosure would set forth when the broker-dealer would be acting in a broker-dealer capacity, and the method the broker-dealer planned to use to clarify its capacity at the time of the recommendation. We understand that many broker-dealers already include such information in account disclosures.

(2) Disclosure of Fees and Costs and Type and Scope of Services, Including Any Material Limitations on the Securities or Investment Strategies That may be Recommended

While many broker-dealers provide fee information to retail customers in a fee schedule, the Commission believes that to comply with the Disclosure Obligation broker-dealers will either amend their existing schedules or develop a new standardized fee schedule to disclose the fees and costs applicable to retail customers' transactions, holdings, and accounts. This fee schedule would be delivered to retail customers at the beginning of a relationship. If, at the time the recommendation is made, the disclosure made to the retail customer is not current or does not contain all material facts regarding the fees and costs of the particular recommendation, the broker-dealer would need to deliver an amended fee schedule or provide an oral update, under the circumstances outlined in Section II.C.1.

With respect to disclosure of the type and scope of services provided by the broker-dealer, including any material limitations on the securities or investment strategies that may be recommended to the retail customer, we assume for purposes of this PRA analysis that a broker-dealer would satisfy the Disclosure Obligation by including this information in the account disclosure provided to the retail customer at the beginning of the relationship, as described above. The broker-dealer would need to deliver an amended account disclosure to the retail customer in the case of any material changes made to the type and scope of services or provide an oral update, under the circumstances outlined in Section II.C.1.

b. Obligation To Provide to the Retail Customer Full and Fair Disclosure, in Writing, of All Material Facts Relating to Conflicts of Interest That are Associated With the Recommendation

Regulation Best Interest requires a broker-dealer to provide the retail customer, in writing, full and fair disclosure of all material facts relating to conflicts of interest that are associated with a recommendation.

As discussed above, we assume that broker-dealers will satisfy the obligation to disclose all material facts relating to conflicts of interest through the use of: (1) A standardized, written disclosure document provided to all retail customers and (2) supplemental disclosure provided to certain retail customers for recommendations of specific products.

We assume for purposes of this analysis that delivery of written disclosure will occur at the beginning of a relationship, such as together with the account opening agreement. For existing retail customers, the disclosure will need to occur "prior to or at the time" of a recommendation. Subsequent disclosures may be delivered or the broker-dealer may provide an oral update, under the circumstances outlined in Section II.C.1, in the event of a material change or if the broker-dealer determines additional disclosure is needed for certain types of products.

The corresponding estimated total annual reporting costs and burdens are addressed below.[1393]

c. Estimated Costs and Burdens

(1) Disclosure of Capacity, Type and Scope of Services

Standalone broker-dealers will satisfy the obligation to disclose the capacity in which they are acting through the delivery to retail customers of the Relationship Summary, in accordance with the rules and guidance set forth in the Relationship Summary Adopting Release. Additionally, although we understand that many dual-registrants and standalone broker-dealers, as a matter of best practice, already disclose the capacity in which they are acting as well as the and type and scope of services they offer to retail customers, for purposes of this analysis, we assume that dual-registrants would create new account disclosure related to capacity and all broker-dealers would create or update account disclosure related to type and scope of services specifically for purposes of compliance with Regulation Best Interest. The Commission assumes that broker-dealers would provide the account disclosure to each retail customer account, regardless of whether the retail customer has multiple accounts with the broker-dealer.

While the Commission recognizes that the Disclosure Obligation applies to the broker-dealer entity and its associated persons, we do not expect associated persons to incur any initial or ongoing burdens with respect to the scope and terms of the relationship, as we assume for purposes of this analysis that this information would be addressed by the broker-dealer entity's account disclosure.[1394] With regard to disclosure of the capacity in which the associated person is acting, the Commission believes that dually registered representatives of broker-dealers will incur initial and ongoing burdens.[1395]

Following is a discussion of the estimated initial and ongoing burdens and costs.

i. Initial Costs and Burdens

Because, as noted above, standalone broker-dealers will satisfy the obligation to disclose the capacity in which they are acting through the delivery to retail customers of the Relationship Summary, we estimate zero burden hours for standalone broker-dealers to disclose the capacity in which they are acting.

[1392] *See* Relationship Summary Adopting Release.

[1393] The costs and burdens arising from the obligation to identify all material conflicts of interest that are associated with the recommendation are addressed below, in the context of the Conflict of Interest Obligation, in Section V.B.1.

[1394] A broker-dealer or an associated person may satisfy the Disclosure Obligation by using oral disclosure if it has previously provided written disclosure to the retail customer beforehand as well as the method it planned to use to clarify the disclosure at the time of the recommendation. In addition, a record of the fact of such oral disclosure having been made must be created and retained. We assume that any disclosure required of a registered representative will be made orally, and that any ongoing costs and burdens will be associated with the record-making memorializing the fact of the oral disclosure. *See* Section IV.B.5 (discussing the costs and burdens associated with record-making).

[1395] *See supra* Section IV.B.5 (discussing the costs and burdens associated with record-making).

We estimate that a dually registered firm will incur an initial internal burden of 10 hours for in-house counsel and in-house compliance [1396] to draft language regarding the capacity in which they are acting for inclusion in the standardized account disclosure that is delivered to the retail customer.[1397]

In addition, we estimate that dual-registrants will incur an estimated external cost of $4,970 for the assistance of outside counsel in the preparation and review of standardized language regarding capacity.[1398] For the estimated 563 dually registered firms with retail business,[1399] we project an aggregate initial burden of 5,630 hours,[1400] and $2.8 million in aggregate initial costs relating to disclosure of the capacity in which they are acting.[1401]

Similarly, to comply with Regulation Best Interest, we believe that broker-dealers [1402] will draft standardized language for inclusion in the account disclosure to provide the retail customer with more specific information regarding the type and scope of services that they provide. We expect that the associated costs and burdens will differ between small and large broker-dealers, as large broker-dealers generally offer more products and services and therefore will need to evaluate a larger number of products and services.

Given these assumptions, we estimate that a small broker-dealer will incur an internal initial burden of 10 hours for in-house counsel and in-house compliance to draft this standardized language.[1403] In addition, a small broker-dealer will incur an estimated external cost of $4,970 for the assistance of outside counsel in the preparation and review of this standardized language.[1404] For the estimated 756 small broker-dealers,[1405] we project an aggregate initial burden of 7,560 hours,[1406] and aggregate initial costs of $3.8 million.[1407]

Given the broader array of products and services offered, we estimate that a large broker-dealer will incur an internal burden of twenty hours to draft this standardized language.[1408] A large broker-dealer will also incur an estimated cost of $7,470 for the assistance of outside counsel in the preparation and review of this standardized language.[1409] For the estimated 2,010 large retail broker-dealers, we estimate an aggregate initial burden of 40,200 hours [1410] and $15 million in aggregate initial costs.[1411]

We estimate that all broker-dealers will each incur approximately 0.02 burden hours [1412] for delivery of the account disclosure document.[1413] Based on FOCUS data, we estimate that the 2,766 broker-dealers that report retail activity have approximately 139 million customer accounts, and that approximately 73.5%, or 102 million, of those accounts belong to retail customers.[1414] We therefore estimate that broker-dealers will have an aggregate initial burden of 2,040,000 hours, or approximately 738 hours [1415] per broker-dealer for the first year after Regulation Best Interest is in effect.[1416]

We estimate a total initial aggregate burden for all broker-dealers to develop and deliver to retail customers account disclosures relating to capacity and type and scope of services of 2,093,390 burden hours.[1417] We estimate a total initial aggregate cost of $21.6 million.[1418]

[1396] The ten hour estimate includes five hours for in-house counsel to draft and review the standardized language, and five hours for consultation and review of compliance personnel.

[1397] As discussed above, the following estimates include the costs and burdens that broker-dealers would incur in drafting standardized account disclosure language related to the scope and terms of the relationship on behalf of their dually registered representatives. For purposes of this analysis, the Commission assumes that broker-dealers will undertake these tasks on behalf of their registered representatives. *See* Section IV.B.5 (discussing the costs and burdens associated with record-making).

[1398] Data from the Securities Industry Financial Markets Association's Management & Professional Earnings in the Securities Industry 2013 ("SIFMA Management and Professional Earnings Report"), modified by Commission staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 (professionals) or 2.93 (office) to account for bonuses, firm size, employee benefits, and overhead, suggests that costs for this position is $497 per hour. The SIFMA Management and Professional Earnings Report was updated in 2019 to reflect inflation. The numbers in the report are higher than the numbers we used in the Proposing Release. This estimate is based on the following calculation: (10 hours for outside counsel review/drafting) × ($497/hour for outside counsel services) = $4,970 in initial outside counsel costs.

[1399] *See supra* Section III.B.1.a, at Table 1, Panel B. The number of dually registered broker-dealers includes broker-dealers that are also Commission- and state-licensed investment advisers.

[1400] This estimate is based on the following calculation: (563 dually registered retail firms) × (10 hours) = 5,630 initial aggregate burden hours.

[1401] This estimate is based on the following calculation: (563 dually registered retail firms) × ($4,970 in external cost per firm) = $2.8 million in aggregate initial costs.

[1402] In the Proposing Release, we inadvertently referred to "standalone broker-dealers" in this discussion, but our subsequent references and estimates reflected our intent to capture initial costs and burdens relating to disclosure of type and scope of services on all broker-dealers (distinguishing between small and large).

[1403] The 10-hour estimate includes 5 hours for in-house counsel to draft and review the standardized language, and 5 hours for consultation and review by in-house compliance.

[1404] This estimate is based on the following calculation: (10 hours for outside counsel review/drafting) × ($497/hour for outside counsel services) = $4,970 in initial outside counsel costs.

[1405] *See supra* footnote 1384 and accompanying text.

[1406] This estimate is based on the following calculation: (756 small broker-dealers) × (10 hours per small broker-dealer) = 7,560 initial aggregate burden hours.

[1407] This estimate is based on the following calculation: (756 small broker-dealers) × ($4,970 in external cost per small broker-dealer) = $3.8 million in aggregate initial outside counsel costs.

[1408] The 20-hour estimate includes 10 hours for in-house counsel to draft and review the standardized language, and 10 hours for consultation and review by in-house compliance.

[1409] This estimate is based on the following calculation: (15 hours for outside counsel review/drafting) × ($497/hour for outside counsel services) = $7,455 in initial outside counsel costs.

[1410] This estimate is based on the following calculation: (2,010 large broker-dealers) × (20 burden hours) = 40,200 aggregate initial burden hours.

[1411] This estimate is based on the following calculation: (2,010 large broker-dealers) × ($7,455 initial outside counsel costs) = $15 million in aggregate initial costs.

[1412] This is the same estimate the Commission makes in the Relationship Summary Adopting Release. It is also the same estimate the Commission made in the Amendments to Form ADV Adopting Release, and for which we received no comment. *See* Amendments to Form ADV, 17 CFR parts 275 and 279 at 49259. We expect that delivery requirements will be performed by a general clerk. The general clerk's time is included in the initial burden estimate.

[1413] As noted above, for new retail customers, we expect delivery to occur at the beginning of the relationship; for existing customers, we expect delivery to occur prior to or at the time of a recommendation.

[1414] We have revised our estimates from the Proposing Release to reflect the updated FOCUS Report data. Therefore, the 2,766 broker-dealers (including dual-registrants) with retail customers report 139 million customer accounts. *See* Section III.B.1.a, at Table 1, Panel B. Assuming the amount of retail customer accounts is proportionate to the percentage of broker-dealers that have retail customers, or 73.5% of broker-dealers, then the number of retail customer accounts would be 73.5% of 139 million accounts = 102 million retail customer accounts. This number likely overstates the number of deliveries to be made due to the double-counting of deliveries to be made by dual-registrants to a certain extent, and the fact that one customer may own more than one account.

[1415] These estimates are based on the following calculations: (0.02 hours per customer account × (102 million retail customer accounts) = 2,040,000 aggregate burden hours. Conversely, (2,040,000 hours)/(2,766 broker-dealers) = approximately 738 burden hours per broker-dealer for the first year after Regulation Best Interest is in effect.

[1416] We estimate that broker-dealers will not incur any incremental postage costs because we assume that they will make such deliveries with another mailing the broker-dealer was already delivering to retail customers.

[1417] This estimate is based on the following calculation: (5,630 aggregate initial burden hours for dual-registrants) + (7,560 aggregate initial burden hours for small broker-dealers) + (40,200 burden hours for large broker-dealers) + (2,040,000 aggregate initial burden hours for all broker-dealers to deliver the account disclosures) = 2,093,390 total aggregate initial burden hours.

[1418] This estimate is based on the following calculation: ($2.8 million in initial aggregate costs for dual-registrants) + ($3.8 million in initial aggregate costs for small broker-dealers) + ($15 million in initial aggregate costs for large broker-

ii. Ongoing Costs and Burdens

For purposes of this analysis, we assume that broker-dealers will review and amend the standardized language in the account disclosure, on average, once a year.[1419] Further, we assume that broker-dealers will not incur outside costs in connection with updating account disclosures, as in-house personnel will be more knowledgeable about changes in capacity, and the type and scope of services offered by the broker-dealer. Additionally, with respect to standalone broker-dealers, because they will meet their obligation to disclose capacity by delivering the Relationship Summary, and will be subject to requirements to amend the Relationship Summary consistent with Form CRS, we estimate zero burden hours annually for ongoing costs relating to disclosure of capacity under the Disclosure Obligation.

We estimate that each dually registered broker-dealer will incur approximately five burden hours annually for in-house compliance and business-line personnel to review changes in the dual-registrant's capacity,[1420] and another two burden hours annually for in-house counsel to amend the account disclosure to disclose material changes to the dual-registrant's capacity, for a total of seven burden hours. The estimated ongoing aggregate burden to amend dual-registrants' account disclosures to reflect changes in capacity is therefore 3,941 hours per year.[1421]

With respect to small broker-dealers, we estimate an internal burden of two hours for in-house compliance and business-line personnel to review and update changes in types or scope of services, and another two burden hours annually for in-house counsel to amend the account disclosure to disclose material changes to type and scope of services—for a total of four burden hours. The estimated ongoing aggregate burden for small broker-dealers to amend account disclosures to reflect changes in type and scope of services is therefore 3,024 hours per year.[1422]

We estimate that large broker-dealers would incur ten burden hours annually for in-house compliance and business-line personnel to review and update changes the type and scope of services, and another ten burden hours annually for in-house counsel to amend the account disclosure to disclose material changes to the type and scope of services, for a total of twenty burden hours. We therefore believe the ongoing, aggregate burden is 40,200 hours per year for large broker-dealers.[1423]

With respect to delivery of the amended account agreements in the event of material changes to the capacity disclosure or disclosure related to type and scope of services, we estimate that this would take place among 20% of a broker-dealer's retail customer accounts annually. We therefore estimate broker-dealers to incur a total annual aggregate burden of 408,000 hours, or 148 hours per year per broker-dealer.[1424]

The total ongoing aggregate burden for all broker-dealers to review, amend, and deliver updated account disclosures to reflect changes in capacity, type and scope of services would be 455,165 burden hours per year.[1425]

The Commission acknowledges that the types of services and product offerings vary greatly by broker-dealer, and therefore the costs and burdens associated with updating the account disclosure might also vary.

(2) Disclosure of Fees and Costs

The Commission assumes for purposes of this analysis that a broker-dealer will disclose its fees and costs through a standardized fee schedule, delivered to the retail customer at the beginning of the relationship, or, for existing retail customers, prior to or at the time of a recommendation and, as discussed below, will amend such fee schedules in the event of material changes. Although we understand that many broker-dealers already provide fee schedules to retail customers, we are assuming for purposes of this analysis that a fee schedule would be created specifically for purposes of compliance with Regulation Best Interest.[1426] While the Commission recognizes that the fee disclosure included in Disclosure Obligation applies to the broker-dealer entity and its associated persons, we do not expect any burdens or costs on associated persons related to the fees and costs as this information would be addressed in the broker-dealer entity's fee schedule.

i. Initial Costs and Burdens

We assume that, for purposes of this analysis, the associated costs and burdens will differ between small and large broker-dealers, as large broker-dealers generally offer more products and services and therefore will need to evaluate a wider range of fees in their fee schedules. As stated above, while we anticipate that many broker-dealers may already create fee schedules, we believe that small broker-dealers will initially spend five hours for in-house compliance and large broker-dealers will spend ten hours for in-house compliance to internally create a new fee schedule in consideration of the requirements of Regulation Best Interest. We additionally estimate a one-time external cost of $2,485 for small broker-dealers[1427] and $4,970 for larger broker-dealers for outside counsel to review the fee schedule.[1428] We therefore estimate the initial aggregate burden for small broker-dealers to be 3,780 burden

dealers) = $21.6 million in total initial aggregate costs.

[1419] We believe this annual timeframe is consistent with other obligations imposed on broker-dealers. For example, FINRA rules set an annual supervisory review as a minimum threshold for broker-dealers, for example, in FINRA Rules 3110 (requiring an annual review of the businesses in which the broker-dealer engages), 3120 (requiring an annual report detailing a broker-dealer's system of supervisory controls, including compliance efforts in the areas of antifraud and sales practices); and 3130 (requiring each broker-dealer's CEO or equivalent officer to certify annually to the reasonable design of the policies and procedures for compliance with relevant regulatory requirements).

[1420] In the Proposing Release, we referred to capacity *and* type and scope of services, however, we captured the ongoing costs and burdens relating to disclosure of type and scope of services in the paragraphs that followed, where we inadvertently referred to "small standalone broker-dealers" and "large standalone broker-dealers," but where our calculations reflected the burdens on all "small broker-dealers" and all "large broker-dealers." *See* Proposing Release, footnotes 600–601. We believe it is appropriate to distinguish between standalone and dually registered broker-dealers in assessing the costs and burdens relating to disclosure of capacity, and to distinguish between small and large firms in assessing the costs and burdens relating to disclosure of type and scope of services, as reflected in this section.

[1421] This estimate is based on the following calculation: (7 burden hours per dually registered firm per year) × (563 dually registered broker-dealers) = 3,941 ongoing aggregate burden hours per year.

[1422] This estimate is based on the following calculation: (4 burden hours per broker-dealer per year) × (756 small broker-dealers) = 3,024 ongoing aggregate burden hours per year.

[1423] This estimate is based on the following calculation: (20 burden hours per broker-dealer per year) × (2,010 large broker-dealers) = 40,200 ongoing aggregate burden hours per year.

[1424] (20%) × (102 million retail customer accounts) × (.02 hours for delivery to each customer account) = 408,000 aggregate burden hours. Conversely, 408,000 aggregate burden hours/2,766 broker-dealers = 148 burden hours per year per broker-dealer.

[1425] This estimate is based on the following calculation: (3,941 ongoing aggregate burden hours for dually registered broker-dealers) + (3,024 ongoing aggregate burden hours for small broker-dealers) + (40,200 ongoing aggregate burden hours for large broker-dealers) + (408,000 ongoing aggregate burden hours for delivery of amended account disclosures) = 455,165 total ongoing aggregate burden hours per year.

[1426] Our estimates may be higher than actual, since firms may be able to use or simply update existing disclosures depending on the facts and circumstances.

[1427] This cost estimate is based on the following calculation: (5 hours of review) × ($497/hour for outside counsel services) = $2,485 outside counsel costs.

[1428] This cost estimate is based on the following calculation: (10 hours of review) × ($497/hour for outside counsel services) = $4,970 outside counsel costs.

hours,[1429] and the initial aggregate cost to be $1.88 million.[1430] We estimate the aggregate burden for large broker-dealers to be 20,100 burden hours,[1431] and the aggregate cost to be $9.99 million.[1432]

Similar to delivery of the account disclosure regarding capacity and type and scope of services, we estimate the burden for broker-dealers to make the initial delivery of the fee schedule to new retail customers, at the beginning of the relationship, and existing retail customers, prior to or at the time of a recommendation, will require approximately 0.02 hours to deliver to each retail customer.[1433] As stated above, we estimate that the 2,766 broker-dealers that report retail activity have approximately 139 million customer accounts, and that approximately 73.5%, or 102 million, of those accounts belong to retail customers.[1434] We therefore estimate that broker-dealers will have an aggregate initial burden of 2,040,000 hours, or approximately 738 hours per broker-dealer for the first year after Regulation Best Interest is in effect.[1435]

The total aggregate initial burden for broker-dealers is therefore estimated at 2,063,880 [1436] hours, and the total aggregate initial cost is estimated at $11.87 million.[1437]

ii. Ongoing Costs and Burdens

For purposes of this PRA analysis, we assume that broker-dealers will review and amend the fee schedule on average, once a year. With respect to small broker-dealers, we estimate that reviewing and updating the fee schedule will require approximately two hours for in-house compliance per year, and for large broker-dealers, we estimate that the recurring, annual burden to review and update the fee schedule will be four hours for in-house compliance for each large broker-dealer. Based on these estimates, we estimate the recurring, aggregate, annualized burden will be 1,512 hours for small broker-dealers [1438] and 8,040 hours for large broker-dealers.[1439] We do not anticipate that small or large broker-dealers will incur outside legal, compliance, or consulting fees in connection with updating their standardized fee schedule since in-house personnel would be more knowledgeable about these facts, and we therefore do not expect external costs associated with updating the fee schedule.

With respect to delivery of the amended fee schedule in the event of a material change, we estimate that this would take place among 40% of a broker-dealer's retail customer accounts annually, and that broker-dealers will require approximately 0.02 hours to deliver the amended fee schedule to each retail customer.[1440] We therefore estimate broker-dealers would incur a total annual aggregate burden of 816,000 hours, or 295 hours per broker-dealer.[1441]

The total ongoing aggregate burden for all broker-dealers to review, amend, and deliver updated account disclosures to reflect changes in fees and costs would be 825,552 burden hours per year.[1442]

The Commission acknowledges that the type of fee schedule may vary greatly by broker-dealer, and therefore that the costs or burdens associated with updating the standardized fee schedule might similarly vary.

(3) Disclosure of All Material Facts Relating to Conflicts of Interest Associated With the Recommendation

Regulation Best Interest requires broker-dealers to provide a retail customer, in writing, full and fair disclosure of all material facts relating to conflicts of interest that are associated with the recommendation. Because the Disclosure Obligation applies to both the broker-dealer entity and its associated persons, the Commission expects that the broker-dealer entity and its associated persons will incur initial and ongoing burdens. However, as with the disclosure of the capacity in which they are acting and type and scope of services, we assume for purposes of this analysis that the broker-dealer entities will incur the costs and burdens of disclosing material conflicts of interest on behalf of their associated persons.[1443]

i. Initial Costs and Burdens

The Disclosure Obligation provides broker-dealers with the flexibility to choose the form and manner of conflict disclosure. However, we believe that many or most broker-dealers will develop a standardized conflict disclosure document and deliver it to their retail customers.[1444] We also assume for purposes of this PRA analysis that broker-dealers will update and deliver the standardized conflict disclosure document yearly on an ongoing basis, following the broker-dealer's annual conflicts review process.

For purposes of this PRA analysis, we assume that a standardized conflict disclosure document will be developed by in-house counsel and reviewed by outside counsel. For small broker-dealers, we estimate it will take in-house counsel, on average, five burden hours to create the standardized conflict disclosure document and outside counsel five hours to review and revise the document. We estimate that the initial aggregate burden for the development of a standardized disclosure document, based on an estimated 756 small broker-dealers, will be 3,780 burden hours.[1445] We additionally estimate an initial cost of

[1429] This estimate is based on the following calculation: (5 burden hours of review per small broker-dealer) × (756 small broker-dealers) = 3,780 aggregate initial burden hours.

[1430] This estimate is based on the following calculation: ($2,485 for outside counsel costs per small broker-dealer) × (756 small broker-dealers) = $1.88 million in aggregate initial outside costs.

[1431] This estimate is based on the following calculation: (10 burden hours of review per large broker-dealer) × (2,010 large broker-dealers) = 20,100 aggregate initial burden hours.

[1432] This estimate is based on the following calculation: ($4,970 for outside counsel costs per large broker-dealer) × (2,010 large broker-dealers) = $9.99 million in aggregate initial costs.

[1433] *See supra* footnote 1411.

[1434] *See supra* footnote 1412.

[1435] This estimate is based on the following calculation: (102 million retail customer accounts) × (.02 hours for delivery to each customer account) = 2,040,000 aggregate burden hours. Conversely, (2,040,000 aggregate burden hours)/(2,766 broker-dealers) = 738 burden hours per broker-dealer for the first year after Regulation Best Interest is in effect.

[1436] This estimate is based on the following calculations: (3,780 aggregate burden hours for small broker-dealers) + (20,100 burden hours for large broker-dealers) + (2,040,000 burden hours for delivery) = 2,063,880 total aggregate initial burden hours.

[1437] This estimate is based on the following calculation: ($1.88 million for small broker-dealer costs) + ($9.99 million large broker-dealer costs) = $11.87 million in total initial aggregate costs.

[1438] This estimate is based on the following calculation: (2 burden hours per broker-dealer) × (756 small broker-dealers) = 1,512 aggregate burden hours per broker-dealer per year.

[1439] This estimate is based on the following calculation: (4 burden hours per broker-dealer) × (2,010 large broker-dealers) = 8,040 aggregate burden hours per broker-dealer per year.

[1440] *See supra* footnote 1411.

[1441] This estimate is based on the following calculation: (40% of 102 million retail customer accounts) × (.02 hours) = 816,000 aggregate burden hours. Conversely, (816,000 aggregate burden hours)/(2,766 broker-dealers) = 295 burden hours per broker-dealer per year.

[1442] This estimate is based on the following calculation: (1,512 ongoing aggregate burden hours for small broker-dealers) + (8,040 ongoing aggregate burden hours for large broker-dealers) + (816,000 ongoing aggregate burden hours for delivery of amended account disclosures) = 825,552 total ongoing aggregate burden hours per year.

[1443] *See* Section IV.B.5 (discussing the costs and burdens associated with record-making, including for associated persons of a broker-dealer).

[1444] As noted above, we assume that delivery for new customers will occur at the beginning of the relationship, and that delivery for existing customers will occur prior to or at the time a recommendation is made.

[1445] This estimate is based on the following calculation: (5 hours) × (756 small broker-dealers) = 3,780 aggregate initial burden hours.

$2,485 per small broker-dealer,[1446] and an aggregate initial cost of $1.88 million for all small broker-dealers.[1447]

We expect the development and review of the standardized conflict disclosure document to take longer for large broker-dealers because, as discussed above, we believe large broker-dealers generally offer more products and services and employ more individuals, and therefore will need to disclose a larger number of conflicts. We estimate that for large broker-dealers, it will take 7.5 burden hours for in-house counsel to create the standardized conflict disclosure document, and outside counsel will take another 7.5 hours to review and revise the disclosure document. As a result, we estimate the initial aggregate burden, based on an estimated 2,010 large broker-dealers, to be approximately 15,075 burden hours.[1448] We additionally estimate initial costs of $3,728 per broker-dealer,[1449] and an aggregate initial cost for large broker-dealers of approximately $7.49 million.[1450]

We assume that broker-dealers will deliver the standardized conflict disclosure document to new retail customers at the inception of the relationship, and to existing retail customers prior to or at the time of a recommendation. We estimate that broker-dealers will require approximately 0.02 hours to deliver the standardized conflict disclosure document to each retail customer.[1451] We therefore estimate that broker-dealers will incur an aggregate initial burden of 2,040,000 hours, or approximately 738 hours per broker-dealer for delivery of the standardized conflict disclosure document the first year after Regulation Best Interest is in effect.[1452]

The total aggregate initial burden for broker-dealers is therefore estimated at 2,058,855 [1453] hours, and the total aggregate initial cost is estimated at $9.37 million.[1454]

ii. Ongoing Costs and Burdens

We believe that broker-dealers will incur ongoing annual burdens and costs to update the disclosure document to include newly identified conflicts. We assume for purposes of this analysis that broker-dealers will update their conflict disclosure document annually, after conducting an annual conflicts review. We estimate that the conflicts disclosures will be updated internally by both small and large broker-dealers.

We estimate that in-house counsel at a small broker-dealer will require approximately one hour per year to update the standardized conflict disclosure document, for an ongoing aggregate, annual burden of approximately 756 hours.[1455] For large broker-dealers, we estimate that the ongoing, aggregate annual burden would be two hours for each broker-dealer: One hour for in-house compliance and one hour for in-house counsel for legal personnel. We therefore estimate the ongoing, aggregate burden for large broker-dealers to be approximately 4,020 burden hours.[1456] We do not anticipate that small or large broker-dealers will incur outside legal, compliance, or consulting fees in connection with updating their standardized conflict disclosure document, since in-house personnel would presumably be more knowledgeable about conflicts of interest.

With respect to ongoing delivery of the updated conflict disclosure document, we estimate that this will take place among 40% of a broker-dealer's retail customer accounts annually, and that broker-dealers will require approximately 0.02 hours to deliver the updated conflict disclosure document to each retail customer.[1457] We therefore estimate that broker-dealers will incur an ongoing, aggregate annual burden of 816,000 hours, or 295 burden hours per broker-dealer.[1458] The total aggregate ongoing burden for broker-dealers is therefore estimated at 820,776 hours.[1459]

Based on the calculation describe above, we estimate that broker-dealers will incur an aggregate total initial burden of 6,216,125 hours [1460] and a total initial cost of $42.84 million,[1461] as well as an aggregate total ongoing annual burden of 2,101,493 hours [1462] to comply with the Disclosure Obligation.

2. Care Obligation

The Care Obligation requires a broker-dealer to have a reasonable basis to believe, based on its understanding of the potential risks, rewards, and costs of the recommended security or investment strategy involving securities,

[1446] This estimate is based on the following calculation: ($497/hour) × (5 hours) = $2,485 in initial costs.

[1447] This estimate is based on the following calculation: ($497/hour × 5 hours) × (756 small broker-dealers) = $1.88 million in aggregate initial costs.

[1448] This estimate is based on the following calculation: (7.5 hours × 2,010 large broker-dealers) = 15,075 aggregate initial burden hours.

[1449] This estimate is based on the following calculation: ($497/hour) × (7.5 hours) = $3,728 in initial costs per broker-dealer.

[1450] This estimate is based on the following calculation: ($497/hour) × (7.5 hours) × 2,010 large broker-dealers) = $7.49 million in aggregate costs.

[1451] *See supra* footnote 1411. For purposes of this PRA analysis, we have assumed any initial disclosures made by the broker-dealer related to material conflicts of interest will be delivered together.

[1452] These estimates are based on the following calculations: (0.02 hours per customer account × 102 million retail customer accounts) = 2,040,000 aggregate initial burden hours. Conversely, (2,040,000 hours)/(2,766 broker-dealers) = 738 burden hours per broker-dealer.

[1453] This estimate is based on the following calculations: (3,780 aggregate burden hours for small broker-dealers) + (15,075 burden hours for large broker-dealers) + (2,040,000 burden hours for delivery) = 2,058,855 total aggregate initial burden hours.

[1454] This estimate is based on the following calculation: ($1.88 million for small broker-dealer costs) + ($7.49 million large broker-dealer costs) = $9.37 million in total aggregate initial costs.

[1455] This estimate is based on the following calculation: (1 hour per broker-dealer) × (756 small broker-dealers) = 756 aggregate burden hours per year.

[1456] This estimate is based on the following calculation: (2 hours per broker-dealer) × (2,010 large broker-dealers) = 4,020 aggregate burden hours per year.

[1457] *See supra* footnote 1411. The Commission estimates that broker-dealers will update their disclosures of fees and costs and material facts relating to conflicts of interest that are associated with their recommendation more frequently than disclosure related to capacity or type and scope of services.

[1458] This estimate is based on the following calculation: (40% of 102 million retail customer accounts) × (.02 hours) = 816,000 aggregate burden hours per year. Conversely, (816,000 aggregate burden hours)/(2,766 broker-dealers) = 295 hours per broker-dealer per year.

[1459] This estimate is based on the following calculations: (756 aggregate burden hours for small broker-dealers) + (4,020 aggregate burden hours for large broker-dealers) + (816,000 aggregate burden hours for delivery) = 820,776 total aggregate ongoing burden hours.

[1460] This estimate is based on the following calculation: (2,093,390 aggregate initial burden hours for initial compliance with disclosure of capacity and type and scope of services) + (2,063,880 aggregate initial burden hours for initial compliance with disclosure of fees and costs) + (2,058,855 aggregate initial burden hours for initial compliance with disclosure of all material facts regarding disclosure of conflicts of interest associated with the recommendation) = 6,216,125 total aggregate initial burden hours for compliance with the Disclosure Obligation.

[1461] This estimate is based on the following calculation: ($21.6 million aggregate initial cost for compliance with disclosure of capacity and type and scope of services) + ($11.87 million aggregate initial cost for compliance with disclosure of fees and costs) + ($9.37 aggregate initial cost for compliance with disclosure of all material facts regarding disclosure of conflicts of interest associated with the recommendation) = $42.84 million total aggregate initial cost for compliance with the Disclosure Obligation.

[1462] This estimate is based on the following calculation: (455,165 aggregate annual burden hours for ongoing compliance with disclosure of capacity and type and scope of services) + (825,552 aggregate annual burden hours for ongoing compliance with disclosure of fees and costs) + (820,776 aggregate annual burden hours for ongoing compliance with disclosure of all material facts regarding disclosure of conflicts of interest associated with the recommendation) = 2,101,493 total aggregate burden hours per year for ongoing compliance with the Disclosure Obligation.

and in light of the retail customer's investment profile, that the recommendation is in the best interest of the particular retail customer and does not place the broker-dealer's interest ahead of the retail customer's interest. However, any PRA burdens or costs associated with the Care Obligation are duplicative of costs associated with other obligations in Regulation Best Interest, including the Disclosure Obligation and the Record-Making Obligation under Rule 17a–3(a)(35) and Recordkeeping Obligation under Rule 17a–4(e)(5).

3. Conflict of Interest Obligation

The Conflict of Interest Obligation creates an overarching obligation to require broker-dealers [1463] to establish written policies and procedures reasonably designed to identify and at a minimum disclose, pursuant to the Disclosure Obligation, or eliminate all conflicts of interest associated with a recommendation. More specifically, broker-dealers are specifically required to establish, maintain, and enforce written policies and procedures reasonably designed to: (i) Identify and mitigate any conflicts of interest associated with recommendations that create an incentive for a natural person who is an associated person of a broker or dealer to place the interest of the broker or dealer, or such natural person making the recommendation, ahead of the interest of the retail customer; (ii) (A) identify and disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended to a retail customer and any conflicts of interest associated with such limitations, in accordance with the Disclosure Obligation, and (B) prevent such limitations and associated conflicts of interest from causing the broker, dealer, or a natural person who is an associated person of the broker or dealer to make recommendations that place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; and (iii) identify and eliminate sales contests, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.[1464]

Written policies and procedures developed pursuant to the Conflict of Interest Obligation of Regulation Best Interest would help a broker-dealer to develop a process reasonably designed for its business, for identifying conflicts of interest, and then determining whether to eliminate, or disclose and/or mitigate the conflict and the appropriate means of eliminating, disclosing and/or mitigating the conflict. In addition, establishing and maintaining written policies and procedures would generally (1) assist a broker-dealer in supervising its associated persons and assessing compliance with the Conflict of Interest Obligation; and (2) assist the Commission and SRO staff in connection with examinations and investigations.[1465]

In light of the modifications to several substantive requirements of the rule relative to the Proposing Release, including the Conflict of Interest Obligation, as discussed in more detail above, we believe these changes will allow broker-dealers' to more easily incorporate the requirements of Regulation Best Interest into existing supervisory and compliance systems and streamline compliance with Regulation Best Interest.[1466] Therefore, we generally believe our proposed burdens and costs are accurate but have updated estimates to reflect changes in the number of broker-dealers and costs of certain services since the last estimate in the Proposing Release.

Following is a detailed discussion of the estimated costs and burdens associated with the Conflict of Interest Obligation.

a. Written Policies and Procedures

i. Initial Costs and Burdens

We believe that most broker-dealers have policies and procedures in place to address conflicts of interest, but do not necessarily have written policies and procedures regarding the identification and management of conflicts as required by Regulation Best Interest. To comply with the Conflict of Interest Obligation, we believe that broker-dealers would utilize a combination of in-house and outside legal and compliance counsel to update existing policies and procedures.[1467] We assume that, for purposes of this analysis, the associated costs and burdens would differ between small and large broker-dealers, as large broker-dealers generally offer more products and services and therefore would need to evaluate and address a greater number of potential conflicts of interest. As discussed above, we estimate that 2,010 broker-dealers would qualify as large broker-dealers for purposes of this analysis and 756 would qualify as small broker-dealers that have retail business.[1468]

In the Proposing Release, we estimated that a large broker-dealer would incur a one-time internal burden of 60 hours for in-house legal and in-house compliance counsel to update existing policies and procedures to comply with Regulation Best Interest.[1469] We also estimated a cost of $4,720 for outside counsel to review updated policies and procedures on behalf of a large broker-dealer, with an aggregate initial burden of 123,300 burden hours and aggregate initial cost of $9.70 million for large broker-dealers.[1470]

In the Proposing Release, we assumed that small broker-dealers would primarily rely on outside counsel to update existing policies and procedures, as small broker-dealers generally have fewer in-house legal and compliance personnel. Given that smaller broker-dealers generally have fewer conflicts of interest, we estimated that 40 hours of outside legal counsel services would be required, for a one-time cost of $18,800 per small broker-dealer, and an aggregate cost of $15.1 million for all small broker-dealers, and we also expected that in-house compliance personnel would require 10 hours to review and approve the updated policies and procedures, for an aggregate burden of 8,020 hours.[1471] Therefore, we estimated the total initial aggregate burden to be 131,320 hours and the total initial aggregate cost to be $24.8 million.[1472]

We believe our estimates are generally accurate in light of the increased specificity in Regulation Best Interest as to how a broker-dealer must address specified conflicts of interest but due to changes in the number of broker-dealers and cost estimates for certain services, we are revising our burden and cost estimates.[1473]

[1463] As discussed above, the Conflict of Interest Obligation and Compliance Obligation apply solely to the broker or dealer entity, and not to the associated persons of a broker or dealer.

[1464] Rule 15*l*–1 under the Exchange Act.

[1465] *See* Section II.C.3.a.

Any written policies and procedures developed pursuant to Regulation Best Interest would be required to be retained pursuant to Exchange Act Rule 17a–4(e)(7), which requires broker-dealers to retain compliance, supervisory, and procedures manuals (and any updates, modifications, and revisions thereto) describing the policies and procedures of the broker-dealer with respect to compliance with applicable laws and rules, and supervision of the activities of each associated, for a specified period of time. The record retention requirements of Rule 17a–4(e)(7) include any written policies and procedures that broker-dealers may produce pursuant to the Conflict of Interest Obligation of Regulation Best Interest.

[1466] *See* Section II.C.3.

[1467] *See* footnote 1381 and accompanying text.

[1468] *See* footnote 1387 and accompanying text.

[1469] *See* Proposing Release at 21666.

[1470] *Id.*

[1471] *Id.*

[1472] *Id.*

[1473] We have revised our cost estimates to reflect the updated SIFMA Management and Professional Earnings Report which was updated in 2019 to reflect inflation. Therefore, the hourly rates used

For purposes of Regulation Best Interest as adopted, we estimate that a large broker-dealer would incur an initial burden of 50 hours for in-house counsel and in-house compliance to update existing policies and procedures to comply with Regulation Best Interest and an initial burden of 5 hours for general counsel and 5 hours for a Chief Compliance Officer to review and approve the updated policies and procedures, for a total of 60 burden hours.[1474] We also estimate ten hours of outside counsel services will be required at a cost of $4,970 to review updated policies and procedures on behalf of a large broker-dealer.[1475] We therefore estimate the aggregate initial burden for large broker-dealers to be of 120,600 burden hours[1476] and initial aggregate cost of approximately $10.0 million for large broker-dealers.[1477]

For small broker-dealers, we believe that they would primarily rely on outside counsel to update existing policies and procedures, as small broker-dealers generally have fewer in-house legal and compliance personnel. Given that smaller broker-dealers generally have fewer conflicts of interest, we estimate that 40 hours of outside legal counsel would be required to update existing policies and procedures, for a one-time cost of $19,880 per small broker-dealer,[1478] and an aggregate cost of $15.0 million for all small broker-dealers.[1479] We also expect that in-house compliance would require 10 hours to review and approve the updated policies and procedures, for an aggregate burden of 7,560 hours.[1480] Therefore, we estimate the total initial aggregate burden to be 128,160 hours[1481] and the total initial aggregate cost to be approximately $25.0 million.[1482]

ii. Ongoing Costs and Burdens

For purposes of this analysis, we assume that small and large broker-dealers would review and update policies and procedures on an annual basis to accommodate the addition of, for example, new products or services, new business lines, and/or new personnel. We also assume that broker-dealers would review and update their policies and procedures for compliance with the Conflict of Interest Obligation on an annual basis, and in-house personnel would perform the review and make any updates.

In the Proposing Release, we estimated that large broker-dealers would incur an annual internal burden of 12 hours to review and update existing policies and procedures to identify new conflicts for an ongoing, aggregate burden of 24,660 hours with no ongoing costs as they would rely on internal personnel.[1483] We assumed small broker-dealers would rely on outside legal counsel and compliance consultants to review and update policies and procedures, with final review and approval from in-house compliance[1484] with an aggregate, annual ongoing cost of $3.08 million per year.[1485] In addition to these costs, we believed that small broker-dealers would incur an internal an ongoing, aggregate burden of 28,670 hours. While the Commission believes our time estimates from the Proposing Release are generally accurate, we have revised our burdens and estimates to account for changes in both the number of broker-dealers and external costs of services.

We estimate that large broker-dealers, which generally have more numerous and complex products and services, as well as and higher rates of hiring and turnover would incur an annual internal burden of 12 hours to review and update existing policies and procedures: Four hours for in-house counsel, four hours for in-house compliance, and four hours for business-line personnel to identify new conflicts. We therefore estimate an ongoing, aggregate burden for large broker-dealers of approximately 24,120 hours.[1486] Because we assume that large broker-dealers would rely on internal personnel to update policies and procedures on an ongoing basis, we do not believe large broker-dealers would incur ongoing external costs.

We assume for purposes of this analysis that small broker-dealers, generally have fewer and less complex products and lower rates of hiring. We also assume they would primarily rely on outside legal counsel and outside compliance consultants for review and update of their policies and procedures, with final review and approval from an in-house compliance manager. We estimate that outside legal counsel would require approximately five hours per year to update policies and procedures, for an annual cost of $2,485 for each small broker-dealer.[1487] The projected aggregate, annual ongoing cost for outside legal counsel to update policies and procedures for small broker-dealers would be $1.88 million per year.[1488] In addition, we expect that small broker-dealers would require five hours of outside compliance services per year to update their policies and procedures, for an ongoing cost of $1,365 per year;[1489] and an aggregate ongoing cost of $1.03 million.[1490] The total aggregate, ongoing cost for small

here for certain services, for example, outside legal counsel and outside compliance costs, are higher than the numbers in the Proposing Release.

1474 This estimate is based on the following calculation: (50 hours of review for in-house counsel and in-house compliance counsel) + (5 hours of review for general counsel) + (5 hours of review for Chief Compliance Officer) = 60 initial burden hours per large broker-dealer.

1475 Data from the SIFMA Management and Professional Earnings Report suggests that the average hourly rate for legal services is $497/hour. This cost estimate is therefore based on the following calculation: (10 hours of review) × ($497/hour for outside counsel services) = $4,970 in outside counsel costs per large broker-dealer.

1476 This estimate is based on the following calculation: (60 burden hours of review per large broker-dealer) × (2,010 large broker-dealers) = 120,600 aggregate burden hours for large broker-dealers.

1477 This estimate is based on the following calculation: ($4,970 for outside counsel costs per large broker-dealer) × (2,010 large broker-dealers) = approximately $10.0 million in outside counsel costs for large broker-dealers.

1478 This cost estimate is based on the following calculation: (40 hours of review) × ($497/hour for outside counsel services) = $19,880 in outside counsel costs per small broker-dealer.

1479 This cost estimate is based on the following calculation: ($19,880 for outside attorney costs per small broker-dealer) × (756 small broker-dealers) = approximately $15.0 million in outside counsel costs for small broker-dealers.

1480 This estimate is based on the following calculation: (10 burden hours) × (756 small broker-dealers) = 7,560 aggregate burden hours.

1481 This estimate is based on the following calculation: (120,600 aggregate burden hours for large broker-dealers) + (7,560 aggregate burden hours for small broker-dealers) = 128,160 total aggregate burden hours.

1482 This estimate is based on the following calculation: ($10 million in aggregate costs for large broker-dealers) + ($15.0 million in aggregate costs for small broker-dealers) = $25.0 million total aggregate costs.

1483 Proposing Release at 21667.

1484 *Id.*

1485 *Id.*

1486 This estimate is based on the following calculation: (12 burden hours per large broker-dealer) × (2,010 large broker-dealers) = 24,120 aggregate ongoing burden hours.

1487 This estimate is based on the following calculation: (5 hours per small broker-dealer) × ($497/hour for outside counsel services) = $2,485 in outside counsel costs.

1488 This estimate is based on the following calculation: ($2,485 in outside counsel costs per small broker-dealer) × (756 small broker-dealers) = $1.88 million in aggregate, ongoing outside legal costs per year.

1489 We believe that performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Professional Earnings Report suggests that costs for these positions are $237 and $309 per hour, respectively for an average of $273 per hour. This cost estimate is based on the following calculation: (5 hours of review) × ($273/hour for outside compliance services) = $1,365 in outside compliance service costs.

1490 This estimate is based on the following calculation: ($1,365 in outside compliance costs per small broker-dealer) × (756 small broker-dealers) = $1.03 million in aggregate, ongoing outside compliance costs per year.

broker-dealers is therefore projected at $2.91 million per year.[1491]

In addition to the costs described above, we additionally believe small broker-dealers would incur an internal burden of approximately 5 hours for an in-house compliance manager to review and approve the updated policies and procedures per year. The ongoing, aggregate burden for small broker-dealers would be 3,780 hours for in-house compliance manager review.[1492]

We therefore estimate the total ongoing aggregate ongoing burden to be 27,900 hours per year [1493] and the total ongoing aggregate cost to be $2.91 million per year.[1494]

The Commission acknowledges that policies and procedures may vary greatly by broker-dealer, given the differences in size and the complexity of broker-dealer business models. Accordingly, we expect that the need to update policies and procedures might also vary greatly.

b. Identification and Management of Conflicts of Interest

With respect to identifying and determining whether a conflict of interest exists in connection with a recommendation and whether it needs to be addressed through disclosure, mitigation and/or elimination, a broker-dealer would first need to establish mechanisms to proactively and systematically identify conflicts of interest in its business on an ongoing or periodic basis.[1495] For purposes of this analysis, we assume that most broker-dealers already have an existing technological infrastructure in place, and we assume it would need to be modified to comply with the Conflict of Interest Obligation.

i. Initial Costs and Burdens

As stated in the Proposing Release, we believed that costs and burdens may vary greatly depending on the size of the broker-dealer, but we expected that modification of a broker-dealer's existing technology would initially require the retention of an outside programmer as well as coordination between the programmer and the broker-dealer's in-house compliance manager. The costs and burdens for this process were estimated to be $15.43 million and 14,285 burden hours.[1496] In addition to these costs and burdens, we expected that a broker-dealer would spend time to determine whether the conflict of interest identified were material and would have required an additional 14,285 burden hours for all broker-dealers for an aggregate burden of 28,570 hours for identification of conflicts of interest.[1497]

As stated above, we believe the process would be largely the same as set forth in the Proposing Release but have revised our estimates and costs below to account for changes in the number of broker-dealers and external costs as well as to account for some changes to the structure of the Conflict of Interest Obligation.

To comply with the Conflict of Interest Obligation, we expect that broker-dealers will modify existing technology through the work of an outside programmer which would require, on average, an estimated 20 hours, for an estimated cost per broker-dealer of $5,680.[1498] We additionally continue to estimate (as was set forth in the Proposing Release) that coordination between the programmer and the broker-dealer's compliance manager would involve five burden hours.[1499] The aggregate initial costs and burdens for the modification of existing technology to identify conflicts of interest would therefore be $15.71 million,[1500] and 13,830 burden hours.[1501]

As a result of the changes made to the rule text of the Conflict of Interest Obligation, we believe that broker-dealers would incur burdens to: (1) Identify conflicts of interest and determine whether the conflict involves an incentive to an associated person to place the interest of the broker-dealer or natural person making the recommendation ahead of the interest of the retail customer, a material limitation on the product menu, or a sales practice that is based on the sales of specific securities or specific types of securities within a limited period of time and (2) determine whether and how the conflict would be disclosed, disclosed and mitigated, or eliminated in accordance with the Conflict of Interest Obligation. In order to complete this process, we believe a broker-dealer, on average, would require approximately 20 hours [1502] of review per broker-dealer,[1503] for an aggregate of 55,320 burden hours for all broker-dealers.[1504] We therefore estimate the total initial aggregate burden for identification and management of conflicts of interest is 69,150 hours.[1505]

ii. Ongoing Costs and Burdens

To maintain compliance with the Conflict of Interest Obligation, we assume for purposes of this analysis that a broker-dealer would seek to identify additional conflicts of interest as its business evolves. As noted above, the Commission recognizes that broker-dealers vary in the types of services and product offerings and therefore vary in the types of conflicts of interest that exist within and across broker-dealers.[1506]

However, for purposes of the PRA analysis in the Proposing Release, we assumed that broker-dealers would, at a minimum, engage in a material conflicts identification process on an annual basis, and we estimated that in the aggregate broker-dealers would spend approximately 28,570 hours each to complete this process per year.[1507] Similar to the Proposing Release, we believe that for purposes of this analysis, broker-dealers would, through the help of the business line and compliance personnel, spend on average 10 hours [1508] to perform an annual

[1491] This estimate is based on the following calculation: ($1.88 million for outside legal counsel costs) + ($1.03 million for outside compliance costs) = $2.91 million total aggregate ongoing costs per year.

[1492] This estimate is based on the following calculation: (5 hours compliance manager review per small broker-dealer) × (756 small broker-dealers) = 3,780 aggregate ongoing burden hours per year.

[1493] This estimate is based on the following calculation: (24,120 aggregate ongoing burden hours for large broker-dealers) + (3,780 aggregate ongoing burden hours for small broker-dealers) = 27,900 total aggregate ongoing burden hours per year.

[1494] This estimate is based on the following calculation: ($2.91 million per year in total aggregate ongoing costs for small broker-dealers) + ($0 projected ongoing costs for large broker-dealers) = $2.91 million per year in total aggregate ongoing costs.

[1495] *See supra* Section III.C.3.

[1496] Proposing Release at 21667.

[1497] *Id.*

[1498] Data from the SIFMA Management and Professional Earnings Report suggests that the average hourly rate for technology services in the securities industry is $284. This cost estimate is based on the following calculation: (20 hours of review) × ($284/hour for technology services) = $5,680.

[1499]

[1500] This cost estimate is based on the following calculation: ($5,680 in outside programmer costs per broker-dealer) × (2,766 broker-dealers) = $15.71 million in aggregate outside programmer costs.

[1501] This burden estimate is based on the following calculation: (5 burden hours for in-house compliance manager) × (2,766 broker-dealers) = 13,830 aggregate burden hours.

[1502] In light of the changes made to the rule text of the Conflict of Interest Obligation and the comments received, we have increased our estimate to 20 burden hours per broker-dealer.

[1503] This burden estimate consists of 10 hours for review by business line personnel, and 10 hours for review by in-house compliance manager.

[1504] This burden estimate is based on the following calculation: (20 burden hours) × (2,766 broker-dealers) = 55,320 aggregate burden hours.

[1505] This burden estimate is based on the following calculation: (13,830 burden hours for modification of technology) + (55,320 burden hours for evaluation of managing conflicts) = 69,150 total aggregate burden hours.

[1506] *See supra* Section II.C.3.

[1507] *See* Proposing Release at 21668.

[1508] This burden estimate consists of five hours for review by business line personnel, and five conflicts review using the modified technology infrastructure.[1509] Therefore, the Commission estimates that the aggregate ongoing burden for an annual conflicts review, based on an estimated 2,766 retail broker-dealers, would be approximately 27,660 burden hours per year.[1510] Because we assume that broker-dealers would use in-house personnel to identify and evaluate new, potential conflicts, we continue to believe they would not incur additional ongoing external costs.

c. Training

As discussed in the Proposing Release, we expect that broker-dealers would develop training programs to comply with Regulation Best Interest, including the Conflict of Interest Obligation. However, we believe that any burdens and costs associated with a training program would fall under the new Compliance Obligation as it would be developed to comply with Regulation Best Interest as a whole, including each of the component obligations.

In total, to comply with the Conflict of Interest Obligation, the Commission estimates that the total initial burdens and costs to be 197,310 hours[1511] and $40.71 million,[1512] and the total ongoing burdens and costs to be 55,560 hours[1513] per year and $2.91 million per year.[1514]

4. Compliance Obligation

As discussed above, in response to comments that we should require policies and procedures to comply with Regulation Best Interest as a whole, we are adopting the Compliance Obligation.[1515] The Compliance Obligation requires that the broker-dealer[1516] establish, maintain and enforce written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest. This Compliance Obligation creates an explicit obligation under the Exchange Act with respect to Regulation Best Interest as a whole. Similar to the policies and procedures requirement of the Conflict of Interest Obligation, broker-dealers will have flexibility to design policies and procedures that are reasonable for the scope, size and risks associated with the operations of the firm and the types of business in which the broker-dealer engages. Because we did not include the Compliance Obligation in the Proposing Release, we did not previously include costs and burdens associated with the Compliance Obligation, but we have provided a detailed explanation of these costs and burdens below.[1517]

a. Written Policies and Procedures

i. Initial Costs and Burdens

While the Compliance Obligation creates an explicit requirement under the Exchange Act, we believe that broker-dealers would likely establish policies and procedures to comply with Regulation Best Interest pursuant to Section 15(b)(4)(E) and SRO rules by adjusting their current systems of supervision and compliance, as opposed to creating new systems. While broker-dealers must already have policies and procedures in place to address other Commission and SRO rules, they would need to update their systems of supervision and compliance to account for Regulation Best Interest.

To comply with the Compliance Obligation, we believe that broker-dealers would employ a combination of in-house and outside legal and compliance counsel to update existing policies and procedures to account for the Disclosure and Care Obligations.[1518] We assume that, for purposes of this analysis, the associated costs and burdens would differ between small and large broker-dealers, as large broker-dealers generally offer more products and services and employ more individuals and therefore would need to evaluate and update a greater number of systems. As discussed above, we estimate that 2,010 broker-dealers would qualify as large broker-dealers for purposes of this analysis and 756 would qualify as small broker-dealers that have retail business.[1519]

For purposes of this analysis we estimate that a large broker-dealer would incur a one-time average internal burden of 30 hours for in-house legal personnel and in-house compliance counsel to update existing policies and procedures to comply with the Compliance Obligation and a one-time burden of five hours for general counsel and five hours for a Chief Compliance Officer to review and approve the updated policies and procedures, for a total of 40 burden hours.[1520] We also estimate six hours of outside counsel services a cost of $2,982 for outside counsel to review updated policies and procedures on behalf of a large broker-dealer.[1521] We therefore estimate the aggregate burden for large broker-dealers to be of 80,400 burden hours[1522] and aggregate cost of $6.0 million for large broker-dealers.[1523]

For small broker-dealers, we believe that they would primarily rely on outside counsel to update existing policies and procedures, as small broker-dealers generally have fewer in-house legal and compliance personnel. We estimate that only 20 hours of outside legal counsel services would be required, for a one-time cost of $9,940 per small broker-dealer,[1524] and an aggregate cost of $7.5 million for all

hours for review by an in-house compliance manager.

[1509] FINRA rules set an annual supervisory review as a minimum threshold for broker-dealers. *See, e.g.*, FINRA Rules 3110 (requiring an annual review of the businesses in which the broker-dealer engages); 3120 (requiring an annual report detailing a broker-dealer's system of supervisory controls, including compliance efforts in the areas of antifraud and sales practices); and 3130 (requiring each broker-dealer's CEO or equivalent officer to certify annually to the reasonable design of the policies and procedures for compliance with relevant regulatory requirements).

[1510] This estimate is based on the following calculation: (10 hours per retail broker-dealer) × (2,766 retail broker-dealers) = 27,660 aggregate burden hours per year.

[1511] This estimate is based on the following calculation: (128,160 initial burden hours for policies and procedures) + (69,150 initial burden hours for identification and management of conflicts of interest) = 197,310 initial burden hours to comply with the Conflict of Interest Obligation.

[1512] This estimate is based on the following calculation: ($25.0 million initial costs for policies and procedures) + ($15.71 million initial costs for identification and management of conflicts of interest) = $40.71 million initial total costs to comply with the Conflict of Interest Obligation.

[1513] This estimate is based on the following calculation: (27,900 ongoing burden hours for policies and procedures) + (27,660 ongoing burden hours for identification and management of conflicts of interest) = 55,560 aggregate ongoing burden hours per year to comply with Conflict of Interest Obligation.

[1514] This estimate is based on the following calculation: ($2.91 million ongoing costs for policies and procedures) + ($0 ongoing costs for identification and management of conflicts of interest) = $2.91 million aggregate ongoing total costs per year to comply with the Conflict of Interest Obligation.

[1515] Section II.C.4.

[1516] *See supra* footnote 1462 and accompanying text.

[1517] We note that any burdens and costs to comply with the Conflict of Interest Obligation are included in the estimates in Section IV.B.3 above.

[1518] *Id.*

[1519] *See supra* footnote 1387 and accompanying text.

[1520] This estimate is based on the following calculation: (30 hours of review for in-house legal and in-house compliance) + (5 hours of review for general counsel) + (5 hours of review for Chief Compliance Officer) = 40 burden hours.

[1521] Data from the SIFMA Management and Professional Earnings Report suggests that the average hourly rate for legal services is $497/hour. This cost estimate is therefore based on the following calculation: (6 hours of review) × ($497/hour for outside counsel services) = $2,982 in outside counsel costs.

[1522] This estimate is based on the following calculation: (40 burden hours of review per large broker-dealer) × (2,010 large broker-dealers) = 80,400 aggregate burden hours.

[1523] This estimate is based on the following calculation: ($2,982 for outside counsel costs per large broker-dealer) × (2,010 large broker-dealers) = $6.0 million in outside counsel costs.

[1524] This cost estimate is based on the following calculation: (20 hours of review) × ($497/hour for outside counsel services) = $9,940 in outside counsel costs.

small broker-dealers.[1525] We also expect that in-house compliance personnel would require 6 hours to review and approve the updated policies and procedures, for an aggregate burden of 4,536 hours.[1526] Therefore, we estimate the total initial aggregate burden to be 84,936 hours [1527] and the total initial aggregate cost to be $13.5 million.[1528]

ii. Ongoing Costs and Burdens

For purposes of this analysis, we assume that small and large broker-dealers would review and update policies and procedures on a periodic basis to accommodate the addition of, among other things, new products or services, new business lines, and/or new personnel. We also assume that broker-dealers would review and update their policies and procedures for compliance with Regulation Best Interest on an annual basis, and for purposes of this analysis, we assume they would perform the review and update using in-house personnel. Under the Compliance Obligation, we do not believe that broker-dealers would incur any costs or burdens associated with compliance with the Conflict of Interest Obligation, as those are included in the discussion above, but would for ongoing compliance with the Disclosure and Care Obligations.

For large broker-dealers with more numerous and complex products and services, as well as higher rates of hiring and turnover, we estimate that each broker-dealer would annually incur an internal burden of 12 hours to review and update existing policies and procedures: four hours for legal personnel, four hours for compliance personnel, and four hours for business-line personnel. We therefore estimate an ongoing, aggregate burden for large broker-dealers of approximately 24,120 hours per year.[1529]

We assume for purposes of this analysis that small broker-dealers, who generally have fewer and less complex products, and lower rates of hiring and turnover, would mostly rely on outside legal counsel and compliance consultants for review and update of their policies and procedures, with final review and approval from an in-house compliance manager. We estimate that outside counsel would require approximately five hours per year to update policies and procedures, for an annual cost of $2,485 for each small broker-dealer.[1530] The projected aggregate, annual ongoing cost for outside legal counsel to update policies and procedures for small broker-dealers would be $1.88 million.[1531] In addition, we expect that small broker-dealers would require five hours of outside compliance services per year to update their policies and procedures, for an ongoing cost of $1,365 per year,[1532] and an aggregate ongoing cost of $1.03 million.[1533] The Commission estimates the total aggregate, ongoing cost for small broker-dealers is therefore $2.91 million per year.[1534]

b. Training

Pursuant to the Compliance Obligation's requirement to "maintain and enforce" written policies and procedures, we additionally believe broker-dealers will develop training programs that promote compliance with Regulation Best Interest. We believe that a training program would cover compliance with Regulation Best Interest as a whole and would therefore cover the Disclosure, Care and Conflict of Interest Obligations. The initial and ongoing costs and burdens associated with such a training program are estimated below.

i. Initial Costs and Burdens

We believe that broker-dealers would likely use a computerized training model to train their associated persons regarding the policies and procedures pertaining to Regulation Best Interest. We estimate that a broker-dealer would retain an outside systems analyst, outside programmer, and an outside programmer analyst to create the training module, at 20 hours, 40 hours, and 20 hours, respectively. The total cost to develop the training module would be approximately $20,920,[1535] for an aggregate initial cost of $62.8 million.[1536]

Additionally, we expect that the training module would require the approval of the Chief Compliance Officer, as well as in-house counsel, each of whom would require approximately 2 hours to review and approve the training module. The initial aggregate burden for broker-dealers is therefore estimated at 11,064 burden hours.[1537]

In addition, broker-dealers would incur an initial cost for associated persons to undergo training through the training module. We estimate the training time at one hour per associated person, for an aggregate burden of 428,404 burden hours, or an initial burden of 154.9 hours per broker-dealer.[1538] We estimate the total initial aggregate burden to approve the training module and implement the training program would be 439,486 burden hours.[1539]

[1525] This cost estimate is based on the following calculation: ($9,940 for outside counsel costs per small broker-dealer) × (756 small broker-dealers) = $7.5 million in outside counsel costs.

[1526] This estimate is based on the following calculation: (6 burden hours) × (756 small broker-dealers) = 4,536 initial aggregate burden hours.

[1527] This estimate is based on the following calculation: (80,400 aggregate burden hours for large broker-dealers) + (4,536 aggregate burden hours for small broker-dealers) = 84,936 total initial aggregate burden hours.

[1528] This estimate is based on the following calculation: ($6 million in aggregate costs for large broker-dealers) + ($7.5 million in aggregate costs for small broker-dealers) = $13.5 million total initial aggregate costs.

[1529] This estimate is based on the following calculation: (12 burden hours per large broker-dealer) × (2,010 large broker-dealers) = 24,120 aggregate ongoing burden hours per year.

[1530] Data from the SIFMA Management and Professional Earnings Report suggests that the average hourly rate for legal services is $497/hour. This estimate is therefore based on the following calculation: (5 hours per small broker-dealer) × ($497/hour for outside counsel services) = $2,485 in outside counsel costs per year.

[1531] This estimate is based on the following calculation: ($2,485 in outside counsel costs per small broker-dealer) × (756 small broker-dealers) = $1.88 million in aggregate, ongoing legal costs per year.

[1532] We believe that performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Professional Earnings Report suggests that costs for these positions are $237 and $309 per hour, respectively for an average of $273 per hour. This estimate is therefore based on the following calculation: (5 hours per small broker-dealer) × ($273/hour for outside counsel services) = $1,365 in outside compliance service costs per year.

[1533] This estimate is based on the following calculation: ($1,365 in outside compliance costs per small broker-dealer) × (756 small broker-dealers) = $1.03 million in aggregate, ongoing outside compliance costs per year.

[1534] This estimate is based on the following calculation: ($1.88 million for outside legal counsel costs) + ($1.03 million for outside compliance costs) = $2.91 million total aggregate ongoing costs per year.

[1535] Data from the SIFMA Management and Professional Earnings Report suggests that the average hourly rate in the securities industry is $263 for a systems analyst, $271 for a programmer, and $241 for a programmer analyst.. This cost estimate is based on the following calculation: ((20 hours for a systems analyst) × ($263/hour)) + ((40 hours of labor for a programmer) × ($271/hour)) + ((20 hours of labor for a programmer analyst) × ($241/hour)) = $20,920 in external technology costs per broker-dealer.

[1536] This estimate is based on the following calculation: (2,766 broker-dealers) × ($20,920in external technology costs per broker-dealer) = $57.9 million in aggregate costs for technology services.

[1537] This estimate is based on the following calculation: (2,766 broker-dealers) × (4 burden hours per broker-dealer) = 11,064 burden hours.

[1538] This estimate is based on the following calculation: (1 burden hour) × (428,404 registered representatives at standalone or dually registered broker-dealers) = 428,404 aggregate burden hours. Conversely, (428,404 aggregate burden hours)/(2,766 retail broker-dealers) = 154.9 initial burden hours per broker-dealer per year.

[1539] This estimate is based on the following calculation: (428,404 burden hours for training of registered representatives) + (11,064 burden hours to approve training program) = 439,468 total aggregate burden hours per year.

ii. Ongoing Costs and Burdens

We believe that, as a matter of best practice, broker-dealers would likely require registered representatives to repeat the training module for Regulation Best Interest on an annual basis. The ongoing aggregate cost for the one-hour training would be 428,404 burden hours per year, or 154.9 burden hours per broker-dealer per year.[1540]

In total, to comply with the Compliance Obligation, the Commission estimates the total initial burdens and costs to be 524,414 hours[1541] and $71.4 million,[1542] and the total ongoing burdens and costs to be 463,588 hours[1543] and $2.91 million.[1544]

5. Record-Making and Recordkeeping Obligations

The record-making and recordkeeping obligations will impose record-making and recordkeeping requirements on broker-dealers with respect to certain information collected from, or provided to, retail customers. Specifically, the Commission is amending Rules 17a–3 and 17a–4 of the Exchange Act, which set forth minimum requirements with respect to the records that broker-dealers must make, and how long those records and other documents must be kept, respectively. Records made and retained in accordance with the amendments to Rule 17a–3(a)(35) and 17a–4(e)(5) will (1) assist a broker-dealer in supervising and assessing internal compliance with Regulation Best Interest; and (2) assist the Commission and SRO staff in connection with examinations and investigations.

Due to changes in the number of broker-dealers and costs estimated for certain services, we are revising our estimates from those in the Proposing Release. However, while we understand commenters' concerns that the estimates are lower than what would actually be required to comply with Regulation Best Interest, we believe the estimates are generally accurate in light of the increased specificity in Regulation Best Interest on how to comply with the component obligations, including the Disclosure Obligation.[1545] The record-making and recordkeeping costs and burdens associated with the amendments to Rule 17a–3(a)(35) and Rule 17a–4(e)(5) are addressed below.

a. Record-Making Obligation

We are amending Rule 17a–3 by adding a new paragraph (a)(35) that requires a record of all information collected from, and provided to, the retail customer pursuant to Regulation Best Interest, as well as the identity of each natural person who is an associated person of a broker or dealer, if any, responsible for the account.[1546] This requirement applies with respect to each retail customer to whom a recommendation of any securities transaction or investment strategy involving securities is provided. The neglect, refusal, or inability of a retail customer to provide or update any such information will, however, excuse the broker-dealer from obtaining that information.

We indicated in the Proposing Release, and we continue to believe that broker-dealers currently make records of relevant customer investment profile information, and we therefore assume that no additional record-making obligations would arise as a result of broker-dealers' or their registered representatives' collection of information from retail customers.[1547] In addition, we continue to believe that broker-dealers likely make records of the "identity of each natural person who is an associated person, if any, responsible for the account." However, we are assuming, for purposes of compliance with Rule 17a–3(a)(35), that broker-dealers will need to create a record, or modify an existing record, to identify the associated person, if any, responsible for the account in the context of Regulation Best Interest. In addition, in cases where broker-dealers choose to meet part of the Disclosure Obligation orally under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation,* we believe the requirement to maintain a record of the fact that oral disclosure was provided to the retail customer will trigger a record-making obligation under paragraph (a)(35) of Rule 17a–3 and a recordkeeping obligation under paragraph (e)(5) of Rule 17a–4 that may impose additional compliance costs and burdens on broker-dealers.

i. Initial Costs and Burdens

In the Proposing Release, we assumed that broker-dealers would satisfy the record-making requirement of the proposed amendment to Rule 17a–3(a)(25) by amending an existing account disclosure document to include the "identity of each natural person who is an associated person, if any, responsible for the account." We estimated that the inclusion of this information in an account disclosure document would require an approximate total aggregate initial burden of 3,808,000 hours, or approximately 1,333 hours per broker-dealer for the first year after Regulation Best Interest is in effect.[1548]

As discussed above, we continue to believe that broker-dealers will satisfy the record-making requirements of the amendment to Rule 17a–3(a)(35) by amending an existing account disclosure document to include the "identity of each natural person who is an associated person, if any, responsible for the account." We believe that the inclusion of this information in an account disclosure document will require, on average, approximately 1

[1540] This estimate is based on the following calculation: (1 burden hour) × (428,404 registered representatives at standalone or dually registered broker-dealers) = 428,404 burden hours. Conversely, (428,404 aggregate burden hours) / (2,766 retail broker-dealers) = 154.9 initial burden hours per broker-dealer.

[1541] This estimate is based on the following calculation: (84,946 initial burden hours for policies and procedures) + (439,468 initial burden hours training) = 524,414 initial burden hours to comply with the Compliance Obligation.

[1542] This estimate is based on the following calculation: ($13.5 million initial costs for policies and procedures) + ($57.9 million initial costs for training) = $71.4 million initial total costs to comply with the Compliance Obligation.

[1543] This estimate is based on the following calculation: (24,120 ongoing burden hours for policies and procedures) + (439,468 ongoing burden hours for training) = 463,588 ongoing burden hours to comply with Compliance Obligation.

[1544] This estimate is based on the following calculation: ($2.91 million ongoing costs for policies and procedures) + ($0 million ongoing costs for training) = $2.91 million ongoing costs to comply with the Compliance Obligation.

[1545] *See, e.g.,* Raymond James Letter; CCMC Letters; SIFMA August 2018 Letter.

[1546] As indicated in the Proposing Release, we understand that broker-dealers likely make such records in the ordinary course of their business pursuant to Exchange Act Rules 17a–3(a)(6) and (7). We continue to believe, for purposes of compliance with Rule 17a–3(a)(35), that broker-dealers would need to create a record, or modify an existing record, to identify the associated person, if any, responsible for the account in the context of Regulation Best Interest. *See* Proposing Release at 21673.

[1547] The PRA burdens and costs arising from the requirement that a record be made of all information provided to the retail customer are accounted for in Regulation Best Interest and the Relationship Summary Adopting Release. With respect to the requirement that a record be made of all information *from* the retail customer, we believe that Rule 17a–3(a)(35) will not impose any new substantive burdens on broker-dealers. As discussed above, we continue to believe that the obligation to exercise reasonable diligence, care, and skill will not require a broker-dealer to collect additional information from the retail customer beyond that currently collected in the ordinary course of business even though a broker-dealer's analysis of that information and any resulting recommendations will need to adhere to the enhanced best interest standard of Regulation Best Interest. *See supra* Section II.C.2.

[1548] These estimates were based on the following calculations: (0.04 hours per customer account) × (95.2 million retail customer accounts) = 3,808,000 aggregate burden hours. Conversely, (3,808,000 aggregate burden hours)/(2,857 broker-dealers) = 1,333 hours per broker dealer for the first year after Regulation Best Interest is in effect. *See* Proposing Release at 21673.

hour per year for outside legal counsel at small broker-dealers, at an updated average rate of $497/hour, for an average annual cost of $497 for each small broker-dealer to update an account disclosure document. The projected aggregate initial cost for small broker-dealers is therefore estimated to be $375,732 per year.[1549] For broker-dealers that are not small entities, we estimate that the initial burden will be 2 hours for each broker-dealer: 1 hour for compliance personnel and 1 hour for legal personnel. We therefore estimate the aggregate initial burden for broker-dealers that are not small entities to be approximately 4,020 burden hours.[1550] Finally, we estimate it will require an additional 0.04 hours for the registered representative responsible for the information (or other clerical personnel) to fill out that information in the account disclosure document, for an approximate total aggregate initial burden of 4,080,000 hours, or approximately 1,475 hours per broker-dealer for the first year after Regulation Best Interest is in effect.[1551] Because we have already included the costs and burdens associated with the creation of a record to memorialize an oral disclosure, and the delivery of the amended account disclosure document discussed above, they are not included in this section of the analysis.[1552]

The total aggregate initial burden for broker-dealers is therefore estimated at 4,084,020 hours,[1553] and the total aggregate initial cost is estimated at $375,732.[1554]

ii. Ongoing Costs and Burdens

We do not believe that the identity of the registered representative responsible for the retail customer's account will change. Accordingly, we continue to believe that there are no ongoing costs and burdens associated with this recordmaking requirement of the amendment to Rule 17a–3(a)(35).

With respect to memorializing oral disclosures in cases where broker-dealers choose to meet part of the Disclosure Obligation orally under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation,* we estimate that this would take place among 52% of a broker-dealer's retail customer accounts (and thus 52% of a registered representative's retail customer accounts) annually.[1555] We therefore estimate broker-dealers to incur a total annual aggregate burden of 1.06 million hours, or 383.5 burden hours per year per broker-dealer.[1556]

b. Recordkeeping Obligation

We are amending Rule 17a–4(e)(5) to require that broker-dealers retain all records of the information collected from or provided to each retail customer pursuant to Regulation Best Interest for at least six years after the earlier of the date the account was closed or the date on which the information was last replaced or updated. We assume that, for purposes of this analysis, the following records would likely be retained pursuant to amended Rule 17a–3(a)(35): (1) Existing account disclosure documents; (2) comprehensive fee schedules; (3) disclosures identifying material conflicts; and (4) memorialized oral disclosures under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation.*[1557]

i. Initial Costs and Burdens

We believe that, to reduce costs and for ease of compliance, broker-dealers will utilize their existing recordkeeping systems in order to retain the forgoing records made pursuant to Regulation Best Interest, and as required to be kept under the amendment to Rule 17a–4(e)(5). As noted above, broker-dealers currently are subject to recordkeeping obligations pursuant to Rule 17a–4, which require, for example, broker-dealers to "preserve for a period of not less than six years, the first two years in an easily accessible place, all records required to be made pursuant to" Rule 17a–3(a)(1), (a)(2), (a)(3), (a)(5), (a)(21), (a)(22), and analogous records created pursuant to paragraph 17a–3(f). Thus, for example, broker-dealers are already required to maintain documents such as account blotters and ledgers for six years.

We continue to believe that broker-dealers will utilize their existing recordkeeping systems to include any additional or amended records required by Regulation Best Interest or pursuant to the amendment to Rule 17a–4(e)(5), and would similarly utilize their existing recordkeeping systems to account for any differences in the retention period. Thus, where broker-dealers currently retain documents on an electronic database to satisfy existing Rule 17a–4 or otherwise, we continue to expect broker-dealers to maintain any additional documents required by Regulation Best Interest or the amendment to Rule 17a–4(e)(5) by the same means. Likewise, where broker-dealers maintain documents required by existing Rule 17a–4 by paper, we would expect broker-dealers to continue to do so.

Based on our belief that broker-dealers will rely on existing infrastructures to satisfy the recordkeeping obligations of Regulation Best Interest and the amendment to Rule 17–a(4)(e)(5), we believe the burden for broker-dealers to add new documents or

[1549] This estimate is based on the following calculation: (1 hour per small broker-dealer) × (756 small broker-dealers) × ($497/hour) = $375,732 in aggregate costs per year.

[1550] This estimate is based on the following calculation: (2 burden hours per broker-dealer) × (2,010 large broker-dealers) = 4,020 aggregate burden hours per year.

[1551] These estimates are based on the following calculations: (0.04 hours per customer account) × (102 million retail customer accounts) = 4,080,000 aggregate burden hours. Conversely, (4,080,000 burden hours)/(2,766 broker-dealers) = 1,475 hours per broker-dealer for the first year after Regulation Best Interest is in effect.

[1552] *See supra* Section IV.B.1.

[1553] This estimate is based on the following calculation: (0 aggregate burden hours for small broker-dealers) + (4,020 burden hours for large broker-dealers) + (4,080,000 burden hours for personnel to fill out information in the account disclosure document) = 4,080,000 initial burden hours.

[1554] This estimate is based on the following calculation: ($375,732 for small broker-dealer costs) + ($0 for large broker-dealer costs) = ($375,732 in total aggregate initial costs).

[1555] We believe (and our experience indicates) that broker-dealers will use oral disclosure rarely, and primarily when making disclosures regarding a change in capacity. We do not have reliable data to determine the precise number of retail customers that have both a brokerage and an advisory account with a dually registered associated person. As indicated above, approximately 52% of registered representatives were dually registered as investment adviser representatives at the end of 2018. *See supra* footnote 945 and accompanying text. As a result, we have assumed for purposes of this analysis that this will take place among 52% of all retail customer accounts at broker-dealers annually. This estimate is likely over inclusive, as it includes all retail customer accounts at all broker-dealers (as opposed to only retail customer accounts where the retail customer has both a brokerage and advisory account with a dually registered financial professional), and under inclusive, as it assumes that such an oral disclosure will happen annually (as opposed to multiple times a year).

[1556] (52%) × (102 million retail customer accounts) × (0.02 hours for recording each oral disclosure relating to a retail customer's account) = 1,060,800 aggregate burden hours. Conversely, 1,060,800 aggregate burden hours/2,766 broker-dealers = 383.5 burden hours per broker-dealer per year.

[1557] In the Proposing Release, we identified four records that would likely need to be retained pursuant to amended Rule 17a–3(a)(25) (now reflected as Rule 17a–3(a)(35)): (1) A standardized Relationship Summary document; (2) existing account disclosure documents; (3) a comprehensive fee schedule; and (4) disclosures identifying material conflicts. However, in calculating the estimated burden for broker-dealers to add new documents or modify existing documents to the broker-dealer's existing retention system, we erroneously assumed a broker-dealer would upload or file *five* account documents, as opposed to the *four* account documents identified in the Proposing Release. *See* Proposing Release at 21673–21674. In addition, while the burden for broker-dealers to retain a standardized relationship summary was included in the Regulation Best Interest Proposing Release, it is excluded here because its associated burden is reflected in the Relationship Summary Proposal and Relationship Summary Adopting Release.

modify existing documents to the broker-dealer's existing retention system will be approximately 13.6 million burden hours for all broker-dealers, assuming a broker-dealer will need to upload or file each of the four account documents discussed above for each retail customer account.[1558] We do not believe there will be additional substantive internal or external costs relating to the uploading or filing of the documents. In addition, because we have already included the costs and burdens associated with the delivery of the amended account opening agreement and other documents above, we do not include them in this section of the analysis.

ii. Ongoing Costs and Burdens

We estimate that the approximate ongoing burden associated with the recordkeeping requirement of the amendment to Rule 17a–4(e)(5) is 4.46 million burden hours per year.[1559] We do not believe that the ongoing costs associated with ensuring compliance with the retention schedule would change from the current costs of ensuring compliance with existing Rule 17a–4 and as outlined above.

V. Final Regulatory Flexibility Act Analysis

The Commission has prepared this Final Regulatory Flexibility Analysis ("FRFA") in accordance with the provisions of the Regulatory Flexibility Act ("RFA")[1560] relating to Regulation Best Interest. An Initial Regulatory Flexibility Analysis ("IRFA") was prepared in accordance with the RFA and included in the Proposing Release.[1561]

A. Need for and Objectives of the Rule

Broker-dealers play an important role in helping Americans organize their financial lives, accumulate and manage retirement savings, and invest toward other important long-term goals, such as buying a house or funding a child's college education.

As discussed in Section I, concerns exist regarding: (1) The potential harm to retail customers resulting from broker-dealer recommendations provided in the presence of conflicts of interest and (2) the insufficiency of existing broker-dealer regulatory requirements to address these conflicts when broker-dealers make recommendations to retail customers. More specifically, there are concerns that existing requirements do not require a broker-dealer's recommendations to be in the retail customer's best interest.

As a result, we are adopting Regulation Best Interest, which creates an enhanced standard of conduct applicable to broker-dealers at the time they recommend to a retail customer a securities transaction or investment strategy involving securities. This includes recommendations of account types and rollovers or transfers of assets and also covers implicit hold recommendations, resulting from agreed-upon account monitoring. When making a recommendation, a broker-dealer must act in the retail customer's best interest and cannot place its own interests ahead of the customer's interests. This General Obligation is satisfied only if the broker-dealer complies with four specified component obligations: (1) Disclosure Obligation, (2) Care Obligation, (3) Conflict of Interest Obligation, and (4) Compliance Obligation. In addition, the Commission is amending Rules 17a–3 and 17a–4 of the Exchange Act, which set forth minimum requirements with respect to the records that broker-dealers must make, and how long those records and other documents must be kept, respectively.

First, as described in Section II.C.1, under the Disclosure Obligation, before or at the time of making a recommendation, a broker-dealer must disclose, in writing,[1562] material facts about the scope and terms of its relationship with the customer. This includes a disclosure that the broker-dealer or associated person is acting in a broker-dealer capacity; the material fees and costs the customer will incur; and the type and scope of the services to be provided, including any material limitations on the recommendations that could be made to the retail customer. Moreover, the broker-dealer must disclose all material facts relating to conflicts of interest associated with the recommendation that might incline a broker-dealer to make a recommendation that is not disinterested, including, for example, proprietary products, payments from third parties, and compensation arrangements.

Second, as described in Section II.C.2, under the Care Obligation, a broker-dealer must exercise reasonable diligence, care, and skill when making a recommendation to a retail customer. The broker-dealer must understand potential risks, rewards, and costs associated with the recommendation. The broker-dealer must then consider those risks, rewards, and costs in light of the retail customer's investment profile and have a reasonable basis to believe that the recommendation is in the customer's best interest and does not place the broker-dealer's interest ahead of the retail customer's interest. When recommending a series of transactions, the broker-dealer must have a reasonable basis to believe that the transactions taken together are not excessive, even if each is in the retail customer's best interest when viewed in isolation.

Third, as described in Section II.C.3, under the Conflict of Interest Obligation, a broker-dealer must establish, maintain, and enforce reasonably designed written policies and procedures addressing conflicts of interest associated with its recommendations to retail customers. These policies and procedures must be reasonably designed to identify all such conflicts and at a minimum disclose or eliminate them. Additionally, the policies and procedures must be reasonably designed to mitigate conflicts of interests that create an incentive for an associated person of the broker-dealer to place its interests or the

[1558] This estimate is based on the following calculation: (4 documents per customer account) × (102 million retail customer accounts) × (2 minutes per document)/60 minutes = 13,600,000 aggregate burden hours. As indicated above, the following records would likely need to be retained: (1) Existing account disclosure documents; (2) comprehensive fee schedules; (3) disclosures identifying material conflicts; and (4) memorialized oral disclosures under the circumstances outlined in Section II.C.1, Disclosure Obligation, *Oral Disclosure or Disclosure After a Recommendation.*

[1559] This estimate is based on the percentage of account records we expect would be updated each year as described in Section IV.B.1, *supra,* and the following calculation: (40% of fee schedules × 102 million retail customer accounts) × (2 minutes per document) + (40% of conflict disclosure forms × 102 million retail customer accounts) × (2 minutes per document) + (20% of account opening documents × 102 million retail customer accounts) × (2 minutes per document) = 204 million minutes/60 minutes = 3.4 million aggregate ongoing burden hours. In addition, with respect to ongoing memorialization of the updated oral disclosures, we estimate that this will take place among 52% of a broker-dealer's retail customer accounts annually. We therefore estimate that broker-dealers will incur an aggregate ongoing burden of 1.06 million hours per year (calculated as follows: (52% of updated oral disclosures x 102 million retail customer accounts) × (1.2 minutes per document) = 63.6 million minutes/60 minutes = 1.06 million aggregate ongoing burden hours); or 383.5 burden hours per broker-dealer (1.06 million hours/2,766 broker-dealers = 383.5). 3.4 million burden hours per year + 1.06 million burden hours per year = 4,460,000 total aggregate ongoing burden hours per year.

[1560] 5 U.S.C. 603.

[1561] *See* Proposing Release, *supra* footnote 7, at Section VII.

[1562] As discussed above, there are circumstances where broker-dealers and their associated persons may make oral disclosures or written disclosures after the time of a recommendation under the circumstances outlined in Section II.C.1, Disclosure Obligation, *Oral Disclosure or Disclosure After a Recommendation.*

interest of the firm ahead of the retail customer's interest. Moreover, when a broker-dealer places material limitations on recommendations that may be made to a retail customer (*e.g.*, offering only proprietary or other limited range of products), the policies and procedures must be reasonably designed to disclose the limitations and associated conflicts and to prevent the limitations from causing the associated person or broker-dealer to place the associated person's or broker-dealer's interests ahead of the customer's interest. Finally, the policies and procedures must be reasonably designed to identify and eliminate sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sale of specific securities or specific types of securities within a limited period of time.

Fourth, as described in Section II.C.4, under the Compliance Obligation, a broker-dealer must also establish, maintain, and enforce written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest as a whole. Thus, a broker-dealer's policies and procedures must address not only conflicts of interest but also compliance with its Disclosure and Care Obligations under Regulation Best Interest.

The enhancements contained in Regulation Best Interest will improve investor protection by enhancing the quality of broker-dealer recommendations to retail customers and reducing the potential harm to retail customers that may be caused by conflicts of interest. Regulation Best Interest will complement the related rules, interpretations, and guidance that the Commission is concurrently issuing.[1563] Individually and collectively, these actions are designed to help retail customers better understand and compare the services offered by broker-dealers and investment advisers and make an informed choice of the relationship best suited to their needs and circumstances, provide clarity with respect to the standards of conduct applicable to investment advisers and broker-dealers, and foster greater consistency in the level of protections provided by each regime, particularly at the point in time that a recommendation is made.

All of these requirements are discussed in detail in Section II above. The costs and burdens of these requirements on small broker-dealers are discussed below as well as above in our Economic Analysis and PRA Analysis, that discuss the costs and burdens on all broker-dealers.

B. Significant Issues Raised by Public Comments

The Commission is sensitive to the burdens that the new rule may have on small entities. In the Proposing Release, we requested comment on matters discussed in the IRFA. In particular, we sought comments on the number of small entities that may be affected by proposed Regulation Best Interest, and whether proposed Regulation Best Interest would have an effect on small entities that had not been considered. We requested that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of such impact. We also requested comment on the proposed compliance burdens and the effects these burdens would have on smaller entities.

As discussed in the Economic Analysis and PRA Analysis above, we received comments regarding the potential costs and burdens of the proposal on broker-dealers, including those that are small entities.[1564] Additionally, the Commission received some comments specifically addressing the costs to smaller broker-dealers.

One commenter stated that for a small firm with $500,000 in net capital, a compliance cost of $60,000[1565] could constitute 12% of that net capital, making compliance with the rule burdensome for such firms and potentially forcing many small firms to hire additional compliance personnel.[1566] Another commenter raised concerns that replacing the term "suitable" with "best interest" could create legal risk and cause smaller and mid-sized professional firms to leave the market.[1567] As noted above in Section III, we acknowledge that the costs of the rule could be more burdensome for small firms and discuss any corresponding competitive effects in Section III.D.1.[1568] Further, as described above, we acknowledge the requests by commenters for further clarity on what it means to "act in the best interest" of the retail customer, and particularly what it means to make a recommendation in a retail customer's "best interest" under the Care Obligation. Consequently, in Section II.A, and in the detailed discussion of each of the Disclosure, Care, Conflict of Interest, and Compliance Obligations in Section II.C, we have provided further clarity on how a broker-dealer can comply with Regulation Best Interest. However, with respect to the comment concerning the term "suitable," we are adopting a "best interest" standard as proposed—which enhances the broker-dealer standard of conduct beyond existing suitability obligations—in light of our goal to enhance retail investor protection and decision making.

Another commenter stated that costs for small broker-dealers could be reduced if the Commission approved a standard disclosure, which would add certainty and reduce costs for small firms and their customers.[1569] We

[1563] *See* Relationship Summary Adopting Release; Fiduciary Interpretation; Solely Incidental Interpretation.

[1564] *See supra* Sections III and IV.

[1565] *See* NSCP Letter ("Consider the estimated $60,000 in additional compliance costs referenced in the Release which would represent 12% of net capital of a $500,000 firm.")

[1566] *See id* ("Several small firms estimate that they incur approximately $80,000 in compliance costs to meet basic ongoing regulatory requirements. Notably, this amount does not include expenses associated with new rules, regulatory changes, regulatory exams or running a compliance department. In isolation, it may seem that this single proposal by one regulatory agency would have manageable marginal impact on costs. But in fact, it would be one of many changes (and importantly, a major change) that smaller firms must address. Many small firms do not have large Compliance Departments adequate to shoulder these ever increasing regulatory demands. In fact, many small firm Compliance Departments are comprised of just one or two persons."). *See also, generally*, NFIB Letter ("America's small and independent businesses in the financial industry cannot afford the army of lawyers and clerks needed to comply with the welter of complex rules issued or proposed by the U.S. Department of Labor (DOL) (Reference 1 above), the U.S. Securities and Exchange Commission (SEC) (Reference 2 above), and the several states to govern the duties of financial businesses toward their retail customers.")

[1567] *See* Iowa Insurance Commissioner Letter ("Striking "suitability," and its history and legal precedence, will usher in an age of legal and marketing confusion. Additionally, smaller and mid-sized professional firms, to avoid the risks of this confusion and the resulting litigation, will leave the market, and the larger firms will remain, increasing market concentration. A decision to replace the term "suitable" in the text of traditional suitability rules with the phrase "best interest" will disrupt the market, decrease competition, increase the price of services out of the reach of thousands of middle class Americans, and significantly reduce consumer options for selecting valuable professional services.") *But see* NAIFA Letter ("NAIFA supports a best interest standard of conduct for securities-licensed firms and individuals, and we appreciate the SEC's considerable efforts to establish such a standard *without* imposing unduly prescriptive or burdensome implementation or compliance requirements. The SEC's general approach, we believe, will preserve choices for consumers at all income levels and account sizes—and should not unnecessarily increase costs for consumers or businesses.")

[1568] *See also* infra Section V.E., noting that we believe that Regulation Best Interest will result in multiple investor protection benefits, and these benefits should apply to retail customers of smaller entities as well as retail customers of large broker-dealers.

[1569] *See* Chepucavage Letter ("Costs for the small bd's however can be reduced with a commission approved standard disclosure which would add certainty and ought to be considered especially for the small investor. [. . .] A standard disclosure document would also be useful for the small bd that considered, as an alternative to the Disclosure Obligation, mandating a standardized disclosure.[1570] However, as described in Section II.C.1, after careful consideration of the comments concerning the proposed Disclosure Obligation, we have decided not to require any standard written disclosures under Regulation Best Interest at this time. We recognize the wide variety of business models and practices and we continue to believe it is important to provide broker-dealers with flexibility to enable them to better tailor disclosure and information that their retail customers can understand and may be more likely to read at relevant points in time, rather than, for example, mandating a standardized all-inclusive (and likely lengthy) disclosure.

The vast majority of commenters supported the Commission's rulemaking efforts to address the standards of conduct that apply to broker-dealers when making recommendations, but nearly all commenters suggested modifications to proposed Regulation Best Interest. These suggestions touch on almost every aspect of the proposal, as summarized in Section I.C above and as discussed in more detail, along with explanations of modifications made in light of the comments, throughout the release.

C. Small Entities Subject to the Rule

For purposes of a Commission rulemaking in connection with the RFA, a broker-dealer will be deemed a small entity if it: (i) Had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act,[1571] or, if not required to file such statements, had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (ii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1572]

As discussed in Section IV above, the Commission estimates that as of December 31, 2018, approximately 2,766 retail broker-dealers will be subject to Regulation Best Interest and the amendments to Rules 17a–3 and 17a–4.[1573] Based on FOCUS Report data,[1574] the Commission estimated that as of December 31, 2018, approximately 756 of those retail broker-dealers might be deemed small entities for purposes of this analysis.[1575] For purposes of this RFA analysis, we refer to broker-dealers that might be deemed small entities under the RFA as "small entities," and we continue to use the term "broker-dealers" to refer to broker-dealers generally, as the term is used elsewhere in this release.[1576] Of these 756 small entities, the Commission estimates that 623 are standalone broker-dealers and 133 are dually registered as investment advisers.[1577]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The new requirements impose certain reporting and compliance requirements on certain broker-dealers, including those that are small entities. The new requirements are summarized in this FRFA (Section V.A. above). All of these requirements are also discussed in detail, in Section II above, and these requirements as well as the costs and burdens on broker-dealers, including those that are small entities, are discussed above in Sections III and IV (the Economic Analysis and PRA Analysis) and below.

1. Disclosure Obligation

The Disclosure Obligation under Regulation Best Interest requires a broker-dealer or its associated persons, prior to or at the time of recommending a securities transaction or strategy involving securities to a retail customer, to provide the retail customer, in writing, full and fair disclosure of: (1) All material facts relating to the scope and terms of the relationship with the retail customer, including: (a) That the broker, dealer, or such natural person is acting as a broker, dealer, or an associated person of a broker or dealer with respect to the recommendation, (b) the fees and costs that apply to the retail customer's transactions, holdings, and accounts, and (c) the type and scope of services provided to the retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer; and (2) all material facts relating to conflicts of interest that are associated with the recommendation. The estimated costs and burdens incurred by small entities in relation to this Disclosure Obligation are discussed in detail below.[1578]

a. Obligation To Provide to the Retail Customer Full and Fair Disclosure, in Writing, of All Material Facts Relating to the Scope and Terms of the Relationship With the Retail Customer

The Commission assumes for purposes of this analysis that small entities would meet the obligation to disclose to the retail customer, in writing, the material facts related to the scope and terms of the relationship with the retail customer through a combination of delivery of the Relationship Summary,[1579] creating account disclosures to include standardized language related to the capacity in which they are acting and type and scope of services, and the development of fee schedules.

b. Estimated Costs and Burdens

In addition to the costs described below, additional costs associated with Regulation Best Interest are described above in Section III.C.[1580]

(1) Disclosure of Capacity, Type and Scope of Services

As explained above, standalone broker-dealers that are small entities will satisfy the obligation to disclose the capacity in which they acting through the delivery to the retail customer of the Relationship Summary, and accordingly, we estimate zero burden hours for standalone broker-dealers that are small entities to disclose the capacity in which they are acting.

We estimate that a dually registered firm that is a small entity will incur an initial internal burden of 10 hours for in-house counsel and in-house compliance to draft language regarding the capacity in which it is acting for inclusion in the standardized account disclosure that is delivered to the retail customer.[1581] In addition, we estimate

cannot afford the legal assistance needed to evaluate this 1,000 page proposal and draft appropriate documents. [. . .] The Commission should therefore reconsider the impact of its proposal on small investors and small bd's with the assumption that retirement accounts are significantly more important than regular brokerage accounts especially for small and elderly investors. A standard disclosure for small firms would reduce costs for the firms and their customers.")

[1570] *See supra* Section III.E and *infra* Section V.E.

[1571] 17 CFR 240.17a–5(d).

[1572] *See* 17 CFR 240.0–10(c).

[1573] As noted above, this estimate likely overstates the number that would be impacted by Regulation Best Interest. *See supra* Section III.C.1.a.

[1574] *See supra* footnote 1384.

[1575] *See supra* footnote 1386.

[1576] Consistent with the PRA, unless otherwise notes, we use the terms "registered representative" and "dually registered representative of a broker-dealer" herein.

[1577] These estimate are based on FOCUS Report Data, *see supra* footnote 1384

[1578] For a discussion of additional costs and burdens as well as monetized burdens, related to the Disclosure Obligation, *see supra* Section III.C.2.b.

[1579] *See* Exchange Act Rule 17a–14 and Relationship Summary Adopting Release, *supra* footnote 12.

[1580] *See* Sections III.C.2.b, III.C.3.b, III.C.4, III.C.5, and III.C.6.

[1581] *See supra* footnotes 1395–1396.

that dual-registrants that are small entities will incur an estimated external cost of $4,970 for the assistance of outside counsel in the preparation and review of standardized language regarding capacity.[1582] For the estimated 133 dually registered broker-dealers that are small entities, we project an aggregate initial burden of 1,330 hours,[1583] and $661,010 in aggregate initial costs for drafting language regarding capacity.[1584]

Similarly, to comply with Regulation Best Interest, we believe that small entities will draft standardized language for inclusion in the account disclosure to provide the retail customer with more specific information regarding the type and scope of services that they provide. We estimate that a small entity will incur an internal initial burden of 10 hours for in-house counsel and in-house compliance to draft this standardized language.[1585] In addition, a small entity will incur an estimated external cost of $4,970 for the assistance of outside counsel in the preparation and review of this standardized language.[1586] For the estimated 756 small entities,[1587] we project an aggregate initial burden of 7,560 hours,[1588] and aggregate initial costs of $3.8 million for drafting language regarding type and scope of services.[1589]

We estimate that small entities will each incur approximately 0.02 burden hours[1590] for delivery of the account disclosure document.[1591] Based on FOCUS data, we believe that the 756 small entities have a total of 5,281 customer accounts, and that approximately all of those accounts belong to retail customers.[1592] We therefore estimate that small entities will have an aggregate initial burden of 106 hours, or approximately 0.14 hours[1593] per small entity for the first year after Regulation Best Interest is in effect for delivery of the account disclosure document.[1594]

We therefore estimate a total initial aggregate burden for small entities to develop and deliver to retail customers account disclosures relating to the capacity in which they are acting and type and scope of services of 7,666 burden hours.[1595]

In terms of ongoing costs, we estimate that each dually registered broker-dealer that is a small entity will incur approximately 5 burden hours annually for in-house compliance and business-line personnel to review changes in the dual-registrant's capacity, and another 2 burden hours annually for in-house counsel to amend the account disclosure to disclose material changes to the dual-registrant's capacity, for a total of 7 burden hours. The estimated ongoing aggregate burden to amend account disclosures of dual-registrants that are small entities to reflect changes in capacity is therefore 931 hours per year.[1596]

With respect to small entities, we estimate an internal burden of 2 hours for in-house compliance and business-line personnel to review and update changes in types or scope of services,[1597] and another 2 burden hours annually for in-house counsel to amend the account disclosure to disclose material changes to type and scope of services—for a total of 4 burden hours per year. The estimated ongoing aggregate burden for standalone broker-dealers that are small entities to amend account disclosures to reflect changes in type and scope of services is therefore 2,492 hours per year.[1598]

With respect to delivery of the amended account agreements in the event of material changes to the capacity disclosure or disclosure related to type and scope of services, we estimate that this would take place among 20% of a small entity's retail customer accounts annually. We therefore estimate small entities to incur a total annual aggregate burden of 21 hours, or 0.03 hours per small entity per year.[1599]

The total ongoing aggregate burden for small entities to review, amend, and deliver updated account disclosures to reflect changes in capacity, type and scope of services would be 3,444 burden hours per year.[1600]

The Commission acknowledges that the types of services and product offerings vary greatly by broker-dealer, and therefore the costs or burdens associated with updating the account disclosure might also vary.

(2) Disclosure of Fees and Costs

As stated above, while we anticipate that many small entities may already create fee schedules, we believe that small entities will initially spend 5 hours to internally create a new fee schedule in consideration of the requirements of Regulation Best Interest. We additionally estimate a one-time external cost of $2,485 for small entities.[1601] We therefore estimate the initial aggregate burden for small entities to be 3,780 burden hours,[1602] and the initial aggregate cost to be $1.88 million.[1603]

Similar to delivery of the account disclosure regarding capacity and type and scope of services, we estimate the burden for small entities to make the initial delivery of the fee schedule to new retail customers, at the inception of the relationship, and existing retail customers, prior to or at the time of a recommendation, will require approximately 0.02 hours to deliver to each retail customer.[1604] We therefore estimate that small entities will have an aggregate initial burden of 106 hours, or

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[1582] *See supra* footnote 1397.

[1583] *See supra* footnote 1395. This estimate is based on the following calculation: (133 dually registered retail firms that are small entities) × (10 hours) = 1,330 initial aggregate burden hours.) The professional skills associated with the estimated burden hours are specified in Section IV above.

[1584] This estimate is based on the following calculation: (133 dually registered retail firms that are small entities) × ($4,970 in external cost per firm) = $661,010 in aggregate initial costs.

[1585] *See supra* footnote 1402.

[1586] *See supra* footnote 1403.

[1587] *See supra* footnote 1385 and accompanying text.

[1588] *See supra* footnote 1405.

[1589] *See supra* footnote 1406.

[1590] *See supra* footnote 1411.

[1591] *See supra* footnote 1412.

[1592] This estimate may overstate the number of retail customer accounts at small entities and/or may overstate the number of deliveries to be made due to the double-counting of deliveries to be made by dual-registrants to a certain extent, and the fact that one customer may own more than one account.

[1593] These estimates are based on the following calculations: (0.02 hours per customer account × (5,281 retail customer accounts) = 106 aggregate burden hours. Conversely, (106 hours) / (756 small entities) = approximately 0.14 burden hours per small entity for the first year after Regulation Best Interest is in effect.

[1594] *See supra* footnote 1415.

[1595] This estimate is based on the following calculation: (1,330 aggregate initial burden hours for dually registered broker-dealers that are small entities) + (6,230 aggregate initial burden hours for standalone broker-dealers that are small entities) + (106 aggregate initial burden hours for small entities to deliver the account disclosures) = 7,666 total aggregate initial burden hours.

[1596] This estimate is based on the following calculation: (7 burden hours per dually registered firm per year) × 133 dually registered broker-dealers that are small entities) = 931 ongoing aggregate burden hours per year.

[1597] As noted above, we estimate zero burden hours annually for standalone broker-dealers that are small entities relating to disclosure of capacity under the Disclosure Obligation. *See supra* Section IV.B.1.a.ii.

[1598] This estimate is based on the following calculation: (4 burden hours per small entity per year) × (623 standalone broker-dealers that are small entities) = 2,492 ongoing aggregate burden hours per year.

[1599] (20%) × (5,281 retail customer accounts) × (0.02 hours for delivery to each customer account) = 21 aggregate burden hours per year. Conversely, 21 aggregate burden hours/756 small entities = 0.03 burden hours per small entity per year.

[1600] This estimate is based on the following calculation: (931 ongoing aggregate burden hours for dually registered broker-dealers that are small entities) + (2,492 ongoing aggregate burden hours for standalone broker-dealers that are small entities) + (21 ongoing aggregate burden hours for delivery of amended account disclosures) = 3,444 total ongoing aggregate burden hours per year.

[1601] *See supra* footnote 1426.

[1602] *See supra* footnote 1428.

[1603] *See supra* footnote 1429.

[1604] *See supra* footnote 1411.

approximately 0.14 hours per small entity for the first year after Regulation Best Interest is in effect.[1605]

With respect to small entities, we estimate that reviewing and updating the fee schedule will require approximately 2 hours per year. Based on these estimates, we estimate the recurring, aggregate, annualized burden will be 1,512 hours for small entities.[1606] We do not anticipate that small entities will incur outside legal, compliance, or consulting fees in connection with updating their standardized fee schedule since in-house personnel would be more knowledgeable about these facts, and we therefore do not expect external costs associated with updating the fee schedule.

With respect to delivery of the amended fee schedule in the event of a material change, we estimate that this would take place among 40% of a small entity's retail customer accounts annually, and that small entities will require approximately 0.02 hours to deliver the amended fee schedule to each retail customer. We therefore estimate small entities would incur a total annual aggregate burden of 42 hours, or 0.06 hours per small entity.[1607]

The Commission acknowledges that the type of fee schedule may vary greatly by small entity and therefore that the costs or burdens associated with updating the standardized fee schedule might similarly vary.

(3) Disclosure of All Material Facts Relating to Conflicts of Interest Associated With the Recommendation

We believe that many or most small entities will develop a standardized conflict disclosure document and deliver it to their retail customers.[1608] For small entities, we estimate it will take in-house counsel, on average, 5 burden hours to create the standardized conflict disclosure document and outside counsel 5 hours to review and revise the document. We estimate that the initial aggregate burden for the development of a standardized disclosure document, based on an estimated 756 small entities, will be 3,780 burden hours.[1609] We additionally estimate an initial cost of $2,485 per small entity,[1610] and an aggregate initial cost of $1.88 million for all small broker-dealers.[1611]

We assume that small entities will deliver the standardized conflict disclosure document to new retail customers at the inception of the relationship, and to existing retail customers prior to or at the time of a recommendation. We estimate that small entities will require approximately 0.02 hours to deliver the standardized conflict disclosure document to each retail customer.[1612] We therefore estimate that small entities will incur an aggregate initial burden of 106 hours, or approximately 0.14 hours per small entity for delivery of the standardized conflict disclosure document the first year after Regulation Best Interest is in effect.[1613] Accordingly, the total aggregate initial burden for small entities is estimated at 3,886 hours,[1614] and the total aggregate initial cost is estimated at $1.88 million.[1615]

We believe that small entities will incur ongoing annual burdens and costs to update the disclosure document to include newly identified conflicts. We estimate that in-house counsel at a small entity will require approximately 1 hour per year to update the standardized conflict disclosure document, for an ongoing aggregate burden of approximately 756 hours per year.[1616] We do not anticipate that small entities will incur outside legal, compliance, or consulting fees in connection with updating their standardized conflict disclosure document, since in-house personnel would presumably be more knowledgeable about conflicts of interest.

With respect to ongoing delivery of the updated conflict disclosure document, we estimate that this will take place among 40% of a small entity's retail customer accounts annually, and that small entities will require approximately 0.02 hours to deliver the updated conflict disclosure document to each retail customer.[1617] We therefore estimate that small entities will incur an aggregate ongoing burden of 42 hours, or 0.06 burden hours per small entity per year.[1618]

2. Care Obligation

As discussed above in Section IV.B.2, we believe that any burdens or costs associated with the Care Obligation are accounted for in other obligations under Regulation Best Interest, including the Disclosure Obligation and the Record-making Obligation under Rule 17a–3(a)(35) and Recordkeeping Obligation under Rule 17a–4(e)(5). Other costs applicable to broker-dealers, including small entities, associated with the Care Obligation are discussed above in Section III.C.3.b.

3. Conflict of Interest Obligation

As described more fully above in Section IV.B.3, the Conflict of Interest Obligation would generally include the obligation to: (1) Update written policies and procedures to comply with Regulation Best Interest and (2) establish mechanisms to proactively and systematically identify and manage conflicts of interest in its business on an ongoing or periodic basis.[1619]

a. Written Policies and Procedures

i. Initial Costs and Burdens

To initially comply with this obligation, we believe that small entities would primarily rely on outside counsel to update existing policies and procedures, as small broker-dealers generally have fewer in-house legal and compliance personnel. We estimate that 40 hours of outside legal counsel services would be required, for a one-time initial cost of $19,880 per small entity,[1620] and an aggregate initial cost of $15.0 million for all small entities.[1621] We also expect that in-

[1605] This estimate is based on the following calculation: (5,281 retail customer accounts) × (0.02 hours for delivery to each customer account) = 106 aggregate burden hours. Conversely, (106 aggregate burden hours) / (756 small entities) = 0.14 burden hours per small entity for the first year after Regulation Best Interest is in effect.

[1606] *See supra* footnote 1437.

[1607] This estimate is based on the following calculation: (40% of 5,281 retail customer accounts) × (0.02 hours) = 42 aggregate burden hours. Conversely, (42 aggregate burden hours)/(756 small entities) = 0.06 burden hours per small entity per year.

[1608] *See supra* footnote 1443.

[1609] *See supra* footnote 1444.

[1610] *See supra* footnote 1445.

[1611] *See supra* footnote 1446.

[1612] *See supra* footnote 1411. For purposes of this analysis, we have assumed any initial disclosures made by the small entities related to material conflicts of interest will be delivered together.

[1613] These estimates are based on the following calculations: (0.02 hours per customer account × 5,281 retail customer accounts) = 106 aggregate burden hours. Conversely, (106 hours)/(756 small entities) = 0.14 burden hours per small entity for the first year after Regulation Best Interest is in effect.

[1614] This estimate is based on the following calculation: (3,780 aggregate initial burden hours for the development of a standardized conflict disclosure document) + (106 burden hours for delivery of the standardized conflict disclosure document) = 3,886 aggregate initial burden hours.

[1615] *See supra* footnote 1429.

[1616] *See supra* footnote 1453.

[1617] *See supra* footnote 1455.

[1618] This estimate is based on the following calculation: (40% of 5,281 retail customer accounts) × (0.02 hours) = 42 aggregate burden hours. Conversely, (42 aggregate burden hours per year)/(756 small entities) = 0.06 hours per small entity per year.

[1619] *See supra* Section IV.B.3. For a discussion of additional costs and burdens, as well as monetized burdens, related to the Conflict of Interest Obligation, *see supra* Section III.C.4.

[1620] *See supra* footnote 1477.

[1621] *See supra* footnote 1478.

house compliance would require 10 hours to review and approve the updated policies and procedures, for an initial aggregate burden of 7,560 hours.[1622] Therefore, we estimate the total initial aggregate burden for small entities to be 128,160 hours[1623] and the total initial aggregate cost to be $25.0 million.[1624]

We believe that the related ongoing costs for small entities (relating to outside counsel reviewing and updating policies and procedures on a periodic basis) would be $2,485 annually for each small entity,[1625] and the projected aggregate, annual ongoing cost for small entities (relating to outside legal counsel) would be $1.88 million.[1626] In addition, we expect that small entities would require five hours of outside compliance services per year to update their policies and procedures, for an ongoing cost of $1,365 per year per small entity,[1627] and an aggregate ongoing cost of $1.03 million per year.[1628] The total aggregate, ongoing cost for small entities is therefore projected at $2.91 million per year.[1629]

In addition to the costs described above, we additionally believe small broker-dealers would incur an internal burden of approximately five hours for an in-house compliance manager to review and approve the updated policies and procedures per year. The ongoing, aggregate burden for small broker-dealers would be 3,780 hours for in-house compliance manager review per year.[1630]

b. Identification and Management of Conflicts of Interest

To comply with Regulation Best Interest, we expect that small entities would modify existing technology through an outside programmer which would require, on average, an estimated 20 hours, for an estimated initial cost per small entity of $5,680.[1631] We additionally continue to project that coordination between the programmer and the small entity's compliance manager would involve five initial burden hours. The aggregate initial costs and burdens for small entities for the modification of existing technology to identify conflicts of interest would therefore be $4.29 million,[1632] and 3,780 burden hours.[1633]

As a result of the changes made to the rule text of the Conflict of Interest Obligation of Regulation Best Interest, we believe that small entities would incur burdens to determine how to manage the conflict of interest. We believe that small entities would require approximately 20 hours per small entity,[1634] for an aggregate of 15,120 initial burden hours for all small entities.[1635] The total initial aggregate burden for small entities for identification and management of conflicts of interest is therefore 18,900 initial burden hours.[1636]

To maintain compliance with the Conflict of Interest Obligation, we believe that for purposes of this analysis, small entities would, through the help of the business line and compliance personnel, spend on average 10 hours[1637] to perform an annual conflicts review using the modified technology infrastructure.[1638] Therefore, the aggregate ongoing burden for an annual conflicts review, based on an estimated 756 small entities, would be approximately 7,560 burden hours per year.[1639] Because we assume that small entities would use in-house personnel to identify and evaluate new, potential conflicts, we continue to believe they would not incur additional ongoing costs.

c. Training

As discussed in the Proposing Release, we expect that small entities would develop training programs to comply with Regulation Best Interest, including the Conflict of Interest Obligation. However, we believe that any burdens and costs associated with a training program would fall under the new Compliance Obligation as it would be developed to comply with the rule as a whole, including each of the component obligations.

In total, to comply with the Conflict of Interest Obligation, the Commission estimates that the total initial burdens and costs for small entities to be 135,720 hours[1640] and $29.29 million[1641] and the total ongoing burdens and costs for small entities to be 11,340 hours[1642] and $2.91 million.[1643]

4. Compliance Obligation

As discussed above, in response to comments that we should require policies and procedures to comply with the rule as a whole, we are adopting the Compliance Obligation.[1644] Because we did not include the Compliance Obligation in the Proposing Release, we did not include costs and burdens associated with the Compliance Obligation, but have provided a detailed explanation in Section IV.B.4 above, and a summary below.

To comply with the Compliance Obligation, we believe that small entities would primarily rely on outside counsel to update existing policies and procedures, and that 20 hours of outside legal counsel services would be required, for a one-time cost of $9,940 per small entity,[1645] and an aggregate initial cost of $7.5 million for all small entities.[1646] We also expect that in-house compliance personnel would require 6 hours to review and approve the updated policies and procedures, for an aggregate initial burden of 4,536 hours.[1647]

In terms of ongoing costs, we assume for purposes of this analysis that small entities would mostly rely on outside legal counsel and compliance consultants for review and update of their policies and procedures, with final review and approval from an in-house compliance manager. We estimate that outside counsel would require approximately five hours per year to update policies and procedures, for an

[1622] See supra footnote 1479.

[1623] See supra footnote 1480.

[1624] See supra footnote 1481.

[1625] See supra footnote 1486.

[1626] See supra footnote 1487.

[1627] See supra footnote 1488.

[1628] See supra footnote 1489.

[1629] See supra footnote 1490.

[1630] See supra footnote 1491.

[1631] See supra footnote 1497.

[1632] This cost estimate is based on the following calculation: ($5,680 in outside programmer costs per broker-dealer) × (756 small entities) = $4.29 million in aggregate initial outside programmer costs.

[1633] This burden estimate is based on the following calculation: (5 burden hours) × (756 small entities) = 3,780 aggregate initial burden hours.

[1634] See supra footnotes 1501 and 1502.

[1635] This burden estimate is based on the following calculation: (20 burden hours) × (756 small entities) = 15,120 aggregate initial burden hours.

[1636] This burden estimate is based on the following calculation: (3,780 burden hours for modification of technology) + (15,120 burden hours for evaluation of managing conflicts) = 18,900 total aggregate initial burden hours.

[1637] See supra footnote 1507.

[1638] See supra footnote 1508.

[1639] This estimate is based on the following calculation: (10 hours of labor per small entity per year) × (756 small entities) = 7,560 aggregate burden hours per year.

[1640] This estimate is based on the following calculation: (128,160 burden hours for written policies and procedures) + (7,560 burden hours for identification and management of conflicts of interest) = 135,720 hours.

[1641] This estimate is based on the following calculation: ($25 million initial aggregate costs relating to written policies and procedures) + ($4.29 million initial aggregate costs for modification of existing technology to identify conflicts of interest) = $29.29 million initial aggregate costs.

[1642] This estimate is based on the following calculation: (3,780 burden hours for reviewing and approving the updated policies and procedures) + (7,560 burden hours for annual conflicts review) = 11,340 initial aggregate burden hours.

[1643] See supra footnote 1629.

[1644] Section II.C.4.

[1645] See supra footnote 1523.

[1646] See supra footnote 1524.

[1647] See supra footnote 1525.

annual cost of $2,485 for each small entity.[1648] The projected aggregate, annual ongoing cost for outside legal counsel to update policies and procedures for small entities would be $1.88 million per year.[1649] In addition, we expect that a small entity would require five hours of outside compliance services per year to update its policies and procedures, for an ongoing cost of $1,365 per year,[1650] and an aggregate ongoing cost of $1.03 million per year.[1651] The total aggregate, ongoing cost for small entities is therefore projected at $2.91 million per year.[1652]

a. Training

Pursuant to the obligation to "maintain and enforce" written policies and procedures, we additionally believe small entities will develop training programs that promote compliance with Regulation Best Interest.

We estimate that a small entity would retain an outside systems analyst, outside programmer, and an outside programmer analyst to create a training module, at 20 hours, 40 hours, and 20 hours, respectively. The total cost to develop the training module would be approximately $20,920 per small entity,[1653] for an aggregate initial cost to small entities of $17.18 million.[1654]

Additionally, we expect that the training module would require the approval of the Chief Compliance Officer, as well as in-house counsel, each of whom would require approximately 2 hours to review and approve the training module. The initial aggregate burden for small entities is therefore estimated at 3,024 initial burden hours.[1655]

In addition, small entities would incur an initial cost for registered representatives to undergo training through the training module. We estimate the training time at one hour per associated person, for an aggregate initial burden of 5,094 burden hours, or an initial burden of 6.7 hours per small entity.[1656] The total aggregate burden to approve the training module and implement the training program would be 8,118 initial burden hours.[1657]

For purposes of this analysis, we assume that small entities would likely require registered representatives to repeat the training module for Regulation Best Interest on an annual basis. The ongoing aggregate cost for the one-hour training would be 5,094 burden hours per year, or 6.7 burden hours per small entity per year.[1658]

In total, for small entities to comply with the Compliance Obligation, the Commission estimates the total initial burdens and costs to be 12,654 hours [1659] and $23.31 million,[1660] and the total ongoing burdens and costs to be 5,094 hours [1661] and $2.91 million.[1662]

5. Record-Making and Recordkeeping Obligations

The record-making and recordkeeping obligations will impose record-making and recordkeeping requirements on broker-dealers with respect to certain information collected from, or provided to, retail customers.

a. Record-Making Obligation

As discussed above, we continue to believe that small entities will satisfy the record-making requirements of the amendment to Rule 17a–3(a)(35) by amending an existing account disclosure document to include certain information.[1663] We believe that the inclusion of this information in an account disclosure document will require, on average, approximately 1 hour per year for outside counsel at small entities, at an updated average rate of $497/hour, for an annual cost of $497 for each small entity to update an account disclosure document. The projected initial, aggregate cost for small entities is therefore estimated to be $375,732.[1664] Finally, we estimate it will require an additional 0.04 hours for the registered representative responsible for the information (or other clerical personnel) to fill out that information in the account disclosure document, for an approximate total aggregate initial burden of 211 hours, or approximately 0.28 hours per small entity for the first year after the rule is in effect.[1665]

Because we have already included the costs and burdens associated with the creation of a record to memorialize an oral disclosure, and the delivery of the amended account disclosure document in Section V.D.1., we need not include them in this section of the analysis.

We do not believe that the identity of the registered representative responsible for the retail customer's account will change. Accordingly, we continue believe that there are no ongoing costs and burdens associated with this record-making requirement of the amendment to Rule 17a–3(a)(35). With respect to memorializing oral disclosures, we estimate that this would take place among 52% of a small entity's retail customers (and thus 52% of a registered representative's retail customer accounts) annually.[1666] We therefore estimate that small entities will incur a total annual aggregate ongoing burden of 55 hours or 0.07 hours per small entity per year.[1667]

b. Recordkeeping Obligation

For purposes of this analysis, we assume the following records would likely be retained pursuant to amended Rule 17a–3(a)(35): (1) Existing account disclosure documents; (2) comprehensive fee schedules; (3) disclosures identifying material conflicts; and (4) memorialized oral disclosures under the circumstances outlined in Section II.C.1, *Oral Disclosure or Disclosure After a Recommendation.*

Based on our belief that small entities will rely on existing infrastructures to satisfy the recordkeeping obligations of Regulation Best Interest and the amendment to Rule 17–a(4)(e)(5), we

[1648] *See supra* footnote 1529.

[1649] *See supra* footnote 1530.

[1650] *See supra* footnote 1531.

[1651] *See supra* footnote 1532.

[1652] *See supra* footnote 1533.

[1653] *See supra* footnote 1534.

[1654] This estimate is based on the following calculation: (756 small entities) × ($20,920 initial costs per broker-dealer) = $15.81 million in aggregate initial costs for technology services.

[1655] This estimate is based on the following calculation: (756 small entities) × (4 initial burden hours per small entity) = 3,024 initial burden hours.

[1656] This estimate is based on the following calculation: (1 burden hour) × (5,094 registered representatives at small entities) = 5,094 aggregate initial burden hours. Conversely, (5,094 aggregate burden hours)/(756 small entities) = 6.7 initial burden hours per broker-dealer.

[1657] This estimate is based on the following calculation: (5,094 burden hours for training of registered representatives) + (3,024 burden hours to approve training program) = 8,118 total aggregate initial burden hours.

[1658] *See supra* footnote 1656.

[1659] This estimate is based on the following calculation: (4,536 initial burden hours for policies and procedures) + (8,118 initial burden hours training) = 12,654 initial burden hours to comply with Compliance Obligation.

[1660] This estimate is based on the following calculation: ($7.5 million initial costs for policies and procedures) + ($15.81 million initial costs for training) = $23.31 million initial total costs to comply with Compliance Obligation.

[1661] This estimate is based on the following calculation: (0 ongoing burden hours for policies and procedures) + (5,094 ongoing burden hours for training) = 5,094 ongoing burden hours to comply with Compliance Obligation.

[1662] This estimate is based on the following calculation: ($2.91 million ongoing costs for policies and procedures) + ($0 ongoing costs for training) = $2.91 million ongoing total costs to comply with Compliance Obligation.

[1663] *See supra* Section IV.B.5.a.i.

[1664] *See supra* footnote 1548.

[1665] These estimates are based on the following calculations: (0.04 hours per customer account) × (5,281 retail customer accounts at small entities) = 211 aggregate initial burden hours. Conversely, (211 burden hours)/(756 small entities) = 0.28 initial burden hours per broker-dealer.

[1666] *See supra* footnote 1554.

[1667] (52%) × (5,281 retail customer accounts at small entities) × (0.02 hours for recording each oral disclosure relating to a retail customer's account) = 55 aggregate burden hours per year. Conversely, 55 aggregate burden hours/756 small entities = 0.07 ongoing burden hours per small entity per year.

believe the burden for small entities to add new documents or modify existing documents to the small entity's existing retention system will be approximately 704 burden hours for small entities, assuming a small entity will need to upload or file each of the four account documents discussed above for each retail customer account.[1668] We do not believe there will be additional internal or external costs relating to the uploading or filing of the documents. In addition, because we have already included the costs and burdens associated with the delivery of the amended account opening agreement and other documents in Section V.D.1 above, we do not include them in this section of the analysis.

We estimate that the approximate ongoing burden associated with the recordkeeping requirement of the amendment to Rule 17a–4(e)(5) is 231 burden hours per year.[1669] We do not believe that the ongoing costs associated with ensuring compliance with the retention schedule would change from the current costs of ensuring compliance with existing Rule 17a–4 and as outlined above.

E. Agency Action To Minimize Effect on Small Entities

The RFA directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. As described in the Proposing Release we considered the following alternatives for small entities in relation to the new requirements: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the new requirements, or any part thereof, for such small entities.

Regarding the first alternative, the Commission does not believe that we could effectively achieve our stated objectives by establishing different requirements applicable to broker-dealers of different sizes. We considered adopting tiered compliance dates so that smaller broker-dealers would have had more time to comply. However, as discussed in Section II.E above, we believe the operational capability needed to develop processes to comply with Regulation Best Interest is sufficiently established by firms of all sizes and resources. The Commission has determined, in light of the importance of the protections afforded by Regulation Best Interest to retail customers, that a Compliance Date of one year after the Effective Date is an appropriate timeframe for firms to conduct the requisite operational changes to their systems to establish internal processes to comply with Regulation Best Interest. Further, as discussed above in Section III, each of the component obligations in Regulation Best Interest shares features with existing market best practices, as shaped by FINRA's guidance on relevant rules or as described in its Report on Conflicts of Interest.[1670] To the extent that broker-dealer (and small entity) practices are already aligned with the requirements of Regulation Best Interest, the anticipated magnitude of the costs associated with a given component of the rule will be correspondingly reduced.[1671]

As discussed above, we believe that Regulation Best Interest will result in important investor protection benefits, and these benefits apply to retail customers of smaller entities as well as retail customers of large broker-dealers. For example, a primary objective of this rulemaking is to enhance the quality of recommendations provided by broker-dealers to retail customers, by establishing under the Exchange Act a "best interest" obligation. We do not believe that the interest of investors who are retail customers would be served by establishing differing compliance or reporting requirements or timetables for broker-dealers that are small entities under Regulation Best Interest and the amendments to Rules 17a–3 and 17a–4(e)(5).

Moreover, we continue to believe that providing an exemption or different requirements for small entities would be inconsistent with our goal of facilitating more consistent regulation, in recognition of the importance for both investors and broker-dealers of having the applicable standards for brokerage recommendations be clear, understandable, and as consistent as possible across a brokerage relationship (*i.e.,* whether for retirement or non-retirement purposes) and better aligned with other advice relationships (*e.g.,* a relationship with an investment adviser). Further, as discussed above, broker-dealers are subject to regulation under the Exchange Act and the rules of each SRO of which the broker-dealer is a member, including a number of obligations that attach when a broker-dealer makes a recommendation to a customer, as well as general and specific requirements aimed at addressing certain conflicts of interest. We note that these existing requirements do not generally distinguish between small entities and other broker-dealers.

For the same reasons as described in the Proposing Release, we still do not believe that additional clarification, consolidation, or simplification of compliance and reporting requirements would be appropriate for small entities. We note, however, in crafting Regulation Best Interest, we generally aimed to provide broker-dealers flexibility in determining how to satisfy the component obligations. We continue to believe that this flexibility reflects a general performance-based approach, rather than design-based approach.

As discussed in the Economic Analysis in Section III.E above, the Commission also considered a number of alternatives as they affect all firms, including small entities. Specifically, the Commission considered three different options for imposing a fiduciary standard on broker-dealers: (1) Applying the fiduciary standard under the Advisers Act to broker-dealers; (2) adopting a "new" uniform fiduciary standard of conduct applicable to both broker-dealers and investment advisers, such as that recommended by the staff in the 913 Study, and, or (3) adopting similar standards to what the DOL had provided under its fiduciary rule to broker-dealers and investment advisers. The Commission further considered requiring broker-dealers to use a specific form for disclosure, similar to, for example, Form ADV Part II in lieu of the flexible approach of the Disclosure Obligation, or in the alternative, developing a disclosure-only standard,

[1668] This estimate is based on the following calculation: (4 documents per customer account) × (5,281 retail customer accounts at small entities) × (2 minutes per document)/60 minutes = 704 aggregate burden hours.

[1669] This estimate is based on the percentage of account records we expect would be updated each year as described in Section IV.B.1, *supra,* and the following calculation: ((40% of fee schedules × 5,281 retail customer accounts at small entities) × (2 minutes per document) + (40% of conflict disclosure forms × 5,281 retail customer accounts at small entities) × (2 minutes per document) + (20% of account opening documents × 5,281 retail customer accounts at small entities) × (2 minutes per document)) = 10,560 minutes/60 minutes = 176 aggregate ongoing burden hours. In addition, with respect to ongoing memorialization of the updated oral disclosures, we estimate that this will take place among 52% of a small entity's retail customer accounts annually. We therefore estimate that small entities will incur an aggregate ongoing burden of 55 hours, or 0.07 burden hours per broker-dealer (calculated as follows: (52% of updated oral disclosures × 5,281 retail customer accounts at small entities) × (1.2 minutes per document) = 3,295 minutes/60 minutes = 55 aggregate ongoing burden hours (or 55 aggregate burden hours/756 small entities = 0.07 burden hours per small entity)). 176 hours + 55 hours = 231 total aggregate ongoing burden hours.

[1670] *See supra* Section III.C.1.b.

[1671] *See supra* text following footnote 1159.

which would require that broker-dealers satisfy only the Disclosure Obligation of the final rule.

We acknowledge certain commenters urged the Commission to take additional or different regulatory actions than the approach we have adopted, including the alternatives discussed above. We do not believe that any rulemaking governing retail investor-advice relationships can solve for every issue presented. After careful consideration of the comments and additional information we have received, we believe that Regulation Best Interest, as modified, appropriately balances the concerns of the various commenters in a way that will best achieve the Commission's important goals of enhancing retail investor protection and decision making, while preserving, to the extent possible, retail investor access (in terms of choice and cost) to differing types of investment services and products.

VI. Statutory Authority and Text of the Rule

Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act Section 913(f), Public Law 111–203, 124 Stat. 1376, 1827 (2010), and Exchange Act sections 3, 10, 15, 15(c)(6), 15(*l*), 17, 23 and 36 thereof, 15 U.S.C. 78c, 78j, 78o, 78o(c)(6), 78o(*l*), 78q, 78w and 78mm, the Commission is adopting § 240.15*l*–1 and adopting amendments to § 240.17a–3 by adding new paragraph (a)(25), and to revise § 240.17a–4(e)(5) of Title 17 of the Code of Federal Regulations in the manner set forth below.

List of Subjects in 17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

Text of the Rule

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 is amended by adding sectional authorities for section 240.15*l*–1 to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.*; and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1887 (2010); and secs. 503 and 602, Pub. L. 112–106, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.15*l*–1 is also issued under Pub. L. 111–203, sec. 913, 124 Stat. 1376, 1827 (2010).

* * * * *

■ 2. Add § 240.15*l*–1 to read as follows:

§ 240.15*l*–1 Regulation Best Interest.

(a) *Best interest obligation.* (1) A broker, dealer, or a natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.

(2) The best interest obligation in paragraph (a)(1) of this section shall be satisfied if:

(i) *Disclosure obligation.* The broker, dealer, or natural person who is an associated person of a broker or dealer, prior to or at the time of the recommendation, provides the retail customer, in writing, full and fair disclosure of:

(A) All material facts relating to the scope and terms of the relationship with the retail customer, including:

(*1*) That the broker, dealer, or such natural person is acting as a broker, dealer, or an associated person of a broker or dealer with respect to the recommendation;

(*2*) The material fees and costs that apply to the retail customer's transactions, holdings, and accounts; and

(*3*) The type and scope of services provided to the retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer; and

(B) All material facts relating to conflicts of interest that are associated with the recommendation.

(ii) *Care obligation.* The broker, dealer, or natural person who is an associated person of a broker or dealer, in making the recommendation, exercises reasonable diligence, care, and skill to:

(A) Understand the potential risks, rewards, and costs associated with the recommendation, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers;

(B) Have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation and does not place the financial or other interest of the broker, dealer, or such natural person ahead of the interest of the retail customer;

(C) Have a reasonable basis to believe that a series of recommended transactions, even if in the retail customer's best interest when viewed in isolation, is not excessive and is in the retail customer's best interest when taken together in light of the retail customer's investment profile and does not place the financial or other interest of the broker, dealer, or such natural person making the series of recommendations ahead of the interest of the retail customer.

(iii) *Conflict of interest obligation.* The broker or dealer establishes, maintains, and enforces written policies and procedures reasonably designed to:

(A) Identify and at a minimum disclose, in accordance with paragraph (a)(2)(i) of this section, or eliminate, all conflicts of interest associated with such recommendations;

(B) Identify and mitigate any conflicts of interest associated with such recommendations that create an incentive for a natural person who is an associated person of a broker or dealer to place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer;

(C)(*1*) Identify and disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended to a retail customer and any conflicts of interest associated with such limitations, in accordance with subparagraph (a)(2)(i), and

(*2*) Prevent such limitations and associated conflicts of interest from causing the broker, dealer, or a natural person who is an associated person of the broker or dealer to make recommendations that place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; and

(D) Identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.

(iv) *Compliance obligation.* In addition to the policies and procedures required by paragraph (a)(2)(iii) of this section, the broker or dealer establishes, maintains, and enforces written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest.

(b) *Definitions.* Unless otherwise provided, all terms used in this rule shall have the same meaning as in the Securities Exchange Act of 1934. In addition, the following definitions shall apply for purposes of this section:

(1) *Retail customer* means a natural person, or the legal representative of such natural person, who:

(i) 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

(ii) Uses the recommendation primarily for personal, family, or household purposes.

(2) *Retail customer investment profile* includes, but is not limited to, the retail customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the retail customer may disclose to the broker, dealer, or a natural person who is an associated person of a broker or dealer in connection with a recommendation.

(3) *Conflict of interest* means an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer —consciously or unconsciously—to make a recommendation that is not disinterested.

■ 3. Amend § 240.17a–3 by adding reserved paragraphs (a)(24) through (34) and paragraph (a)(35) to read as follows:

§ 240.17a–3 Records to be made by certain exchange members, brokers and dealers.

(a) * * *

(24)–(34) [Reserved].

(35) For each retail customer to whom a recommendation of any securities transaction or investment strategy involving securities is or will be provided:

(i) A record of all information collected from and provided to the retail customer pursuant to § 240.15*l*–1, as well as the identity of each natural person who is an associated person, if any, responsible for the account.

(ii) For purposes of this paragraph (a)(35), the neglect, refusal, or inability of the retail customer to provide or update any information described in paragraph (a)(35)(i) of this section shall excuse the broker, dealer, or associated person from obtaining that required information.

* * * * *

■ 4. Amend § 240.17a–4 by revising paragraph (e)(5) to read as follows:

§ 240.17a–4 Records to be preserved by certain exchange members, brokers and dealers.

* * * * *

(e) * * *

(5) All account record information required pursuant to § 240.17a–3(a)(17) and all records required pursuant to § 240.17a–3(a)(35), in each case until at least six years after the earlier of the date the account was closed or the date on which the information was collected, provided, replaced, or updated.

* * * * *

By the Commission.

Dated: June 5, 2019.

Vanessa Countryman,

Acting Secretary.

[FR Doc. 2019–12164 Filed 7–11–19; 8:45 am]

BILLING CODE 8011–01–P

Form CRS Relationship Summary
Amendments to Form ADV

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 240, 249, 275, and 279

[Release Nos. 34–86032; IA–5247; File No. S7–08–18]

RIN 3235–AL27

Form CRS Relationship Summary; Amendments to Form ADV

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the "Commission" or the "SEC") is adopting new rules and forms as well as amendments to its rules and forms, under both the Investment Advisers Act of 1940 ("Advisers Act") and the Securities Exchange Act of 1934 ("Exchange Act") to require registered investment advisers and registered broker-dealers (together, "firms") to provide a brief relationship summary to retail investors. The relationship summary is intended to inform retail investors about: The types of client and customer relationships and services the firm offers; the fees, costs, conflicts of interest, and required standard of conduct associated with those relationships and services; whether the firm and its financial professionals currently have reportable legal or disciplinary history; and how to obtain additional information about the firm. The relationship summary will also reference *Investor.gov/CRS,* a page on the Commission's investor education website, *Investor.gov,* which offers educational information to investors about investment advisers, broker-dealers, and individual financial professionals and other materials. Retail investors will receive a relationship summary at the beginning of a relationship with a firm, communications of updated information following a material change to the relationship summary, and an updated relationship summary upon certain events. The relationship summary is subject to Commission filing and recordkeeping requirements.

DATES:

Effective dates: The rules and form are effective September 10, 2019.

Compliance dates: The applicable compliance dates are discussed in section II.D.

FOR FURTHER INFORMATION CONTACT: : Gena Lai, James McGinnis, Elizabeth Miller, Sirimal R. Mukerjee, Olawalé Oriola, Alexis Palascak, Benjamin Tecmire, Roberta Ufford, Jennifer Porter (Branch Chief), Investment Adviser Regulation Office at (202) 551–6787 or *IArules@sec.gov;* Benjamin Kalish and Parisa Haghshenas (Branch Chief), Chief Counsel's Office at (202) 551–6825 or *IMOCC@sec.gov,* Division of Investment Management; Alicia Goldin, Emily Westerberg Russell, Lourdes Gonzalez (Assistant Chief Counsel), Office of Chief Counsel, Division of Trading and Markets, at (202) 551–5550 or *tradingandmarkets@sec.gov,* Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting new rule 17 CFR 275.204–5 [rule 204–5] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] [1] and is adopting amendments to Form ADV to add a new Part 3: Form CRS [17 CFR 279.1] under the Advisers Act. The Commission is also adopting amendments to rules 17 CFR 275.203–1 [rule 203–1], 17 CFR 275.204–1 [rule 204–1], and 17 CFR 275.204–2 [rule 204–2] under the Advisers Act. The Commission is adopting new rule 17 CFR 240.17a–14 [rule 17a–14] [2] under the Securities

[1] 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any paragraph of these rules, we are referring to Title 17, part 275 of the Code of Federal Regulations [17 CFR 275], in which these rules are published.

[2] 15 U.S.C. 78a. Unless otherwise noted, when we refer to the Exchange Act, or any paragraph of the Exchange Act, we are referring to 15 U.S.C. 78a, at which the Exchange Act is codified, and when we

Exchange Act of 1934 and new Form CRS [17 CFR 249.641] under the Exchange Act. The Commission is also adopting amendments to rules 17 CFR 240.17a–3 [rule 17a–3] and 17 CFR 240.17a–4 [rule 17a–4] under the Exchange Act. The Commission is also adopting amendments to rule 17 CFR 200.800 [rule 800].

Table of Contents

I. Introduction

Individual investors rely on the services of broker-dealers and investment advisers when making and implementing investment decisions. Research continues to show that retail investors are confused about the services, fees, conflicts of interest, and the required standard of conduct for particular firms, and the differences between broker-dealers and investment advisers.[3] We are adopting a new set of disclosure requirements designed to reduce retail investor confusion in the marketplace for brokerage and investment advisory services and to assist retail investors with the process of deciding whether to engage, or to continue to engage, a particular firm[4] or financial professional and whether to establish, or to continue to maintain, an investment advisory or brokerage relationship.[5] Firms will deliver to retail investors a customer or client relationship summary ("relationship summary" or "Form CRS") that provides succinct information about the relationships and services the firm offers to retail investors, fees and costs that retail investors will pay, specified conflicts of interest and standards of conduct, and disciplinary history, among other things.[6] The relationship summary will also link to *Investor.gov/CRS* on the Commission's investor education website, *Investor.gov*, which offers educational information to investors about investment advisers, broker-dealers, and individual financial professionals and other materials.

We proposed a version of a relationship summary on April 18, 2018.[7] The proposed relationship summary would have required information separated into the following sections: (i) Introduction; (ii) the relationships and services the firm offers to retail investors; (iii) the standard of conduct applicable to those services; (iv) the fees and costs that retail investors will pay; (v) comparisons of brokerage and investment advisory services (for standalone broker-dealers and investment advisers);[8] (vi) conflicts of

refer to rules under the Exchange Act, or any paragraph of these rules, we are referring to Title 17, part 240 of the Code of Federal Regulations [17 CFR 240], in which these rules are published.

[3] Brian Scholl, *et al.*, SEC Office of the Investor Advocate and RAND Corporation, *The Retail Market for Investment Advice* (2018), *available at https://www.sec.gov/comments/s7-07-18/s70718-4513005-176009.pdf* ("OIAD/RAND") (finding that participant understanding of types of financial services and financial professionals continues to be low). The SEC's Office of Investor Advocate and the RAND Corporation prepared this research report regarding the retail market of investment advice prior to, and separate from, our rulemaking proposal. This report was included in the comment file at *https://www.sec.gov/comments/s7-07-18/s70718-4513005-176009.pdf.*

[4] For purposes of this release, the term "firm" includes sole proprietorships and other business organizations that are registered as (i) an investment adviser under section 203 of the Advisers Act; (ii) a broker-dealer under section 15 of the Exchange Act; or (iii) a broker-dealer under section 15 of the Exchange Act and as an investment adviser under section 203 of the Advisers Act.

[5] The requirements adopted here, with modifications as discussed in this release, were proposed in Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, Investment Advisers Act Release No. 4888, Exchange Act Release No. 83063 (Apr. 18, 2018) [83 FR 23848 (May 23, 2018)] ("Proposing Release").

[6] For investment advisers registered with the Commission, a new Form ADV Part 3 will describe the requirements for the relationship summary and it will be required by amended rule 203–1. For broker-dealers, Form CRS will be required by new rule 17a–14 under the Exchange Act. When we refer to Form CRS in this release, we are referring to Form CRS for both broker-dealers and investment advisers registered with the Commission. We are also adopting conforming technical and clarifying amendments to the General Instructions of Form ADV.

[7] *See* Proposing Release, *supra* footnote 5.

[8] We proposed definitions for "standalone investment adviser" and "standalone broker-dealer". *See* Proposed General Instruction 9.(f) to Form CRS. Given the streamlining and other revisions to the Form CRS instructions relative to the proposal, we believe that these proposed definitions are no longer needed and therefore are not adopting them. We use the terms throughout this release, however, for the avoidance of doubt, to indicate broker-dealers and investment advisers that are not dual registrants. We are adopting the

Continued

interest; (vii) where to find additional information, including whether the firm and its financial professionals currently have reportable legal or disciplinary history and who to contact about complaints; and (viii) key questions for retail investors to ask the firm's financial professional. The proposed instructions required firms to use standardized headings in a prescribed order throughout the disclosure and respond to the required items by using a mix of language prescribed in the instructions as well as their own wording in describing their services and offerings. The proposal limited the relationship summary to four pages or an equivalent length if in electronic format and also included three examples of how the relationship summary might look for a standalone broker-dealer, a standalone investment adviser, and a dual registrant.

To better understand retail investors' views about the disclosures designed for them, the Commission engaged in broad outreach to investors and other market participants. As described further throughout the release, the Commission received substantial feedback on the proposed relationship summary in several forms. We received comment letters in connection with the Proposing Release from a variety of commenters including individual investors, consumer advocacy groups, financial services firms, investment professionals, industry and trade associations, state securities regulators, bar associations, and others.[9] Several of those commenters provided alternative mock-ups to illustrate their suggestions. Additionally, some commenters submitted reports of surveys or studies that they had conducted or engaged third parties to conduct in connection with the proposal. The Commission also received input and recommendations from its Investor Advisory Committee ("IAC") on the proposed relationship summary to improve its effectiveness.[10]

The Commission also solicited comments from individual investors through a number of forums in addition to the traditional requests for comment in the Proposing Release. The Commission used a "feedback form" designed specifically to solicit input from retail investors with a set of questions requesting both structured and narrative responses, and received more than 90 responses from individuals who reviewed and commented on the sample proposed relationship summaries published in the proposal.[11] Seven investor roundtables were held in different locations across the country to solicit further comment from individual investors on the proposed relationship summary, and we received in-person feedback from almost 200 attendees in total.[12]

Further, the Commission's Office of the Investor Advocate engaged the RAND Corporation ("RAND") to conduct investor testing of the proposed relationship summary.[13] RAND conducted a survey of over 1,400 individuals through a nationally representative panel to collect information on the opinions, preferences, attitudes, and level of self-assessed comprehension regarding the sample dual-registrant relationship summary in the proposal. RAND also conducted qualitative interviews of a smaller sample of individuals to ascertain comprehension of the relationship summary and gain feedback from interview participants, which allowed RAND to obtain insights to complement its survey.[14] On November 7, 2018, the Office of the Investor Advocate made the report on that testing available in the comment file to allow the public to consider and comment on the supplemental information.[15] The Commission received several letters in response to the inclusion of the RAND 2018 report in the comment file.[16]

As noted, some commenters submitted reports of surveys and studies to the comment file, and the design and scope of these varied considerably. Two reports described online surveys of

proposed definition for "dual registrant" substantially as proposed. We are adding language in the definition of dual registrant in the final instructions to clarify that a dually registered firm is not considered a dual registrant for purposes of Form CRS and the final instructions if the dually registered firm does not provide both investment advisory and brokerage services to retail investors. *See* General Instruction 11.C to Form CRS; *see infra* footnotes 201–202 and accompanying text.

[9] The comment letters are available in the comment file at *https://www.sec.gov/comments/s7-08-18/s70818.htm.*

[10] *See* Investor Advisory Committee, *Recommendation of the Investor as Purchaser Subcommittee Regarding Proposed Regulation Best Interest, Form CRS, and Investment Advisers Act Fiduciary Guidance* (Nov. 7, 2018), *available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac110718-investor-as-purchaser-subcommittee-recommendation.pdf.* ("IAC Form CRS Recommendation"). The majority of the IAC recommended that the Commission conduct usability testing of the proposed Form CRS disclosures and, if necessary, revise them to ensure that they enable investors to make an informed choice among different types of providers and accounts. In addition, when considering potential Commission rulemaking under section 913 of the Dodd-Frank Act, the IAC also recommended that the Commission adopt a uniform, plain English disclosure document to be provided to customers and potential customers of broker-dealers and investment advisers at the start of the engagement, and periodically thereafter, that covers basic information about the nature of services offered, fees and compensation, conflicts of interest, and disciplinary record. *See* Investor Advisory Committee, *Recommendation of the Investor Advisory Committee: Broker-Dealer Fiduciary Duty* (Nov. 22, 2013), *available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation-2013.pdf,* as amended in *https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac112213-minutes.htm* ("IAC Broker-Dealer Fiduciary Duty Recommendations"). We discuss these IAC findings and recommendations in several sections below. Under section 39 of the Exchange Act, the Commission is required to review, assess, and disclose the action, if any, the Commission intends to take with respect to the findings and recommendations of the IAC; however, the Commission is not required to agree or to act upon any such findings or recommendations. *See* 15 U.S.C. 78pp.

[11] The feedback forms are available in the comment file at *https://www.sec.gov/comments/s7-08-18/s70818.htm* ("Feedback Forms"). When we refer to Feedback Form commenters, we include those who completed and submitted a Feedback Form with a relevant response or comment answering at least one of the questions on the form. To simplify discussion of comments received on the Feedback Forms, staff aggregated and summarized these comments in an appendix to this release (*see* Appendix C, the "Feedback Forms Comment Summary"), and references to individual Feedback Forms in this release use short-form names defined in the Feedback Forms Comment Summary.

[12] The transcripts from the seven investor roundtables, which took place in Atlanta ("Atlanta Roundtable"), Baltimore ("Baltimore Roundtable"), Denver ("Denver Roundtable"), Houston ("Houston Roundtable"), Miami ("Miami Roundtable"), Philadelphia ("Philadelphia Roundtable"), and Washington, DC ("Washington, DC Roundtable"), are available in the comment file at *https://www.sec.gov/comments/s7-08-18/s70818.htm#transcripts.*

[13] Angela A. Hung, *et al.*, RAND Corporation, *Investor Testing of Form CRS Relationship Summary* (2018), *available at https://www.sec.gov/about/offices/investorad/investor-testing-form-crs-relationship-summary.pdf* ("RAND 2018").

[14] RAND conducted a total of 31 in-person interviews with investors recruited using guidelines designed to achieve a sample that had a broad range of educational background, racial and ethnic characteristics, gender, age and experience working with financial professionals. In describing the design of qualitative interviews, RAND explains that interviews included some general questions about comprehension and helpfulness of the form, which provided a window into participants' understanding of concepts introduced in the relationship summary, but were not designed to serve as a full assessment of participants' objective understanding of the relationship summary. *See* RAND 2018, *supra* footnote 13.

[15] *See Investor Testing of the Proposed Relationship Summary for Investment Advisers and Broker-Dealers*, Securities and Exchange Commission Press Release 2018–257 (Nov. 7, 2018), *available at https://www.sec.gov/news/press-release/2018-257.*

[16] *See, e.g.*, Comment Letter of Investment Adviser Association (Dec. 4, 2018); Comment Letter of Ron A. Rhodes (Dec. 6, 2018); Comment Letter of AFL–CIO, *et al.* (Dec. 7, 2018) ("AFL–CIO Letter"); Comment Letter of Betterment (Dec. 7, 2018) ("Betterment Letter II"); Comment Letter of Consumer Federation of America (Dec. 7, 2018) ("CFA Letter II"); Comment Letter of Financial Services Institute (Dec. 7, 2018) ("FSI Letter II"); Comment Letter of Public Investors Arbitration Bar Association (Dec. 7, 2018); Comment Letter of Consumer Reports (Feb. 15, 2019) ("Consumer Reports Letter").

larger sample sizes—one based on the sample proposed dual-registrant relationship summary [17] and another based on the proposed sample standalone investment adviser relationship summary.[18] A group of commenters submitted two reports of usability testing of the sample proposed dual-registrant relationship summary based on a small number of long-form interviews.[19] One of the two surveys, and the two interview-based studies, included questions designed to ascertain comprehension and tested alternate relationship summary designs with changes to some of the proposed prescribed wording and presentation from the proposal.[20] Finally, two different commenters submitted surveys of retail investors' views about disclosure communications provided by firms and their relationships with financial professionals, which did not test any version of the proposed relationship summary.[21]

The Commission appreciates the time and effort of these commenters who submitted surveys and studies. The Commission has carefully considered this input. The varying designs and scope of these surveys and studies limits us from drawing definitive conclusions, and we do not view any one of the surveys and studies submitted by commenters, or the RAND 2018 report, as dispositive. However, these surveys and studies submitted by commenters, together with the results of the RAND 2018 report, input from individual investors at our roundtables and on Feedback Forms, and other information offered by other commenters, have informed our policy choices. Throughout this release we discuss observations reported in the RAND 2018 report and in surveys and studies submitted by commenters, and how these observations informed our policy choices as well as the costs and benefits of such choices.

Overall, we believe that feedback we have received from or on behalf of retail investors through the RAND 2018 report, surveys and studies submitted by commenters, and input received at roundtables and on Feedback Forms, demonstrate that the proposed relationship summary would be useful for retail investors and provide information, *e.g.,* about services, fees and costs, and standard of care, that would help investors to make more informed choices when deciding among firms and account options. For example, among the RAND 2018 survey respondents, nearly 90% said that the relationship summary would help them make more informed decisions about types of accounts and services and more than 80% said it would help them compare accounts offered by different firms.[22] RAND 2018 survey participants rated information about the firm's relationship and services and fees and costs to be among the most informative.[23] In other surveys, large majorities of respondents also reacted positively to the relationship summary and the types of information that would be provided.[24] In the RAND 2018 qualitative interviews, it was observed that participants could learn new information from the proposed relationship summary.[25] Similarly, other surveys and studies that assessed investor comprehension observed that investors learned important information by reviewing the relationship summary.[26] Over 70% of individuals submitting Feedback Forms commented that they found the relationship summary to be "useful," with more than 80% rating the relationship summary sections describing relationships and services, obligations, and fees and costs as "very useful" or "useful." [27] Investor roundtable participants also reacted

[17] Comment Letter of Cetera Financial Group (Nov. 19, 2018) ("Cetera Letter II") (attaching report of Woelfel Research Inc. ("Woelfel")). Woelfel, an independent research firm, conducted internet interviews in June 2018 with a sample of 800 adults aged 25 and over, including individuals that had a current relationship with a financial professional and individuals who did not have a current financial professional relationship. Respondents were asked to read the sample dual-registrant relationship summary included in the proposal and answer a series of questions about the document overall and for specific sections. *Id.*

[18] Comment Letter of Betterment (Aug. 7, 2018) ("Betterment Letter I") (attaching report of Hotspex, Inc. ("Hotspex")). Hotspex, an independent research firm, conducted online surveys with 304 current or potential U.S. investors ages 18 and over in June 2018. The survey tested the standalone investment adviser relationship summary prepared following the instructions and sample design of the proposal (the "SEC Form") and a redesigned version developed by Betterment. *Id.* Respondents reviewed and answered questions about only one version; 154 responded to questions on the SEC Form. *Id.*

[19] Kleimann Communication Group, Inc., *Final Report on Testing of Proposed Customer Relationship Summary Disclosures, Submitted to AARP, Consumer Federation of America, and Financial Planning Coalition* (Sept. 10, 2018), *available at https://www.sec.gov/comments/s7-08-18/s70818-4341455-173259.pdf* ("Kleimann I") (results of 15 90-minute qualitative interviews focusing on how consumers interacted with the sample dual-registrant relationship summary as proposed); Kleimann Communication Group, Inc., *Report on Development and Testing of Model Client Relationship Summary, Presented to AARP and Certified Financial Planner Board of Standards, Inc.* (Dec. 5, 2018), *available at https://www.sec.gov/comments/s7-07-18/s70718-4729850-176771.pdf* ("Kleimann II") (results of testing alternate designs of the proposed dual-registrant relationship summary in 18 one-on-one qualitative interviews).

[20] *See* Betterment Letter I (Hotspex), *supra* footnote 18 (online survey included ten true-false questions designed to test investor comprehension of the standalone investment adviser relationship summary as proposed relative to a version redesigned by Betterment); Kleimann I, *supra* footnote 19 (interview questions designed to elicit responses that could demonstrate two levels of cognitive skills); Kleimann II, *supra* footnote 19.

[21] Comment Letter of Charles Schwab & Co., Inc. (Aug. 6, 2018) ("Schwab Letter I") (attaching report of Koski Research ("Koski")). Koski, an independent research firm, conducted an online survey of a national sample of 1000 investors in June 2018 to measure investor understanding of fiduciary duty and best interest standards for investment advice and obtain input from retail investors on method, frequency and content of disclosure communications. *Id.*; Comment Letter of the Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce (Sept. 5, 2018) ("CCMC Letter") (attaching report of investor polling ("investor polling")). CCMC commissioned online polling of 801 investors in May 2018 to examine investors' perspectives on working with financial professionals and gauge priorities regarding new regulatory requirements. *Id.*

[22] RAND 2018, *supra* footnote 13.

[23] RAND 2018, *supra* footnote 13 (a majority of respondents rated both of the relationships and services section and fees and costs sections of the relationship summary as one of two sections that are "most informative").

[24] Cetera Letter II (Woelfel), *supra* footnote 17 (more than 80% of respondents rated all of the nine topics covered by the relationship summary as "very" or "somewhat" important; 88% rated fees and costs and the firm's obligations as "very" or "somewhat" important; 61% said the relationship summary had provided the necessary information to help decide whether a brokerage relationship or an advisory relationship is best); Betterment Letter I (Hotspex), *supra* footnote 18 (finding that around 90% of survey respondents found the proposed relationship summary "very useful" or "somewhat useful"); *see also* CCMC Letter (investor polling), *supra* footnote 21 (when the concept of the proposed relationship summary was described, 62% of participants said they would be interested in reading the document and 72% agreed that the new document will "boost transparency and help build stronger relationships between me and my financial professional").

[25] RAND 2018, *supra* footnote 13 (concluding from qualitative interviews that "[p]articipants demonstrated evidence of learning new information from the relationship summary" even though interview discussions revealed areas of confusion).

[26] *See* Kleimann I, *supra* footnote 19 (although the authors concluded that, overall, participants had difficulty with "sorting out similarities and differences," the study reports that "nearly all participants easily identified a key difference between Brokerage Accounts and Advisory accounts as the fee structure" and that "most participants understood that both Brokerage Accounts and Advisory Accounts could have financial relationships with other companies that could be potential conflicts with clients' best interests."); *see also* Betterment Letter I (Hotspex), *supra* footnote 18 (83% of respondents correctly identified as "true" a statement that "some investment firms have a conflict of interest because they benefit financially from recommending certain investments" when viewing a version of the standalone adviser relationship summary constructed based on the instructions set forth in the proposal").

[27] *See* Feedback Forms Comment Summary, *supra* footnote 11 (summary of answers to Questions 1 and 2). In addition, more than 70% of commenters on Feedback Forms rated all of the other sections of the proposed relationship summary as "very useful" or "useful." *Id.*

positively and indicated that they found the relationship summary to be useful.[28] A significant percentage of RAND 2018 survey participants agreed that the relationship summary would facilitate conversations between retail investors and their financial professionals, and other surveys and studies reported similar observations.[29] Investor roundtable participants and comments on Feedback Forms also indicated that the relationship summary could facilitate conversations between retail investors and their financial professionals in a beneficial way.[30]

Many other commenters supported the concept of a short disclosure document for retail investors that would serve as part of a layered disclosure regime,[31] and agreed that that the relationship summary would facilitate conversations between retail investors and their financial professionals in a beneficial way.[32] However, some commenters argued that the relationship summary is duplicative of other disclosures and is unnecessary.[33] Others cautioned against over-reliance on disclosure efforts to address all issues related to the different business models and the applicable standard of conduct for broker-dealers and investment advisers.[34]

Nearly all commenters (including commenters on Feedback Forms) and investors participating in roundtables, suggested modifications to the proposed relationship summary, as did observations reported in the RAND 2018 report and surveys and studies submitted to the comment file. Suggested changes generally pertained to: Appropriate placement of educational material; length and format; use of prescribed wording; comprehensibility; additional flexibility for firms; and delivery requirements (including electronic delivery). For example, some commenters and observations from the RAND 2018 survey and other surveys and studies indicated that the proposed relationship summary could be difficult to understand, particularly the proposed disclosures on fees, conflicts of interest, and standards of conduct.[35] Many commenters preferred a shorter, one-to-two page document relying more heavily on layered disclosure, such as by using more hyperlinks and other cross-references to more detailed disclosure.[36] Many commenters from both industry and investor groups argued that some of the prescribed wording would not be accurate or applicable in relation to the different services and business models of all firms or could lead to confusing or

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[28] *See e.g.,* Houston Roundtable, at 19 ("I think your idea of having . . . a short four page . . . is really helpful"), at 27 (reacting positively to the idea of the relationship summary but asking that updated versions indicate the changed content), and at 35 (agreeing that a disclosure such as the relationship summary is needed); Atlanta Roundtable, at 28 (stating that the proposed sample relationship summary is "a very good form" and "concise" and "easy to read and clear" but needs to be in a form that can be compared with other relationship summaries).

[29] RAND 2018, *supra* footnote 13 (approximately 76% of participants agreed that they would use the relationship summary as the basis for a conversation with an investment professional; in qualitative interviews, participants said they liked all of the questions and they would ask questions in meeting with a financial service provider); *see also* Kleimann I, *supra* footnote 19 (many investors responded that they would use key questions when speaking with their brokers); Betterment Letter I (Hotspex), *supra* footnote 18 (93% of respondents viewing a version of the proposed standalone relationship summary indicated that they were very or somewhat likely to ask the suggested questions.).

[30] Houston Roundtable (several investors responding that key questions would be helpful conversation starters, one commenter remarking that the Key Questions were "very, very good"); Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 7) (over 75% of commenters indicated that the Key Questions are useful). Eleven Feedback Forms included specific comments agreeing that the Key Questions would encourage discussions with financial professionals. *See, e.g.,* Hawkins Feedback Form ("Useful information for the investor to have before engaging in a conversation with an investment firm. Giving some examples of types of questions to ask would be beneficial."); Asen Feedback Form ("The Relationship Summary (and not the individual BD or RIA account opening forms) is the opportunity to have that important conversation and "educate" the customer."); Baker Feedback Form ("key questions are very useful as they give words to an unsophisticated client").

[31] *See, e.g.,* Comment Letter of AARP (Aug. 7, 2018) ("AARP Letter"); Comment Letter of Consumers Union (Oct. 19, 2018) ("Consumers Union Letter"); Comment Letter Type B; Comment Letter of the North American Securities Administrators Association, Inc. (Aug. 23, 2018) ("NASAA Letter"); Comment Letter of the Securities Industry and Financial Markets Association (Aug. 7, 2018) ("SIFMA Letter"); Comment Letter of Triad Advisors, LLC (Jul. 26, 2018) ("Triad Letter"); Comment Letter of Investacorp, Inc. (Jul. 26, 2018) ("Investacorp Letter"); Comment Letter of Ladenburg Thalmann Financial Services Inc. (Jul. 26, 2018) ("Ladenburg Letter"); Comment Letter of KMS Financial Services, Inc. (Jul. 27, 2018) ("KMS Financial Letter"); Comment Letter of Securities America, Inc. (Jul. 27, 2018) ("Securities America Letter").

[32] *See, e.g.,* Comment Letter of Commonwealth Financial Network (Aug 7, 2018) ("CFN Letter") ("Form CRS may also drive conversations that help potential clients and advisors determine which type of relationship (brokerage or advisory) is most appropriate."); CCMC Letter (concluding from investor polling that "[t]he SEC's proposed Form CRS could be a good way to start a conversation with investors."); Comment Letter of the Financial Services Institute (Aug. 7, 2018) ("FSI Letter I") ("The greatest benefit of these disclosures will come in the conversations they facilitate between the client and their financial professionals"); Comment Letter Wells Fargo & Company (Aug. 7, 2018) ("Wells Fargo Letter") ("the basic premise that a brief overview document designed to provide a high-level understanding of important information to clients (with directions to more detailed information) that can be used to prompt more detailed conversations with financial professionals is a good one"). Triad Letter ("The greatest benefit of the CRS will come in the conversations it facilitates between the client and their Financial Professional. . . ."); Ladenburg Letter (same); KMS Financial Letter (same).

[33] Some commenters stated that Form CRS would be duplicative of the Disclosure Obligation required by Regulation Best Interest. *See, e.g.,* Triad Letter; Investacorp Letter; Ladenburg Letter; KMS Financial Letter; Securities America Letter; FSI Letter I; Comment Letter of Securities Service Network, LLC (Aug. 6, 2018); Comment Letter of Cambridge Investment Research, Inc. (Aug. 7, 2018) ("Cambridge Letter"). Others argued that Form CRS is duplicative of other Form ADV disclosures. *See, e.g.,* Comment Letter of MarketCounsel (Aug. 7, 2018) ("MarketCounsel Letter"); Comment Letter of the Investment Adviser Association (Aug. 6, 2018) ("IAA Letter I"); Comment Letter of Gerald Lopatin (Jul. 30, 2018). One commenter expressed concern that because the relationship summary would be duplicative of Form ADV and Form BD, retail customers would be less likely to read the more comprehensive disclosures. *See* Comment Letter of Financial Engines (Aug. 6, 2018) ("Financial Engines Letter").

[34] *See* Comment Letter of Integrated Financial Planning Solutions (Jul. 20, 2018) ("IFPS Letter") ("Clients do not have the ability to understand the disclosure material that is still written only by and for lawyers."); Comment Letter of Sen. Elizabeth Warren (Aug. 7, 2018) ("Warren Letter") (arguing that "the [Commission] shouldn't rely on disclosure alone to protect consumers"); Consumers Union Letter ("[W]hile we support simple, understandable disclosures, we caution against placing too much reliance on disclosure to protect investors."); Consumer Reports Letter.

[35] *See* RAND 2018, *supra* footnote 13 (among other findings, the percentages of respondents indicating that the fees and costs, conflicts of interest, and standards of conduct sections were either "difficult" or "very difficult" to understand were 35.5%, 33.5%, and 22.9%, respectively); Kleimann I, *supra* footnote 19 (noting that participants had difficulty "sorting out similarities and differences between Broker-Dealer Services and Investment Adviser Services. Both the formatting and language contributed to the confusion."); Betterment Letter I (Hotspex), *supra* footnote 18 (showing that survey participants had difficulty understanding differences in standard of care and did not find the section on conflicts in the standalone adviser relationship summary to be useful); *see also* Comment Letter of John Wahh (Apr. 23, 2018) ("Wahh Letter") (relationship summary is "impenetrable"); Comment Letter of David John Marotta (Apr. 26, 2018) ("Marotta Letter") (disclosures would be too confusing to clients); Comment Letter of John H. Robinson (Aug. 6, 2018) ("Robinson Letter") (expressing concern that relationship summary is too text-heavy for consumers to read and will be ineffective in resolving investor confusion); Comment Letter of CFA Institute (Aug. 7, 2018) ("CFA Institute Letter I") ("[A]s proposed, CRS is too wordy and technically written for the average investor to understand.").

[36] *See, e.g.,* AARP Letter; Comment Letter of Better Markets (Aug. 7, 2018) ("Better Markets Letter"); Comment Letter of the Bank of America (Aug. 7, 2018) ("Bank of America Letter"); Comment Letter of the Committee on Capital Markets Regulation (Jul. 16, 2018) ("CCMR Letter"); Comment Letter of LPL Financial LLC (Aug. 7, 2018) ("LPL Financial Letter"); Schwab Letter I. *Cf.* RAND 2018, *supra* footnote 13 (finding at least a plurality of respondents would keep the length of each section "as is"; however, when asked "Is the Relationship Summary too long, too short, or about right?", 56.9% of respondents answered "too long" and only 41.2% responded "about right").

misleading disclosures.[37] Various commenters advocated for more flexibility for firms to use their own wording to describe their services more accurately.[38] Many commenters favored the use of a question-and-answer format, suggesting, for example, that focusing a document on investors' questions helps them to feel that the document is relevant to them and encourages them to read it.[39] Some commenters viewed parts of the relationship summary as educational, such as the sections comparing broker-dealers and investment advisers, describing the applicable standard of conduct, and containing key questions investors should ask, and advocated that the Commission should develop and provide educational material separately from firm-specific disclosures, such as in an additional disclosure layer or on the Commission's website.[40] Several individuals submitting Feedback Forms also were supportive of links to additional educational information.[41]

Although some commenters argued that the relationship summary is duplicative of other disclosures and is unnecessary,[42] we believe that the relationship summary has a distinct purpose and will provide a separate and important benefit relative to other disclosures. The relationship summary is designed to help retail investors select or determine whether to remain with a firm or financial professional by providing better transparency and summarizing in one place selected information about a particular broker-dealer or investment adviser. The format of the relationship summary also allows for comparability among the two different types of firms in a way that is distinct from other required disclosures. Both broker-dealers and investment advisers must provide disclosures on the same topics under standardized headings in a prescribed order to retail investors, which should benefit retail investors by allowing them to more easily compare services by comparing different firms' relationship summaries.[43] We do not believe that existing disclosures provide this level of transparency and comparability across investment advisers, broker-dealers, and dual registrants. The relationship summary also encourages retail investors to ask questions and highlights additional sources of information. All of these features should make it easier for investors to get the facts they need when deciding among investment firms or financial professionals and the accounts and services available to them. As noted above, the relationship summary will complement additional rules and guidance that the Commission is adopting concurrently to enhance protections for retail investors and is not designed to address all investor protection issues related to different business models and legal obligations of broker-dealers and investment advisers.[44]

Further to this purpose, in response to the comment letters and other feedback, we modified the instructions to reorganize and streamline the relationship summary, to enable more accurate descriptions tailored to what firms offer, and to help improve investor understanding of the disclosures provided. The instructions we are adopting are consistent with and designed to fulfill the original goals of the proposal, including the creation of relationship summaries that will highlight certain information in one place for retail investors in order to help them select or decide whether to remain with a firm or financial professional, encourage retail investors to engage in meaningful and individualized conversations with their financial professionals, and empower them to easily find additional information. Although certain prescribed generalized

[37] *See, e.g.,* Comment Letter of the Vanguard Group, Inc. (Aug. 7, 2018) ("Vanguard Letter") (explaining instances in which the prescribed wording would be inaccurate or not sufficiently nuanced for some of its services); Comment Letter of the American Council of Life Insurers (Aug. 3, 2018) ("ACLI Letter") ("[M]any of the statements mandated in the Proposed Rule are inaccurate from the perspective of a life insurer-affiliated broker-dealer); IAA Letter I (expressing concern that the proposed prescribed language describing legal standards of conduct would result in less accurate understanding and greater confusion for investors); FSI Letter I ("[S]ome of the prescribed disclosure language is highly problematic, will add to investor confusion, and would negatively impact [firms'] client relationships."); AARP Letter (expressing concern that some of the prescribed language is too technical and likely to confuse retail investors); Comment Letter of the Insured Retirement Institute (Aug. 7, 2018) ("IRI Letter") (expressing concern that the prescribed language would not permit descriptions of services offered outside of brokerage accounts, such as recommendations of variable annuities). One commenter asserted that prescribed wording requiring firms to compare themselves adversely with their competitors could raise First Amendment concerns. *See* Comment Letter of the Consumer Federation of America (Aug. 7, 2018) ("CFA Letter I") (arguing that certain language requiring firms to compare their own services unfavorably to those of their competitors may raise First Amendment concerns, and that Proposed Item 5, Comparisons to be provided by standalone investment advisers and standalone broker-dealers, should be eliminated entirely); *see also infra* footnotes 77–80 and accompanying text. Although not explicitly raising First Amendment concerns, another commenter also opposed requiring firms to describe services of other types of financial professionals. *See* IAA Letter I ("In our view, it is not appropriate to require firms to include statements about business models other than their own."). *But see* Comment Letter of AFL–CIO, Consumer Federation of America, *et. al.* (Apr. 26, 2019) ("AFL–CIO, CFA Letter") (arguing that allowing firms more flexibility in their disclosure will result in a failure to clearly convey important information, and such information would not be comparable from firm to firm).

[38] *See, e.g.,* ACLI Letter ("Firms should have the flexibility in the Form CRS to accurately describe their business model and what their clients can expect from the relationship"); NASAA Letter ("[F]irms should have some level of flexibility in crafting their own Form CRS so that it is tailored for the different types of customers they service."); Letter from Members of Congress (Aug. 8, 2019) ("The SEC should develop a disclosure form that ensures firms have the flexibility to provide information that the average investor will understand."); IAA Letter I (advocating that firms be given flexibility to draft their own descriptions of their principal services and conflicts of interest); FSI Letter I (suggesting that the prescribed wording regarding the extent and frequency of monitoring be removed or customized using the firm's own wording); IRI Letter (firms need more latitude to describe their relationships and services and fees and costs, given their variability; one-size-fits-all disclosures are insufficient); Comment Letter of T. Rowe Price (Aug. 10, 2018) ("T. Rowe Letter") (firms should have the flexibility to tailor their disclosures to make it clearer and more readable without potentially confusing investors); Vanguard Letter (suggesting that the Commission clarify that all of the prescribed disclosures may be modified to accurately describe the nature of firms' services and conflicts of interest given their business models); Comment Letter of CUNA Mutual Group (Aug. 7, 2018).

[39] *See, e.g.,* CFA Letter I. Many of the mock-ups submitted by commenters used a question-and-answer format. *See* Comment Letter of Fidelity Brokerage Services LLC (Aug. 7, 2018) ("Fidelity Letter"); IAA Letter I; LPL Financial Letter; Comment Letter of Primerica (Aug. 7, 2018) ("Primerica Letter"); Schwab Letter I; SIFMA Letter; Wells Fargo Letter. For the purposes of this release, we view the substance and design of all mock-ups that commenters provided within their comment letters as comments on our proposed form, and the mock-ups have informed our approach to the relationship summary, as discussed below throughout.

[40] *See, e.g.,* Comment Letter of the American Securities Association (Aug. 7, 2018) ("ASA Letter"); Primerica Letter; ACLI Letter; IAA Letter I; Comment Letter of Pickard Djinis and Pisarri LLP (Aug. 14, 2018) ("Pickard Djinis and Pisarri Letter"); Comment Letter of L.A. Schnase (Jul. 30, 2018) ("Schnase Letter"); CFA Letter I; LPL Financial Letter.

[41] *See, e.g.,* Daunheimer Feedback Form ("I would like to see a list of applicable websites for discerning disciplinary websites or anything else that would additionally educate a consumer."); Asen Feedback Form ("Might want to consider hyperlinking key words for ease of definition lookup."); Baker Feedback Form (responding to a question on the Additional Information section, commented "Helpful also were the website links, *i.e., sec.gov, investor.gov, BrokerCheck.Finra.org.*"); Smith2 Feedback Form ("would like to see a link included a site or sites that contain general investment information. Types of investments, risks, time horizons . . .").

[42] *See supra* footnote 33.

[43] Several individuals submitting Feedback Forms said that more firm-specific information that could be easily compared would be helpful. *See, e.g.,* Lee1 Feedback Form ("The information should let me compare firms. . . . Make it short, more useful (so I can compare services and firms)."); Anonymous13 Feedback Form ("Firm specific info would be nice on this document."); Bhupalam Feedback Form ("I would like to see additional information regarding specific firm rather than a general description.").

[44] *See supra* footnote 34.

comparisons between brokerage and investment advisory services have been removed from the final instructions, we believe the revised instructions will result in more meaningful comparisons among firms.

The key changes of the relationship summary and instructions we are adopting include the following:[45]

• *Standardized Question-and-Answer Format and Less Prescribed Wording.* Instead of declarative headings as proposed, the final instructions for the relationship summary will require a question-and-answer format, with standardized questions serving as the headings in a prescribed order to promote consistency and comparability among different relationship summaries. The headings will be structured and machine-readable, to facilitate data aggregation and comparison. Under the standardized headings, firms will generally use their own wording to address the required topics. Thus, the final instructions contain less prescribed language, which creates more flexibility in providing accurate information to investors. Investment advisers and broker-dealers will be limited to two pages and dual registrants will be limited to four pages (or an equivalent length if in electronic format).[46]

• *Use of Graphics, Hyperlinks, and Electronic Formats.* To help retail investors easily digest the information, the instructions will specifically encourage the use of charts, graphs, tables, and other graphics or text features in order to explain or compare different aspects of the firm's offerings. If the chart, graph, table, or other graphical feature is self-explanatory and responsive to the disclosure item, additional narrative language that may be duplicative is not required. For electronic relationship summaries, the instructions encourage online tools that populate information in comparison boxes based on investor selections. The instructions permit, and in some instances require, a firm to cross-reference additional information (*e.g.*, concerning services, fees, and conflicts), and will require embedded hyperlinks in electronic versions to further facilitate layered disclosures. Firms must use text features to make the required cross-references more noticeable and prominent in relation to other discussion text.

• *Introduction With Link to Commission Information.* The relationship summary will include a more streamlined introductory paragraph that will provide a link to *Investor.gov/CRS,* a page on the Commission's investor education website, *Investor.gov,* which offers educational information about investment advisers, broker-dealers, and individual financial professionals and other materials. In order to highlight the importance of these materials, the introduction also will note that brokerage and advisory services and fees differ and that it is important for the retail investor to understand the differences.

• *Combined Fees, Costs, Conflicts of Interest, and Standard of Conduct Section.* We are integrating the proposed fees and costs section with the sections discussing the conflicts of interest and standards of conduct. We are also expanding the discussion of fees and making several other changes to help make the disclosures clearer for retail investors. The relationship summary will cover the same broad topics as proposed, including a summary of fees and costs, a description of ways the firm makes money, certain conflicts of interest, and standards of conduct. In addition, firms will include disclosure about financial professionals' compensation.

• *Separate Disciplinary History Section.* Firms will be required to indicate under a separate heading whether or not they or any of their financial professionals have reportable disciplinary history and where investors can conduct further research on these events, instead of including this information under the Additional Information section as proposed.

• *Conversation Starters.* The proposed Key Questions to Ask have generally been integrated into the relationship summary sections either as question-and-answer headings or as additional "conversation starters" to provide clearer context for the questions. Retail investors can use these questions to engage in dialogue with their financial professionals about their individual circumstances. The discussion topics raised by certain other proposed key questions have been incorporated into the relationship summary through otherwise-required disclosure.

• *Elimination of Proposed Comparisons Section.* We are eliminating the proposed requirement that broker-dealers and investment advisers include a separate section using prescribed wording that in a generalized way described how the services of investment advisers and broker-dealers, respectively, differ from the firm's services. We encourage, but do not require, dual registrants to prepare a single relationship summary that discusses both brokerage and investment advisory services. Whether dual registrants prepare a single or two separate relationship summaries to describe their brokerage and investment advisory services, they must present information on both services with equal prominence and in a manner that clearly distinguishes and facilitates comparison between the two. The material provided on *Investor.gov* offers educational information about investment advisers, broker-dealers, and individual financial professionals and other materials.

• *Delivery.* As proposed, investment advisers must deliver a relationship summary to each new or prospective client who is a retail investor before or at the time of entering into an investment advisory contract with the retail investor. In a change from the proposal, broker-dealers must deliver the relationship summary to each new or prospective customer who is a retail investor before or at the earliest of: (i) A recommendation of an account type, a securities transaction, or an investment strategy involving securities; (ii) placing an order for the retail investor; or (iii) the opening of a brokerage account for the retail investor. We also are revising the instructions to provide greater clarity on the use of electronic delivery, while generally maintaining the guidelines that were proposed.

We designed the final disclosure requirements in light of comments, input from individual investors through roundtables and on Feedback Forms, and observations reported in the RAND 2018 report and other surveys and studies, that suggest retail investors benefit from receiving certain information about a firm before the beginning of a relationship with that firm, but they prefer condensed disclosure so that they may focus on information that they perceive as salient to their needs and circumstances, and prefer having access to other "layers" of additional information rather than receiving a significant amount of information at once. Together, all of the required disclosures will assist a retail investor to make an informed choice regarding whether a brokerage or investment advisory relationship, as well as whether a particular broker-dealer or investment adviser, best suits his or her particular needs and

[45] If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

[46] For clarification purposes, one page is equivalent to a single-side of text on a sheet of paper, rather than two sides of the same paper.

circumstances. The relationship summary will complement additional rules and guidance that the Commission is adopting concurrently to enhance protections for retail investors.[47]

Some commenters responding to the RAND 2018 report noted that the RAND 2018 survey and qualitative interviews did not objectively test investor comprehension, and they pointed to observations from RAND 2018 interviews that suggested that some interview participants failed to understand differences in the legal standards that apply to brokerage and advisory accounts and did not understand the meaning of the word "fiduciary" for example.[48] They argued that we should conduct more usability testing before adopting Form CRS and Regulation Best Interest.[49]

We disagree. The amount of information available from the various investor surveys and investor testing described in this release, including those submitted by commenters, as well as the comment letters and other input submitted to the Commission for this rulemaking, is extensive. We considered all of this information thoroughly, leveraging our decades of experience with investor disclosures, when evaluating changes to the relationship summary from the proposal. The perceived usefulness of the relationship summary, as shown by observations in the RAND 2018 report, surveys and studies submitted by commenters, and input from individual investors at our roundtables and in Feedback Forms, demonstrates that, even as proposed, the relationship summary would benefit investors by providing information that would help investors make more informed choices when deciding among firms and account options.[50] Large majorities of participants in the RAND 2018 survey and in other surveys supported the specific topics, such as services, fees, conflicts and standards of conduct, that we require firms to address in the relationship summary.[51] Even though the RAND 2018 qualitative interviews and another interview-based study observed that interview participants could have some gaps in understanding, these studies still observed that interview participants could learn new important information from the relationship summary as proposed.[52]

In addition, as noted above and discussed in further detail below, we are making a number of modifications designed to improve the relationship summary relative to the proposal, which are informed by these and other observations reported by RAND 2018 and other surveys and studies, as well as by investor feedback at roundtables and in Feedback Forms and the other comment letters we have received. For example, we are substantially revising our approach to disclosing standard of conduct and conflicts of interest to make this information clearer to retail investors, including (among other changes) eliminating the word "fiduciary" and requiring firms—whether broker-dealers, investment advisers, or dual registrants—to use the term "best interest" to describe their applicable standard of conduct.[53] Further, as compared to the proposal, modifications adopted in the final relationship summary instructions require less prescribed wording, and instead, firms will generally use their own wording to address required topics, which creates flexibility in providing accurate information to investors. We believe that this modification substantially limits the practicability and benefit of additional usability testing because there is no single version of the relationship summary (or a limited set of form versions) that may be used to gauge investor comprehension given firms' flexibility to tailor their relationship summary.[54]

[47] *See* Regulation Best Interest, Exchange Act Release No. 86031 (June 5, 2019) (adopting rule 15*l*–1 under the Exchange Act ("Regulation Best Interest")) ("Regulation Best Interest Release"). Along with adopting Regulation Best Interest, the Commission is clarifying standards of conduct for investment advisers. *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019) ("Fiduciary Release"). The Commission is also providing guidance about when a broker-dealer's advisory services are solely incidental to the conduct of the business of a broker or dealer. *See* Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion to the Definition of Investment Adviser, Advisers Act Release No. 5249 (June 5, 2019) ("Solely Incidental Release").

[48] *See* CFA Letter II (noting that the testing conducted for the RAND 2018 Report is limited and does not provide more detailed information, such as transcripts of the in-depth interviews, to present fully the level of investor understanding); Comment Letter of CFA Institute (May 16, 2019) ("CFA Institute Letter II") ("The RAND Report is clear that its survey was not designed to measure objective comprehension . . . Nor did it provide respondents with alternatives that could have allowed them to express preferences for certain formats or language."). *See also* AFL–CIO Letter; Consumer Reports Letter; Comment Letter of PIABA (Dec. 7, 2018).

[49] *See, e.g.,* AFL–CIO Letter ("If the Commission chooses to maintain different standards for brokers and advisers, it must clearly delineate what the differences are . . . This would require rethinking the Form CRS and re-testing to ensure that it achieves these goals . . ."); CFA Letter II ("make the [RAND 2018] report the start, not the end, of an iterative process of testing and revision needed to develop disclosure that works . . ."); AFL–CIO, CFA Letter (stating ". . . unless the Commission retests the revised disclosure, it won't have any way to know whether the revised version solves the problems that earlier testing has identified."); Consumer Reports Letter ("SEC must test and retest Form CRS disclosures . . . and continue to publish the results of its testing before the form is made final"); CFA Institute Letter II. Others commented on the results of the RAND 2018 report but did not suggest delaying adoption of Form CRS. *See, e.g.,* Comment Letter of Charles Schwab & Co. Inc. (Dec. 7, 2018) ("Schwab Letter II") ("The Commission should acknowledge and act on consensus findings to improve the Form CRS"); Betterment Letter II (noting that the RAND 2018 report "demonstrates that Form CRS serves a valuable function"). *See also* FSI Letter II (encouraging the Commission to "continue investor testing of Form CRS after the final rule is in place").

[50] *See supra* footnotes 22 to 30 and accompanying text. We note that the Department of Labor did not describe or reference usability testing in adopting its now vacated rule broadening the definition of fiduciary investment advice under the Employee Retirement Income Security Act of 1974 as amended ("ERISA") and the related Best Interest Contract Exemption ("BIC Exemption"). The BIC Exemption required certain disclosures to be provided to a retirement investor and included on a financial institution's public website. *See* DOL, Best Interest Contract Exemption, 81 FR 21002, 21045–52 (Apr. 8, 2016).

[51] *See supra* footnotes 23 to 24 and accompanying text; *see also* Schwab Letter (Koski), *supra* footnote 21 (reporting that retail investors say it is most important for firms to communicate about "costs I will pay for investment advice," a "description of advice services," the "obligations the firm and its representatives owe me" and any "conflicts of interest related to the advice I receive"); CCMC Letter (investor polling), *supra* footnote 21 (reporting as issues that "matter most" to investors, "explaining fees and costs," explaining conflicts of interest" and "explaining own compensation").

[52] *See* RAND 2018, *supra* footnote 13 (describing that participants in qualitative interviews had difficulty reconciling the information provided in the obligations section and conflicts of interest section and other areas of confusion, but concluding that "[p]articipants demonstrated evidence of learning new information from the relationship summary"); Kleimann I, *supra* footnote 19 (although study author concluded that, overall, participants had difficulty with "sorting out similarities and differences," the study reports that "nearly all participants easily identified a key difference between Brokerage Accounts and Advisory accounts as the fee structure;" "[p]articipants expected to pay for transactions in a Brokerage Account or the quarterly fee for an Advisory Account;" "most participants understood that both Brokerage Accounts and Advisory Accounts could have financial relationships with other companies that could be potential conflicts with clients' best interests" and "[nearly all participants saw the Key Questions as essential . . . straightforward and raised important questions that they themselves might not have thought to ask."); *see also* Betterment Letter I (Hotspex) *supra* footnote 18 (83% of respondents correctly identified as "true" a statement that "some investment firms have a conflict of interest because they benefit financially from recommending certain investments" when viewing a version of the standalone adviser relationship summary constructed based on the instructions set forth in the proposal).

[53] *See infra,* Section II.B.3.

[54] In this regard, the RAND 2018 report and surveys and studies submitted by commenters generally were based on sample versions of the relationship summary that we included in the proposal. Alternate designs tested by commenters generally used the all of the same topics (*e.g.,* a description of service and the relationship, fees and

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Therefore, we believe that any anticipated benefit from continued rounds of investor usability testing does not justify the cost to investors of delaying a rulemaking designed to increase investor protection.

Accordingly, we believe that the totality of input received through comments (including Feedback Forms), outreach at roundtables and through the OIAD/RAND and RAND 2018 reports, as well as surveys and studies submitted by commenters, fully supports our consideration and adoption of the relationship summary, with modifications informed by this input as discussed more fully below. However, to help ensure that the relationship summary fulfills its intended purpose, we have directed our staff to review a sample of relationship summaries that are filed with the Commission beginning after June 30, 2020, when firms first file their relationship summaries, and to provide the Commission with the results of this review. The Commission and its staff are also reviewing educational materials provided on *Investor.gov* and intend to develop additional content in order to continue to improve the information available to investors about working with investment advisers, broker-dealers, individual financial professionals, and investing.

In the Proposing Release, we proposed certain disclosures to be included in all print or electronic retail investor communications by broker-dealers, investment advisers, and their financial professionals (the "Affirmative Disclosures"). We have determined not to adopt the Affirmative Disclosures, as we discuss further below. In our view, the combination of the disclosure requirements in Form CRS and Regulation Best Interest should adequately address the objectives of the proposed Affirmative Disclosures.

II. Form CRS Relationship Summary

A. Presentation and Format

The relationship summary is designed to be a short and accessible disclosure for retail investors that helps them to compare information about firms' brokerage and/or investment advisory offerings and promotes effective communication between firms and their retail investors.[55] The proposed instructions included requirements on length, formatting, and content. The proposal also provided three examples of what a relationship summary might look like for a standalone broker-dealer, standalone investment adviser, and dual registrant. In providing feedback on the proposed sample relationship summaries, commenters on Feedback Forms and participants in the RAND 2018 survey and other surveys and studies provided by commenters indicated that the proposed relationship summary could be too dense and difficult to read.[56] They suggested using simpler terms and more white space, among other changes.[57] Commenters also encouraged the use of design principles that would result in a more visually appealing and accessible disclosure.[58] In addition, the IAC recommended, through a majority vote, uniform, simple, and clear summary disclosures to retail investors.[59] We have incorporated many of these suggestions into the instructions.

We are changing the instructions to require a question-and-answer format, give additional support for electronic formats, provide guidance that firms should include white space, and implement other design features to make the relationship summary easier to read.[60] We are requiring firms to use standardized headings in a prescribed order to preserve comparability, while permitting greater flexibility in other aspects of the relationship summary's wording and design to enhance the relationship summary's accuracy, usability, and effectiveness.[61] The final instructions will require limited prescribed wording compared to the

costs, standard of care, conflicts, additional information and key questions) as the proposed sample versions, with changes using different versions of prescribed wording and formatting designed to be more appealing to readers. *See* Kleimann II, *supra* footnote 19 (describing alternative Form CRS design assumptions) and Betterment Letter I (Hotspex) *supra* footnote 18 (describing approach to optimizing the Form CRS). Given modifications that we are adopting to the Form CRS instructions that provide firms more flexibility to use their own wording to describe service offerings, fees and costs and their conflicts of interest and more flexibility in formatting as compared to the proposal, we are not preparing sample or illustrative versions of the relationship summary that could be used to repeat such surveys and testing, and we do not believe that we would be able to develop sample versions that would be representative given the diversity among firms in their service and product offerings.

[55] Form CRS defines "relationship summary" as "[a] disclosure prepared in accordance with these Instructions that you must provide to *retail investors*" and also references Advisers Act rule 204–5 and Exchange Act rule 17a–14. Firms that do not have any retail investors to whom they must deliver a relationship summary are not required to prepare or file one. *See* General Instructions to Form CRS, Advisers Act rule 204–5, Exchange Act rule 17a–14(a).

[56] *See* Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Questions 1 and 4) (33 commenters (35%) answered "Somewhat" or "No" in either of Question 3(a) (*Do you find the format of the Relationship Summary easy to follow?*) or Question 3(c) (*Is the Relationship Summary easy to read?*); comments responding to Question 4 ("*Are there topics in the relationship summary that are too technical or that could be improved?*"); 41 Feedback Forms (44%) indicated in response to Question 4 or another question that the relationship summary was too technical or suggested one or more topics that could be improved); *see also* RAND 2018, *supra* footnote 13 (on average, 24% of respondents described any given section as difficult or very difficult, more than 30% described the fees and costs section as difficult or very difficult; but qualitative interview discussions revealed that there were areas of confusion for participants, including differences between account types or financial professionals); Betterment Letter I (Hotspex) *supra* footnote 18 (only 22% of respondents reviewing a version of the standalone adviser relationship summary said information was easy to understand; only 18% said the format was appealing); Kleimann I, *supra* footnote 19 (finding that participants were confused). *Cf.* Cetera Letter II (Woelfel), *supra* footnote 17 (more than 75% of respondents strongly or somewhat agreed that individual topics covered by the relationship summary were described clearly). *See also* comments discussed *supra* footnote 35.

[57] Comment Letter of Front Street Consulting (Jun. 8, 2018) (stating that disclosure must be readable and understandable using plain language); Kleimann II, *supra* footnote 19 (describing design and content principles for a redesigned relationship summary, noting that "[h]eading and white space allow readers to have an overview of the content, see the overall structure of the content, and choose which parts most interest them . . ."); IAA Letter I (recommending flexibility for innovative use of design techniques including "using more white space, and using visuals like icons and images"); Fidelity Letter (discussing designed relationship summary using "key design elements that are informed by our experienced employees whose focus is on graphic design and applying design thinking techniques to customer facing products"). Schwab Letter I (Koski), *supra* footnote 21 (reporting that the "majority of retail investors surveyed want communications that are relevant to them (91%), short and to the point (85%), and visually appealing (79%)"); Schwab Letter II (stating that combined results of RAND 2018 and its own survey indicate that the Form CRS should be shorter, organized around questions, focus on "fees/costs" and "services/relationships" and contain "hyperlinks"); Betterment Letter I (Hotspex), *supra* footnote 18 (providing suggestions for streamlining and focusing the content requirements and improving the visual layout and format of the relationship summary to improve its effectiveness).

[58] *See, e.g.*, Betterment Letter II ("The form should better implement design principles that have been shown to facilitate visual appeal and comprehension."); Schwab Letter I (citing to a presentation given by Kleimann Communication Group, Inc., at an IAC meeting on June 14, 2018); IAA Letter I (arguing that more visually dynamic and engaging design would make the relationship summary more effective and likely to be read).

[59] *See* IAC Form CRS Recommendation, *supra* footnote 10 (reiterating a recommendation from the IAC Broker-Dealer Fiduciary Duty Recommendations in 2013 to "adopt a uniform, plain English disclosure document to be provided to customers and potential customers of broker-dealers and investment advisers that covers basic information about the nature of services offered, fees and compensation, conflicts of interest, and disciplinary record" and recommending that the Commission work with a design expert and test the relationship summary for effectiveness).

[60] General Instruction 2.A. to Form CRS. ("You should include white space and implement other design features to make the *relationship summary* easy to read.").

[61] *See, e.g.*, Items 2.B. and 3.C.(ii) of Form CRS.

proposal and will permit firms to use their own wording to describe most topics. We also are not requiring firms to discuss the sub-topics required within each section in a prescribed order, as proposed.[62] Dual registrants[63] and affiliated brokerage and investment advisory firms also will have flexibility to decide whether to prepare separate or combined relationship summaries. These changes are intended to enhance the relationship summary's clarity, usability, and design, and to promote effective communication and understanding between retail investors and their firms and financial professionals. We describe these changes in more detail below.

We are also adopting some parts of the instructions that address presentation and formatting as proposed. The instructions state that the relationship summary should be concise and direct, and firms must use plain English and take into consideration retail investors' level of financial experience, as proposed.[64] Firms also are not permitted to use multiple negatives, or legal jargon or highly technical business terms unless firms clearly explain them, as proposed. In a change from the proposal, the instructions will not permit use of legal jargon or technical terms without explaining them in plain English, even if the firm believes that reasonable retail investors will understand those terms.[65]

Several commenters suggested that the relationship summary avoid the use of jargon (*e.g.,* terms like "asset-based fee" and "load" in the fees section),[66] and several roundtable participants and participants in the RAND 2018 interviews and another study said that they did not understand certain technical terms.[67] Roundtable participants and commenters on Feedback Forms asked that the relationship summary include definitions or a glossary.[68] In addition, the IAC recommended that a document such as the relationship summary use plain English and a concise format.[69] As a result, we are instructing firms to avoid using legal jargon and highly technical terms in the relationship summary unless they are able to explain the terms in the space of the relationship summary. We believe this simpler approach obviates the need for firms to justify what they believe a reasonable retail investor would or would not understand. Firms would have the flexibility to use their own wording, including legal or highly technical terms as long as they explain them, or may prefer to use simpler terms, given the space limitations of the relationship summary. Additionally, we have added a cover page for Form CRS under the Exchange Act (17 CFR 249.640) only, displaying a currently valid OMB control number and including certain statements relating to federal information law and requirements, and the SEC's collection of information.[70]

1. Limited Prescribed Wording

The proposed instructions would have required firms to include prescribed wording throughout many sections of the relationship summary. In particular, the fees and costs, standard of conduct, and the comparison section for standalone broker-dealers and investment advisers included a number of required statements, many that differed for broker-dealers, investment advisers, and dual registrants.[71] The introduction, conflicts of interest, and key questions sections also included some required statements.[72] In response to comments (as described more fully below) we are largely eliminating the prescribed wording and replacing those statements with instructions that generally allow firms to describe their own offerings with their own wording.

For example, the proposed instructions would have required broker-dealers to state, "If you open a brokerage account, you will pay us a transaction-based fee, generally referred to as a commission, every time you buy or sell an investment" and "The fee you pay is based on the specific transaction and not the value of your account."[73] Broker-dealers also would have stated "The more transactions in your account, the more fees we charge you. We therefore have an incentive to encourage you to engage in transactions."[74] Instead the final instructions will require broker-dealers to describe the principal fees and costs that retail investors will incur, including their transaction-based fees, and summarize how frequently the fees are assessed and the conflicts of interest they create.[75]

Many commenters requested more flexibility for firms to provide accurate descriptions of their services.[76] Some

[62] *See* Proposed General Instruction 1.(b) to Form CRS ("Unless otherwise noted, you must also present the required information within each item in the order listed.").

[63] Form CRS defines "dual registrant" as "A firm that is dually registered as a broker or dealer registered under section 15 of the Exchange Act and an investment adviser registered under section 203 of the Advisers Act and offers services to *retail investors* as both a broker-dealer and an investment adviser." General Instruction 11.C. to Form CRS. This definition varies from the one proposed in that it includes only those investment advisers registered with the SEC, rather than with the States. For the avoidance of doubt, it also includes the statutory registration provisions for broker-dealers and investment advisers.

[64] *See* General Instruction 2.A. to Form CRS (providing that firms should (i) use short sentences and paragraphs; (ii) use definite, concrete, everyday words; (iii) use active voice; (iv) avoid legal jargon or highly technical business terms unless firms clearly explain them; and (v) avoid multiple negatives. Firms must write their responses to each item as if speaking to the *retail investor,* using "you," "us," "our firm," etc.). Delivery of the relationship summary will not necessarily satisfy the additional requirements that broker-dealers and investment advisers have under the federal securities laws and regulations or other laws or regulations. *See* General Instruction 2.D. to Form CRS; Proposed General Instruction 3 to Form CRS.

[65] General Instruction 2.A. to Form CRS. *Compare to* Proposed General Instruction 2 to Form CRS (". . . avoid legal jargon or highly technical terms unless you clearly explain them or you believe that reasonable *retail investors* will understand them . . .").

[66] CFA Letter I; AARP Letter; IAA Letter I.

[67] *See, e.g.,* Miami Roundtable; Houston Roundtable; Philadelphia Roundtable; RAND 2018, *supra* footnote 13 (in qualitative interviews participants asked for definitions of "transaction-based fee," "asset-based fee," and struggled with terms such as "mark-up," "mark-down," "load," surrender "charges" and "wrap fee"); *see also* Kleimann I, *supra* footnote 19.

[68] *See, e.g.,* Philadelphia Roundtable, at 64 (participant recommending a glossary at the end of the relationship summary); Washington, DC Roundtable, at 31 ("You might want to consider a glossary of terms."); Feedback Forms Comment Summary, *supra* footnote 11 (summary of comments to Question 4) (10 comments asked for a definition or a better explanation of the term "fiduciary," seven asked for definitions of terms such as transaction-based fee, asset-based fee or wrap fee); *see also* Anonymous 18 Feedback Form ("A glossary would be nice—not in "legalize" [sic] language").

[69] *See* IAC Broker-Dealer Fiduciary Duty Recommendations, *supra* footnote 10; and IAC Form CRS Recommendation, *supra* footnote 10.

[70] Under the Advisers Act, Form CRS is Part 3 of Form ADV, which already contains a cover page.

[71] *See infra* discussion at Sections II.B.3 (fees and costs and standard of conduct) and II.B.6 (proposed items omitted in final instructions).

[72] *See infra* discussion at Sections II.B.1 (introduction) and II.B.3 (conflicts of interests) and *supra* Section II.A.4 (conversation starters).

[73] Proposed Items 2.B.1. and 4.B.1. of Form CRS.

[74] Proposed Item 4.B.5. of Form CRS.

[75] *See* Items 3.A. through 3.C. of Form CRS.

[76] *See, e.g.,* IAA Letter I; Comment Letter of Massachusetts Mutual Life Insurance Company (Aug. 7, 2018) ("MassMutual Letter"); Comment Letter of the Association for Advanced Life Underwriting (Aug. 7, 2018) ("AALU Letter"); Comment Letter of Prudential Financial, Inc. (Aug. 7, 2018) ("Prudential Letter"); Comment Letter of Mutual of America Life Insurance Company (Aug. 3, 2018) ("Mutual of America Letter"); Comment Letter of John Hancock Life Insurance Company (U.S.A.) (Aug. 3, 2018) ("John Hancock Letter"); ACLI Letter; Comment Letter of New York Life Insurance Company (Aug. 7, 2018) ("New York Life Letter"); Comment Letter of Transamerica (Aug. 7, 2018) ("Transamerica Letter"); Vanguard Letter. *See also* Betterment Letter I, *supra* footnote 18 (arguing that investor survey conducted by Hotspex showed that its more customized version of the relationship summary facilitated investor understanding). Some individuals submitting Feedback Forms also preferred more firm-specific information. *See, e.g.,* Anonymous 13 Feedback Form ("Firm-specific info would be nice on this document."); Bhupalam Feedback Form ("I would like to see additional

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argued that the mix of prescribed and firm-authored wording required by the proposed instructions would be inaccurate, contribute to investor confusion, or be ineffective for investors, particularly language that some commenters considered "boilerplate." [77] Observations reported in the RAND 2018 qualitative interviews and other surveys and studies also showed that investors had difficulty understanding, were confused by, or misinterpreted some of the prescribed wording.[78] A range of commenters asserted that the proposed prescribed wording could be inaccurate or inapplicable.[79] For example, various providers of insurance products explained that references to brokerage or investment advisory accounts were not consistent with their business models and could confuse retail investors because customers generally purchase insurance products directly from the issuer, without needing to open a brokerage account.[80] One commenter expressed concern that some of the prescribed wording could constitute impermissible compelled speech that could raise First Amendment concerns.[81] That same commenter, with others, also opposed providing firms with more flexibility than proposed to implement the relationship summary, arguing that more flexibility could impair comparability.[82]

We recognize that extensive use of prescribed wording in certain contexts could add to investor confusion and may not accurately or appropriately capture information about particular firms. Accordingly, the final instructions permit firms, within the parameters of the instructions, to describe their services, investment offerings, fees, and conflicts of interest using their own wording. This approach should enable firms to reflect accurately what they offer to retail investors, should result in disclosures that are more useful to retail investors, and should mitigate concerns relating to the mix of prescribed and firm-authored wording, and the extensive use of prescribed wording, that the proposed instructions required.

Although we are allowing more flexibility so that firms can describe their offerings more accurately, firms still will be required to discuss required topics within a prescribed order, as discussed below.[83] This approach will facilitate transparency, consistency, and comparability of information across the relationship summaries of different firms, helping retail investors to focus on information that we believe would be particularly helpful in deciding among firms, financial professionals, services, and accounts—namely: Relationships and services; fees, costs, conflicts, and required standard of conduct; disciplinary history; and how to get additional information. We believe that more tailored, specific, and distinct information in the required topic areas also will better serve the educational purpose by facilitating more robust substantive comparisons across firms.

This approach addresses—and mitigates—First Amendment concerns. Generally, the instructions no longer require any specific speech.[84] Rather, they permit firms to use their own words to impart accurate information to investors. In certain circumstances, however, we are continuing to require firms to use prescribed wording. For example, the final instructions require firms to use standardized headings and conversation starters, which are in the form of questions that investors are encouraged to ask.[85] These elements are organizational (the headings) or intended to prompt a discussion by the investor (the conversation starters).[86] The final instructions also require firms to include prescribed statements describing their required standard of conduct when providing recommendations or advice.[87] Requiring firms to provide a consistent articulation of their required legal obligations in this regard will reduce and minimize investor confusion, as compared with allowing firms to state their required standard of conduct using their own wording.[88] These statements are designed to require the disclosure of purely factual information about the standard of conduct that applies to the provision of recommendations by broker-dealers and the provision of advice by investment advisers under their respective legal regimes.[89] Finally, the instructions require firms to include a prescribed, factual statement regarding the impact of fees and costs on investments, and a prescribed statement encouraging retail investors to understand what fees and costs they are paying.[90] As explained further below,

information regarding specific firm rather than a general description."); Christine Feedback Form ("I'm interested in my individual advisor's orientation—small cap, mid cap, large cap or mix growth vs. value foreign, domestic or mix fundamental or quantitative long term or short term").

[77] ASA Letter ("[T]he mix of prescribed and customized language will only create more confusion and complexity, as well as legal risk for financial institutions."); Primerica Letter ("This mix of prescribed and flexible disclosure would ultimately result in a patchwork of new disclosures that fail to comprehensively describe a particular firm's business model in a way that is accessible and digestible by retail investors."); IAA Letter I ("Many firms would . . . be compelled to explain to prospective clients how and why their business is different from the boilerplate descriptions and why the comparisons are not applicable. The boilerplate language may thus detract from a firm's ability to explain its own services and make it harder for investors to understand those services.").

[78] *E.g.*, RAND 2018, *supra* footnote 13 (describing that, in qualitative interviews, participants noted some words or phrases that needed further definition and some misunderstood differences between account types and professionals); Kleimann I, *supra* footnote 19; Betterment Letter I (Hotspex) *supra* footnote 18 (finding that investors had difficulty understanding certain key information on the SEC sample version of standalone investment adviser relationship summary); *see also* Kleimann II, *supra* footnote 19 (investors misconstrued the legal standard in alternative versions of prescribed wording used in a redesigned version of the relationship summary); Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 4) (41 Feedback Forms included narrative responses that indicated that one or more topics were too technical or could be improved; of these, 20 indicated that the relationship summary language was too technical, wordy, confusing or should be simplified; 23 indicated that information on fees and costs was too technical or needed to be more clear; 23 suggested that information in sections on relationships and services and obligations needed clarification, and 14 suggested clarification or more information about conflicts of interest).

[79] *See, e.g.*, IAA Letter I; ACLI Letter; AARP Letter; SIFMA Letter; FSI Letter I; Triad Letter; Vanguard Letter.

[80] *See, e.g.*, Comment Letter of the Committee of Annuity Insurers (Aug. 7, 2018) ("Committee of Annuity Insurers Letter") ("The use of the term 'brokerage account may be confusing to retail investors purchasing and owning annuities, as annuities are typically 'held' directly by an insurance company."); ACLI Letter; IAA Letter I; FSI Letter I; Comment Letter of Lincoln Financial Group (Nov. 13, 2018) ("Lincoln Financial Group Letter") ("Sales of variable annuities, and variable life insurance products, typically do not involve the opening of a brokerage account and are not conducted in a brokerage account.").

[81] *See* CFA Letter I, *supra* footnote 37.

[82] *See* AFL-CIO, CFA Letter.

[83] *See, e.g.*, General Instructions 1.A and 1.B., and 2.B. to Form CRS.

[84] For example, the final instructions no longer require the proposed Comparisons section or other prescribed wording that could be perceived as requiring firms to compare their owns services unfavorably to those of their competitors. *See infra* Section II.B.6.

[85] *See infra* Sections II.A.2 and II.A.4.

[86] *See infra* Sections II.A.2. and II.A.4.

[87] Item 3.B.(i) of Form CRS. *See infra* Section II.B.3.b.

[88] *See infra* Sections II.A.2 and II.B.3.b.

[89] *See Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 249–50 (2010) (upholding against First Amendment challenge a requirement that lawyers disclose their "legal status" and "the character of the assistance provided"); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (upholding required disclosure of factual information about terms of service); *Pharm. Care Mgmt. Ass'n* v. *Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (upholding requirement that pharmacy benefit managers disclose conflicts of interest and financial arrangements).

[90] *See* Item 3.A.(iii) of Form CRS (requiring firms to state, "You will pay fees and costs whether you make or lose money on your investments. Fees and costs will reduce any amount of money you make

the final instructions provide that if a required disclosure or conversation starter is inapplicable to a firm's business or specific wording required by the instructions is inaccurate, firms may omit or modify it.[91]

As in the proposal, the final instructions include parameters for the scope of information expected within the relationship summary, though we are modifying the requirements to clarify the scope further in light of commenter concerns. First, all information in the relationship summary must be true and may not omit any material facts necessary in order to make the disclosures, in light of the circumstances under which they were made, not misleading.[92] The proposed instructions required all information in the relationship summary to be true and prohibited firms from omitting any material facts necessary to make the disclosures required by the instructions and the applicable item not misleading, but did not include the clause "in light of the circumstances under which they were made." [93] Commenters raised concerns with respect to the applicability of this standard to a short document with strict page limits that is meant to provide only a brief summary of information.[94]

We continue to believe that firms should include only as much information as is necessary to enable a reasonable investor [95] to understand the information required by each item.[96] As discussed below, we believe that investors will benefit from receiving a relationship summary containing high-level information that they will be more likely to read and understand, with the ability to access more detailed information.[97] As a result, we recognize a firm's relationship summary by itself is a summary of the information required to inform retail investors about the services a firm provides along with its fees, costs, conflicts of interest, and standard of conduct. We also believe that the disclosure provided in the relationship summary should be responsive and relevant to the topics covered by the final instructions,[98] and not omit information that is required to be disclosed or necessary to make the required disclosure not misleading.[99]

We are sensitive to commenters' concerns, however, regarding expectations for the scope of required information within page limits. In this regard, the instructions continue to provide, as proposed, that firms may not include a disclosure in the relationship summary other than a disclosure that is required or permitted by the instructions and the applicable item,[100] and that all the information contained in the relationship summary must be true.[101]

In a change from the proposal, and to address commenters' concerns, the final instructions provide that the information contained in the relationship summary may not omit any material facts necessary in order to make the disclosures, *in light of the circumstances under which they were*

on your investments over time. Please make sure you understand what fees and costs you are paying."). *See also infra* footnotes 424–425 and accompanying text.

[91] *See* General Instruction 2.B to Form CRS. We are adopting this provision to ensure that firms are not compelled to include wording in their relationship summaries that is misleading or inaccurate in the context of their business models. This provision may apply in limited circumstances. For example, the headings and conversation starters prescribed by the final instructions are worded at a highly generalized level and cover selected key topics that are broadly applicable to broker-dealers and investment advisers and their relationships with retail investors, irrespective of business model (*i.e.*, relationships and services the firm offers to retail investors, fees and costs that retail investors will pay, specified conflicts of interest and standards of conduct, and disciplinary history).

[92] General Instruction 2.B. to Form CRS ("All information in your *relationship summary* must be true and may not omit any material facts necessary in order to make the disclosures required by these Instructions and the applicable Item, in light of the circumstances under which they were made, not misleading."). *Cf.* Proposed Instruction 3 to Form CRS ("All information in your *relationship summary* must be true and may not omit any material facts necessary to make the disclosures required by these Instructions and the applicable item not misleading.").

[93] Proposed General Instruction 3 to Form CRS.

[94] *See, e.g.*, LPL Financial Letter (raising concerns that the relationship summary raises the risk of liability for material omissions given its page limits and required level of detail); CCMC Letter ("The page and length limitations imposed by the proposed regulation, coupled with the required disclosure that is mandated by the proposed rules, present a substantial risk of liability for omissions that may be necessary only to ensure the disclosure meets the Commission's strict formatting requirements."); Fidelity Letter (stating that firms "would find it very challenging to summarize their offerings within the four-page limit and other content and formatting constraints of the form as proposed, let alone to do so in a manner that provides sufficient detail to convey meaningful information to investors, and is sufficiently accurate to avoid creating liability for a misstatement").

[95] The proposed instructions referred to a "reasonable retail investor." For example, under the proposed instructions, firms would have been able to omit or modify prescribed wording or other statements required to be part of the relationship summary if such statements were inapplicable to a firm's business or would have been misleading to a "reasonable retail investor." *See* Proposed General Instruction 3 to Form CRS. The final instructions no longer make reference to a "reasonable retail investor." By eliminating the reference to a "reasonable retail investor," we are clarifying that we did not intend at the proposal, and do not intend now, to introduce a new standard under the federal securities laws, which generally refer to what a "reasonable investor" would consider important in making a decision. *See infra* footnotes 95–105 and accompanying text. References to a "reasonable retail investor" in the proposed instructions were meant to clarify how the operative Instruction or Item would apply in the context of a retail investor. Because new rule 17a–14 under the Exchange Act and new rule 204–5 under the Advisers Act require firms to deliver relationship summaries to retail investors in accordance with such rules, we do not believe such clarifications are necessary.

[96] General Instruction 2.A. to Form CRS. The instructions remind firms to use not only short sentences as proposed, but also short paragraphs. General Instruction 2.A.(i) to Form CRS.

[97] *See infra* Section II.A.3.

[98] Firms should keep in mind the applicability of the antifraud provisions of the federal securities laws, including section 206 of the Advisers Act, section 17(a) of the Securities Act, and section 10(b) of the Exchange Act and rule 10b–5 thereunder, in preparing the relationship summary, including statements made in response to the relationship summary's "conversation starters." *See infra* Section II.B.2.c.

[99] This approach is consistent with the approach the Commission has taken with respect to disclosure more broadly. *See, e.g.*, rule 408(a) under Regulation C [17 CFR 230.408(a)] ("In addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading"); Exchange Act rule 12b–20 [17 CFR 240.12b–20] ("In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading"); *see also* Commission Statement and Guidance on Public Company Cybersecurity Disclosures, Securities Act Release No. 82746 (Feb. 21, 2018) [83 FR 8166 (Feb. 26, 2018)] (stating that the "Commission considers omitted information to be material if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision or that disclosure of the omitted information would have been viewed by the reasonable investor as having significantly altered the total mix of information available"); *TSC Industries* v. *Northway*, 426 U.S. 438, 449 (1976) (stating a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision or if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" to the shareholder); *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 240 (1988) (stating that "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information"); *Securities and Exchange Com'n* v. *Texas Gulf Sulphur*, 258 F. Supp. 262, 279 (S.D.N.Y. 1966) (stating that "[a]n insider's liability for failure to disclose material information which he uses to his own advantage in the purchase of securities extends to purchases made on national securities exchanges as well as to purchases in 'face-to-face' transactions"); *Cochran* v. *Channing Corporation*, 211 F. Supp. 239, 242 (S.D.N.Y. 1962) (stating that the "Securities Exchange Act was enacted in part to afford protection to the ordinary purchaser or seller of securities. Fraud may be accomplished by false statements, a failure to correct a misleading impression left by statements already made or, as in the instant case, by not stating anything at all when there is a duty to come forward and speak").

[100] General Instruction 1.B. to Form CRS; *see also* Proposed General Instruction 1.(d) to Form CRS.

[101] General Instruction 2.B. and 2.C. to Form CRS; *see also* Proposed General Instruction 3 to Form CRS.

made, not misleading.[102] We have added the phrase "in light of the circumstances under which they were made" to clarify that the content included or not included in the relationship summary should be viewed, for example, in light of the fact that the disclosure is intended to be a summary, that firms must adhere to the page limit, and that there will be links to additional information. Any information contained in the relationship summary or omitted facts will not be viewed in isolation in respect of determining whether such information would have been viewed by a reasonable investor as having significantly altered the total mix of information available.[103] As discussed below, firms will provide additional detail and context through layered disclosure. For example, the instructions require firms to include specific references or a link to additional information as part of the relationships and services and fees and conflicts sections.[104] In other instances, the instructions encourage firms to reference or link to additional information to supplement their required disclosures.[105] While this change from the proposal is drawn from other areas of the federal securities laws,[106] Form CRS is not intended to create a private right of action.

Second, firms may omit or modify required disclosures or conversation starters that are inapplicable to their business, or specific wording required by the final instructions that is inaccurate.[107] The proposed instructions permitted firms to omit or modify required disclosures that were inapplicable to their business or would be misleading to a reasonable retail investor.[108] We modified the proposed instruction to provide a more concrete requirement allowing firms to omit or modify prescribed wording, rather than using a broader standard referencing a reasonable retail investor. This instruction is intended to ensure that no statements are misleading or inaccurate in the context of a firm's particular services or business. Rather, the objective of the Commission is to ensure that required disclosures are purely factual and provide investors with an accurate portrayal of the firm's services and operations.

Finally, given that firms will use mostly their own wording, we are adding instructions that remind firms that their responses must be factual and provide balanced descriptions to help retail investors evaluate the firm's services.[109] For example, firms may not include exaggerated or unsubstantiated claims, vague and imprecise "boilerplate" explanations, or disproportionate emphasis on possible investments or activities that are not made available to retail investors.[110] The relationship summary is designed to serve as disclosure, rather than marketing material, and should not unduly emphasize aspects of firms' offerings that may be favorable to investors over those that may be unfavorable.

2. Standard Question-and-Answer Format and Other Presentation Instructions

As with the proposed instructions, the final instructions require firms to present information under standardized headings and to respond to all the items in the final instructions in a prescribed order.[111] Instead of using declarative headings as proposed, however, the headings will be in the form of questions.[112] This change responds to feedback from surveys and studies[113] and commenters,[114] including many submitting their own mock-ups of the relationship summary that suggested or used a question-and-answer format in their own documents. Several commenters noted that the question-and-answer format is a more effective design for consumer disclosures because it focuses on questions to which a consumer wants answers and allows a consumer to skim quickly and understand where to get more information.[115] Based on consideration of these comments, we are both incorporating the format generally and are utilizing several of the question headings suggested by commenters in mock-ups, as discussed in each item below.

In addition to the standardized headings, we continue to believe that a prescribed order of topics facilitates comparability of different firms' relationship summaries. Commenters generally supported or did not oppose the premise of a prescribed order of topics.[116] Some commenters did, however, suggest changes to the organization or inclusion of topics, either explicitly in their comment letters, implicitly by the design of their own mock-ups, or both.[117] Results of

[102] *Id.*

[103] *See* rule 10b–5 under the Exchange Act [17 CFR 240.10b–5]; *supra* footnote 99 and accompanying text; *see also* footnote 469 and accompanying text.

[104] *See infra* Section II.A.3.

[105] *See, e.g.,* General Instruction 3.A. to Form CRS ("You are encouraged to use charts, graphs, tables, and other graphics or text features in order to respond to the required disclosures. . . . You also may include: (i) A means of facilitating access to video or audio messages, or other forms of information (whether by hyperlink, website address, Quick Response Code ("QR code"), or other equivalent methods or technologies); (ii) mouse-over windows; (iii) pop-up boxes; (iv) chat functionality; (v) fee calculators; or (vi) other forms of electronic media, communications, or tools that designed to enhance a *retail investor's* understanding of the material in the relationship summary.").

[106] *See supra* footnotes 99 and 103 and accompanying text.

[107] General Instruction 2.B. to Form CRS.

[108] *See* Proposed General Instruction 3 to Form CRS ("If a statement is inapplicable to your business or would be misleading to a reasonable *retail investor,* you may omit or modify that statement.").

[109] General Instruction 2.C. to Form CRS.

[110] General Instruction 2.C. to Form CRS.

[111] General Instruction 1.B. to Form CRS.

[112] *See generally* Items 2.A., 3.A., 3.B., 3.C, and 4.A to Form CRS.

[113] *See e.g.;* RAND 2018, *supra* footnote 13 (reporting that about 60% of survey respondents preferred a question-and-answer format over the sample relationship summary format presented in the survey). Kleimann I, *supra* footnote 19 ("Participants liked the Key Questions section, but wanted the questions to be answered within the document.").

[114] IAA Letter I ("A [question-and-answer] format will help keep the relationship summary short and should also remove the onus of the retail investor having to ask questions. This format would encourage further conversation, particularly if the Commission requires firms to point investors to additional information—including comparison information and other key questions—on the SEC's website."); Schwab Letter I (citing Kleimann Communication Group, Inc., *Making Disclosures Work for Consumers* (Jun. 14, 2018), *available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac061418-slides-by-susan-kleimann.pdf,* and contemporaneous discussions); Schwab Letter II ("Form CRS should be organized around questions"); Fidelity Letter (redesigned relationship summary with a question-and-answer format).

[115] *See* Kleimann II, *supra* footnote 19 ("Readers ask questions when they read, especially of functional documents . . . . For good design, we want to build upon this tendency by identifying the key questions investors should or are likely to ask and featuring them prominently in the text, thus easing the cognitive task for readers.); Schwab Letter I ("[Q]uestions that a consumer has . . . should be the organizing principle."); *see also* CFA Letter I.

[116] *See, e.g.,* Trailhead Consulting Letter (supporting a standardized order of topics to facilitate comparability); Fidelity Letter ("[W]e urge the SEC to consider prescribing content and topics, but not specific language . . .").

[117] *See, e.g.,* CFA Letter I (suggesting changes to the order of the disclosures and the design of the relationship summary); IAA Letter I (suggesting a different order of topics and elimination of the Comparisons section, including by submitting its own mock-up); Comment Letter of Charles Schwab & Co., Inc. (Feb. 26, 2019) ("Schwab Letter III") (providing sample Form CRS instructions that permit flexibility as to the order of sub-topics under each topic). On Feedback Forms, 57 (about 60%) commenters responded "yes" when asked whether information was in the appropriate order; 8 commenters suggested moving the Key Questions to be first or closer to the front of the document. *See* Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Questions 3(b) and 7). A few commenters on Feedback Forms suggested moving the Additional Information

surveys and studies that assessed comprehension of the sample proposed relationship summaries demonstrated the importance of context and revealed confusion caused by the placement of some information. For example, the RAND 2018 qualitative interviews suggested that investors were confused by and had difficulty reconciling the conflicts and standard of conduct sections, which were separated by the fees and comparisons sections.[118] Another study suggested that the appearance of fee information in three separate sections and separation of the fees and conflicts sections by the comparisons section inhibited understanding of the connection between fees and conflicts.[119] As discussed further below, we are combining the proposed Fees and Costs, Conflicts of Interest, and Standard of Conduct sections into one, to address these comments.[120] In addition, in response to suggestions that we provide more flexibility for how firms describe their services so that they can more accurately convey the information, the final instructions do not require firms to present the information within each section in the order listed.[121] Therefore, firms are free to discuss the required sub-topics within each item in an order that they believe best promotes accurate and readable descriptions of their business.

The final instructions provide for page limits to promote brevity, as proposed. The proposed instructions limited the length of the relationship summary to four pages for both standalone firms and dual registrants.[122] The final instructions provide that for dual registrants that include their brokerage services and advisory services in a single relationship summary, the relationship summary must not exceed four pages in paper format, or the equivalent if delivered electronically.[123] For broker-dealers[124] and investment advisers[125] a relationship summary in paper format must not exceed two pages, or the equivalent if delivered electronically.[126] Dual registrants that prepare separate relationship summaries for their brokerage and advisory services are limited to two pages each, or the equivalent if delivered electronically.[127] Unlike the proposed instructions, the final instructions do not prescribe paper size, font size, and margin width, providing instead that they should be reasonable.[128] For example, we believe that 8½″ x 11″ paper size, at least an 11 point font size, and a minimum of 0.75″ margins on all sides, as proposed, could be considered reasonable, but other parameters could also be reasonable. The objective of the proposed paper, font, and margin size limitations was to make the relationship summary easy to read. We expect that a visually engaging and effective design, including in electronic format, could achieve the same objective without the prescriptive limitations.

Many commenters preferred a shorter, one-to-two page document more heavily relying on layered disclosure with increased use of hyperlinks and other cross-references to more detailed disclosure.[129] Commenters also said that investors are more likely to read a shorter document.[130] Several commenters submitted mock-ups that were shorter than four pages.[131] Others indicated that the length of Form CRS was acceptable but should not exceed four pages.[132] On the other hand, certain commenters suggested that the length of the relationship summary may be too short to appropriately describe firms' insurance services or products.[133] One commenter said that it would be challenging for dual registrants to summarize all of their offerings within the four-page limit.[134] Investor feedback from surveys, studies, roundtables, and Feedback Forms also did not show consistent results. For example, 57% of the RAND 2018 survey respondents indicated that the proposed relationship summary was too long, 41% said it was about right, and roughly 2% said it was too short.[135] In section-by-section questioning, however, the most common response from RAND 2018 survey respondents was to keep the section length as is.[136] Similarly, some roundtable participants provided feedback that the proposed length was right at the maximum, "about right," or "good,"[137] whereas others would have preferred a shorter document.[138] About

section forward. *See* Durgin Feedback Form, Salkowitz Feedback Form, Starmer2 Feedback Form, Anonymous14 Feedback Form, and a few suggested changes to the order of discussion of obligations and conflicts. See Anonymous28 Feedback Form, Asen Feedback Form, Lee2 Feedback Form.

118 *See* RAND 2018, *supra* footnote 13.

119 *See* Kleimann I, *supra* footnote 19, at 30 (participants "had difficulty building knowledge and relating one piece to another when it was separated by physical space.").

120 *See* Item 3 of Form CRS.

121 *See* Proposed General Instruction 1.(b) to Form CRS ("Unless otherwise noted, you must also present the required information within each item in the order listed.").

122 Proposed General Instruction 1.(c) to Form CRS.

123 General Instruction 1.C. to Form CRS.

124 Proposed Form CRS defined "standalone broker-dealer" as "a broker or dealer registered under section 15 of the Exchange Act that offers services to *retail investors* and (i) is not dually registered as an investment adviser under section 203 of the Advisers Act or (ii) is dually registered as an investment adviser under section 203 of the Advisers Act but does not offer services to *retail investors* as an investment adviser." We are not adopting this definition because we believe using the term "broker-dealer" is sufficient for the final instructions. The final instructions provide that Form CRS applies to broker-dealers registered under section 15 if the Exchange Act. *See supra* footnote 8.

125 Proposed Form CRS defined "standalone investment adviser" as "an investment adviser registered under section 203 of the Advisers Act that offers services to *retail investors* and (i) is not dually registered as a broker or dealer under Section 15 of the Exchange Act or (ii) is dually registered as a broker or dealer under Section 15 of the Exchange Act but does not offer services to *retail investors* as a broker-dealer." We are not adopting this definition because we believe using the term "investment adviser" is sufficient for the final instructions. *See* supra footnote 8. Furthermore, the final instructions specify that Form CRS applies to investment advisers registered under section 203 of the Advisers Act.

126 General Instruction 1.C. to Form CRS.

127 General Instruction 1.C. to Form CRS. We discuss additional considerations and requirements for dual registrants and affiliates in Section II.A.5 below.

128 General Instruction 1.C. to Form CRS.

129 *See, e.g.*, Schwab Letter I ("Form CRS should simply be a short navigation aid to the existing Form ADV Part 2 disclosure" for investment advisers or "to additional information readily available on the firm's website or enclosed with the account documentation" for broker-dealers.); FSI Letter I ("While we support the Commission's efforts to ensure concise disclosure by limiting the required Form CRS to four pages (or its electronic equivalent), we suggest an even shorter document (perhaps as short as one page) with hyperlinks to more detailed disclosures."); *see also* AARP Letter; Better Markets Letter; Comment Letter of the Teachers Insurance and Annuity Association of America (Aug. 7, 2018) ("TIAA Letter"); Bank of America Letter; CCMR Letter; LPL Financial Letter; Kleimann II, *supra* footnote 19 ("Form CRS should be as short as possible.").

130 *See* Fidelity Letter; *see also* Schwab Letter I (Koski), *supra* footnote 21 (85% of survey participants answered that they would be more likely to read disclosure that is short and to the point with links to more information; 61% answered that they would be less likely to read a document that is longer and more comprehensive, but 31% answered that they would be more likely to read a longer and more comprehensive disclosure); Comment Letter of Glen Strong (Jul. 27, 2018).

131 *See, e.g.*, Schwab Letter I; Fidelity Letter; IAA Letter I.

132 *See* Cambridge Letter; Comment Letter of Morningstar, Inc. (Aug. 7, 2018) ("Morningstar Letter"); Trailhead Consulting Letter.

133 *See, e.g.*, ACLI Letter; MassMutual Letter.

134 *See* Fidelity Letter.

135 RAND 2018, *supra* footnote 13.

136 RAND 2018, *supra* footnote 13; *see also* Cetera Letter II (Woelfel), *supra* footnote 17 (when asked generally how the relationship summary could be improved, 10% of survey respondents said relationship summary could be shorter).

137 Washington, DC Roundtable, at 18, 26.

138 *See* Philadelphia Roundtable, at 5, 19 (noting that lengthy disclosure "actually prevents investor interest and really understanding more. If something like [the relationship summary] can replace the 200 pages and then you have access to

Continued

40% of commenters on Feedback Forms said that relationship summary was an appropriate length, while about 30% indicated a preference for a shorter document.[139]

In light of commenter and investor feedback, we have determined that the relationship summary should be no more than four pages, and that in many cases a document shorter than four pages is appropriate. As proposed, both standalone firms and dual registrants were subject to a four-page limit, even though a dual registrant may have to include more disclosures discussing its advisory business and brokerage business as compared with standalone firms. Upon further consideration of the comments advocating for a more streamlined disclosure that includes more white space, we are adopting a four-page limit for dual registrants that prepare one combined relationship summary, to permit them to capture all of the required information within twice as much space as for standalone firms. If dual registrants and affiliated [140] standalone firms choose to prepare separate relationship summaries for their brokerage and investment advisory services, each relationship summary should not exceed two pages.[141] The two-page limit will help to facilitate comparison of the dual registrant's services, as investors can easily review the separate relationship summaries side-by-side, and will encourage firms to focus on succinctly and clearly explaining the required information. Some commenters, including providers of insurance products, supported a longer relationship summary or expressed concern that four pages would not be enough to allow for a summary of all of their offerings.[142] We believe that the elimination of certain sections (such as the comparison section) [143] and most of the prescribed wording from the relationship summary, along with the flexibility firms will have under the final instructions to describe services with their own wording, and to omit or modify required disclosures or conversation starters that are inapplicable to their business or specific wording that is inaccurate, should help to alleviate the concerns of those who advocated for the relationship summary to be longer.

3. Electronic and Graphical Formats, and Layered Disclosure

We are adding instructions that clarify our support for firms wishing to use electronic media in preparing the relationship summary for retail investors.[144] The proposed instructions would have permitted firms to add embedded hyperlinks within the relationship summary in order to supplement required disclosures [145] and would have required firms to use hyperlinks for any document that is cross-referenced in any electronic relationship summary.[146] The proposed instructions also permitted firms to use various graphics or text features to explain the required information but did not reference whether they should be electronic- or paper-based.[147]

Many commenters supported electronic formats, including in connection with layered disclosure.[148] One commenter endorsed electronic, including mobile, formats as inherently easier to navigate and use in a layered approach and asserted that the relationship summary would be more engaging to investors, and thus more effective as a disclosure, if the Commission encouraged more creative use of electronic formats.[149] Research submitted by commenters and feedback from our investor roundtables indicated that investors preferred a more visually appealing disclosure.[150] Commenters recommended a more visually-focused and designed experience, and many mock-ups that commenters submitted used graphics and other design features extensively.[151] In addition, the IAC has recommended exploring the use of layered disclosure in certain contexts.[152] The IAC has also recommended that the Commission "continue to explore methods to encourage a transition to electronic delivery that respect investor preferences and that increase, rather than reduce, the likelihood that investors will see and read important disclosure documents." [153] Some commenters also expressed support for the IAC's recommendation relating to electronic delivery.[154]

Accordingly, we are adopting and adding provisions to the proposed

the 200 pages if you want them, that's a better system").

[139] *See* Feedback Forms Comment Summary (summary of responses to Question 6), *supra* footnote 11.

[140] Form CRS defines an "affiliate" as "Any persons directly or indirectly controlling or controlled by you or under common control with you." General Instruction 11.A. to Form CRS.

[141] General Instruction 1.C. to Form CRS ("*Dual registrants* and *affiliates* that prepare separate *relationship summaries* are limited to two pages for each relationship summary. . . . If delivered electronically, the relationship summary must not exceed the equivalent of two pages or four pages in paper format, as applicable.").

[142] *See supra* footnotes 133–134 and accompanying text.

[143] *See infra* Section II.B.6 (Proposed Items Omitted in Final Instructions).

[144] Delivery is discussed in Section II.C. Firms may deliver electronic versions of the relationship summary in accordance with the final instructions and the Commission's guidance regarding electronic delivery. *See* General Instructions 10.B. through 10.D. to Form CRS.

[145] Proposed General Instruction 1.(g) to Form CRS ("You may add embedded hyperlinks within the *relationship summary* in order to supplement required disclosures, for example, links to fee schedules, conflicts disclosures, the firm's narrative brochure required by Part 2A of Form ADV, or other regulatory disclosures.").

[146] Proposed General Instruction 1.(g) to Form CRS ("In a *relationship summary* that is posted on your website or otherwise provided electronically, you must use hyperlinks for any document that is cross-referenced in the *relationship summary* if the document is available online.").

[147] Proposed General Instruction 1.(f) to Form CRS ("You may use charts, graphs, tables, and other graphics or text features to respond to explain the required information, so long as the information: (i) Is responsive to and meets the requirements in these instructions (including space limitations); (ii) is not inaccurate or misleading; and (iii) does not, because of the nature, quantity, or manner of presentation, obscure or impede understanding of the information that must be included. When using interactive graphics or tools, you may include instructions on their use and interpretation.").

[148] *See, e.g.,* IAA Letter I ("Each key point should be made as simply and succinctly as possible, and the investor should then be pointed clearly and directly to specific additional plain English disclosure explaining the point . . . . This approach would also provide firms with the flexibility they need to use innovative design and delivery techniques.").

[149] *See* IAA Letter I.

[150] *See* Betterment Letter I (Hotspex), *supra* footnote 18 (reporting study authors' conclusions that survey respondents found a version of the standalone adviser relationship summary "more appealing and understandable," where Betterment revised the form to "[i]mprove visual hierarchy (*e.g.,* layout, shading, shorten and standardize paragraph lengths to improve legibility, appeal and retention of information"); Schwab Letter I (Koski), *supra* footnote 21(79% of survey respondents said they are more likely to read disclosure that is "visually appealing and did not seem like a legal document"); Washington, DC Roundtable, at 20; Atlanta Roundtable, at 35.

[151] *See, e.g.,* CFA Letter I; Fidelity Letter (citing to Stanford Law School Design Principles, *Use visual design and interactive experiences, to transform how you present legal info to lay people, available at http://www.legaltechdesign.com/communication-design*); Betterment Letter I (mock-up); SIFMA Letter; IAA Letter I; Schwab Letter I; *see also* Kleimann II, *supra* footnote 19 (describing design assumptions for a redesigned version of the relationship summary).

[152] *See* IAC Broker-Dealer Fiduciary Duty Recommendations, *supra* footnote 10 (in connection with the disclosure of disciplinary history, the Commission "should look at whether it might be beneficial to adopt a layered approach to such disclosures, with the goal of developing a more abbreviated, user-friendly document for distribution to investors").

[153] Investor Advisory Committee, *Recommendation of the Investor as Purchaser Subcommittee: Promotion of Electronic Delivery and Development of a Summary Disclosure Document for Delivery of Investment Company Shareholder Reports* (Dec. 7, 2017), *available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-promotion-of-electronic-delivery-and-development.pdf* ("IAC Electronic Delivery Recommendation").

[154] *See, e.g.,* FSI Letter I; Cambridge Letter; Comment Letter of the Institute for Portfolio Alternatives (Aug. 7, 2018) ("Institute for Portfolio Alternatives Letter").

instructions to encourage the use of electronic formatting and graphical, text, online features and layered disclosures in preparing their relationship summaries.[155] Key elements of the final instructions include the following:

• The instructions encourage (rather than just permit, as proposed) firms to use graphics or text features to respond to the required disclosures, or to make comparisons among their offerings, including by using charts, graphs, tables, text colors, and graphical cues, such as dual-column charts.[156] If the chart, graph, table, or other graphical feature is self-explanatory and responsive to the disclosure item, additional narrative language that may be duplicative is not required. For a relationship summary provided electronically, the instructions further encourage online tools that populate information in comparison boxes based on investor selections.[157]

• The instructions reference a non-exhaustive list of electronic media, communications, or tools that firms may use in their relationship summary.[158] We are including an instruction that, in a relationship summary that is posted on a firm's website or otherwise provided electronically, firms must provide a means of facilitating access (*e.g.*, hyperlinking) to any information that is referenced in the relationship summary if the information is available online.[159] For relationship summaries delivered in paper format, firms may include URL addresses, QR codes, or other means of facilitating access to such information.[160] This instruction permits layered disclosure through paper disclosures and hybrid paper and electronic deliveries, while supporting some investors' preference for paper.

• The instructions provide guidance that firms may include instructions on the use and interpretation of interactive graphics or tools, as proposed.[161] We believe that these features can make the relationship summary more engaging, accessible, and effective in communicating to retail investors.[162]

• The instructions replace the term "hyperlink" with the more evergreen concept of "a means of facilitating access," which will include hyperlinks as well as website addresses, QR Codes, or other equivalent methods or technologies.[163] Expanding the types of technology referenced in the instructions will make them more relevant as new technologies continue to be developed.

A number of commenters suggested different approaches for whether we would treat the relationship summary as "incorporating by reference" information provided in additional disclosures or materials that are hyperlinked to or otherwise accessible from the relationship summary.[164] Some of these commenters suggested that we treat certain hyperlinked information as "incorporated by reference." [165] Other commenters recommended that firms should be permitted, but not necessarily required, to incorporate in the relationship summary additional information provided in other documents.[166]

[155] We created a separate section in the instructions focused on electronic and graphical formats that includes these instructions. Proposed General Instruction 1.(f) to Form CRS ("You may use charts, graphs, tables, and other graphics or text features to explain the required information, so long as the information: (i) Is responsive to and meets the requirements in these instructions (including space limitations); (ii) is not inaccurate or misleading; and (iii) does not, because of the nature, quantity, or manner of presentation, obscure or impede understanding of the information that must be included. When using interactive graphics or tools, you may include instructions on their use and interpretation.").

[156] *See* General Instruction 3.A. to Form CRS ("You are encouraged to use charts, graphs, tables, and other graphics or text features to respond to the required disclosures. You are also encouraged to use text features, text colors, and graphical cues, such as dual-column charts, to compare services, account characteristics, investments, fees, and conflicts of interest.").

[157] *See* General Instruction 3.A. to Form CRS ("For a *relationship summary* that is posted on your website or otherwise provided electronically, we encourage online tools that populate information in comparison boxes based on investor selections.").

[158] General Instruction 3.A. to Form CRS ("You also may include: (i) A means of facilitating access to video or audio messages, or other forms of information (whether by hyperlink, website address, Quick Response Code ("QR code"), or other equivalent methods or technologies); (ii) mouse-over windows; (iii) pop-up boxes; (iv) chat functionality; (v) fee calculators; or (vi) other forms of electronic media, communications, or tools designed to enhance a *retail investor's* understanding of the material in the *relationship summary*.").

[159] General Instruction 3.B. to Form CRS. ("In a *relationship summary* that is posted on your website or otherwise provided electronically, you must provide a means of facilitating access to any information that is referenced in the *relationship summary* if the information is available online, including, for example, hyperlinks to fee schedules, conflicts disclosures, the firm's narrative brochure required by Part 2A of Form ADV, or other regulatory disclosures.").

[160] General Instruction 3.B. to Form CRS. ("In a *relationship summary* that is delivered in paper format, you may include URL addresses, QR codes, or other means of facilitating access to such information.").

[161] General Instruction 3.C. to Form CRS. Instructions that firms provide on the use and interpretation of interactive graphics or tools would not be subject to the page limitation for relationship summaries under General Instruction 1.C to Form CRS, but should be succinct, consistent with General Instruction 2.A.

[162] Similar to the proposed instructions, the final instructions include the caveat that these graphical and text features and electronic media, communications, or tools, (i) must be responsive to and meet the requirements in these instructions for the particular item in which the information is placed; and (ii) may not, because of the nature, quantity, or manner of presentation, obscure or impede understanding of the information that must be included. General Instruction 3.C. to Form CRS. *Cf.* Proposed General Instruction 1.(f) to Form CRS ("You may use charts, graphs, tables, and other graphics or text features to explain the required information, so long as the information: (i) Is responsive to and meets the requirements in these instructions (including space limitations); (ii) is not inaccurate or misleading; and (iii) does not, because of the nature, quantity, or manner of presentation, obscure or impede understanding of the information that must be included."). We deleted the reference in the proposed instructions to "is not inaccurate or misleading" because it is covered by another instruction.

[163] *See, e.g.*, General Instruction 3.A. to Form CRS ("You also may include: (i) A means of facilitating access to video or audio messages, or other forms of information (whether by hyperlink, website address, Quick Response Code ("QR code"), or other equivalent methods or technologies"); General Instruction 3.B. to Form CRS ("In a *relationship summary* that is posted on your website or otherwise provided electronically, you must provide a means of facilitating access to any information that is referenced in the *relationship summary* if the information is available online, including, for example, hyperlinks to fee schedules, conflicts disclosures, the firm's narrative brochure required by Part 2A of Form ADV, or other regulatory disclosures.)." *Cf.* Proposed General Instruction 1.(g) to Form CRS ("In a *relationship summary* that is posted on your website or otherwise provided electronically, you must use hyperlinks for any document that is cross-referenced in the *relationship summary* if the document is available online.").

[164] *See, e.g.*, Comment Letter of Cetera Financial Group (Aug. 7, 2018) ("Cetera Letter I"); IRI Letter; Schwab Letter I; Schwab Letter III (providing sample Form CRS instructions permitting incorporation of materials by reference); Comment Letter of The National Society of Compliance Professionals (Aug. 7, 2018) ("NSCP Letter"); Schnase Letter; LPL Financial Letter.

[165] Schwab Letter I (with respect to broker-dealers, Form CRS should navigate investors to additional information readily available on the firm's website or enclosed with account information, and the additional information would be considered incorporated by reference); NSCP Letter (firms should be permitted to incorporate by reference public disciplinary disclosure events); Schnase Letter ("Firms that follow the SEC rules in filing, posting and linking should get the full anti-fraud benefit of the information in the Firm Brochure being deemed "delivered" when the Relationship Summary is delivered, without having to resort to arcane and outmoded language and concepts such as "incorporation by reference.").

[166] *See* Cetera Letter I (suggesting that firms "should be permitted to incorporate other information in Form CRS by reference without reproducing the specified information in its' [sic] entirety, so long as the location is reasonably accessible to the public and the other sources of information are sufficient to meet the standards of Form CRS"); IRI Letter (the Commission should "permit (but not require) firms to use incorporation by reference to satisfy particular components of the disclosures required under Regulation Best Interest and/or Form CRS. In other words, if an investor already receives a particular piece of information in an existing disclosure document (including disclosures required under the federal securities laws, SEC or FINRA rules, ERISA, or DOL rules) the firm should be permitted to merely reference that existing document (with sufficient information for investors to locate or obtain that document.").

As discussed above, we support the use of layered disclosure and believe that investors will benefit greatly from receiving a relationship summary containing high-level information that they will be more likely to read and understand, with the ability to access more detailed information. Layered disclosure is an approach that can balance the goal of keeping the relationship summary short and accessible with the goal of providing retail investors with fulsome and specific information. The relationship summary is intended to be a self-contained document, however, and firms should be able to meet the instructions' requirements by providing generalized and summary responses to each item, without relying on incorporation by reference to other documents providing additional information. In contrast with other disclosure obligations such as prospectuses and registration statements, a firm could not satisfy the disclosure requirements set forth in the relationship summary instructions by incorporating another document (such as the Form ADV Part 2A brochure) by reference.

At the same time, we recognize the communicative value of layered disclosure. The instructions provide, as discussed above, that firms may[167] (and in some cases must)[168] cross-reference other documents and use hyperlinks or other tools to give more details about the topic. Where firms link to content outside the relationship summary disclosure, whether on a permissive or mandatory basis, the information may not substitute for providing any narrative descriptions that the instructions require, and the additional information should be responsive and relevant to the topic covered by the instruction. Firms should be mindful that the antifraud standards under the federal securities laws apply to linked information, as with other securities law disclosures.

All together we believe encouraging the use of electronic and graphical formatting online features, and layered disclosures will permit firms to create innovative disclosures that engage investors.

4. Conversation Starters

Consistent with the proposal, the relationship summary will be required to contain suggested follow-up questions for retail investors to ask their financial professional. The relationship summary, however, will not include a separate section of "Key Questions to Ask," at the end of the relationship summary, as proposed. Instead, firms will be required to integrate those "key questions" for retail investors to ask their financial professionals throughout the relationship summary as headings to items or as "conversation starters."

The proposed relationship summary would have required firms to include ten questions, as applicable to their particular business, under the heading "Key Questions to Ask" after a statement that the retail investors should ask their financial professional the key questions about a firm's investment services and accounts.[169] In addition, we proposed to allow firms to include up to four additional frequently asked questions.[170]

Most comment letters that discussed the "Key Questions to Ask" section generally did not support the proposed approach of including a separate section of up to fourteen questions at the end of the relationship summary. Commenters who proposed keeping a key questions section typically suggested significant substantive or stylistic alterations.[171] In a separate approach, many commenter mock-ups included topics and questions from "Key Questions to Ask" in a question-and-response format throughout the relationship summary.[172] Several commenters suggested that the key questions be removed from the relationship summary and placed on the Commission's website with other educational materials.[173]

Observations reported in the RAND 2018 report and other surveys and studies, and individual investor feedback at roundtables and on Feedback Forms generally indicated, that retail investors found the key questions helpful, however. In the RAND 2018 survey, the "Key Questions to Ask" section received the highest support of all sections to "keep as is" when investors were asked if they would add more detail, keep as is, shorten, or delete the section, and a majority of RAND 2018 survey respondents also indicated that they were either "very comfortable" or "somewhat comfortable" with asking each of the key questions.[174] Surveys and studies submitted by commenters also indicated that most investors who reviewed one of the proposed sample relationship summaries found the suggested questions to be useful and said they were likely to ask the questions.[175] In addition, the "Key Questions to Ask" section received the most "very useful" ratings from commenters who submitted Feedback Forms, and narrative comments on several Feedback Forms specifically indicated that the questions would encourage discussion with financial professionals.[176] Similarly, investors at

[167] *See, e.g.,* General Instruction 3.A. to Form CRS ("You also may include: (i) A means of facilitating access to video or audio messages, or other forms of information (whether by hyperlink, website address, Quick Response Code ("QR code"), or other equivalent methods or technologies); (ii) mouse-over windows; (iii) pop-up boxes; (iv) chat functionality; (v) fee calculators; or (vi) other forms of electronic media, communications, or tools designed to enhance a *retail investor's* understanding of the material in the *relationship summary.*").

[168] *See, e.g.,* Item 3.A.(iii) of Form CRS ("You must include specific references to more detailed information about your fees and costs that, at a minimum, include the same or equivalent information to that required by the Form ADV, Part 2A brochure (specifically Items 5.A., B., C., and D.) and Regulation Best Interest, as applicable.").

[169] *See* Proposed Item 8 of Form CRS.

[170] *See id.*

[171] *See, e.g.,* CFA Institute Letter I (suggesting interspersing questions through sections of Form CRS rather than including at the end); SIFMA Letter (suggesting that firms only be required to answer "four to five" questions to make the communication "shorter and more meaningful" to investors).

[172] *See, e.g.,* IAA Letter I; Comment Letter of the Institute for the Fiduciary Standard (Aug. 6, 2018) ("IFS Letter"); LPL Financial Letter; Schwab Letter I.

[173] *See, e.g.,* ACLI Letter; IAA Letter I; LPL Financial Letter. One commenter representing investors argued that the Commission was better-placed to provide information on topics covered in the "Key Questions to Ask" section because financial professionals would have "room for obfuscation" in their discussions with retail investors. *See* CFA Letter I.

[174] *See* RAND 2018, *supra* footnote 13. RAND 2018 also reports that, in qualitative interviews, "[m]ost interview participants said that they liked all of the questions, that they would ask these questions in meeting with a financial service provider, and did not suggest dropping any of the questions."

[175] *See* Betterment Letter I (Hotspex) *supra* footnote 18 (82% of respondents viewing a version of the investment-adviser relationship summary found the suggested questions to be very or somewhat useful and 93% were very or somewhat likely to ask the questions); Cetera Letter II (Woelfel) *supra* footnote 17 (85% of survey participants who viewed the sample dual-registrant relationship summary found the key questions to be "very" or "somewhat" important to cover, and 84% "strongly" or "somewhat" agreed that the key questions described their topics clearly); Kleimann I, *supra* footnote 19 ("Nearly all participants saw the Key Questions as essential. They felt the questions were straight forward and raised important questions . . . Many said they would use the set of questions in their next exchange with their broker or adviser.").

[176] *See* Feedback Forms Comment Summary, *supra* footnote 11 (51 commenters (55%) responded to Question 2(g) that the Key Questions section was "very useful" and 28 (30%) responded that the Key Questions section was "useful"; in comparison, other sections were scored as "very useful" in the range of 31% to 44%; similarly, more than 75% of Feedback Forms included a narrative response to Question 7 or other response indicating that the Key Questions were useful; 11 narrative responses included specific comments agreeing that the Key Questions would encourage discussions with

Commission-held roundtables indicated that they viewed the questions as helpful.[177]

In light of comments, we believe that including questions for investors to ask their financial professionals is an important component of the relationship summary. Several commenter mock-ups showed questions throughout the relationship summary grouped by subject matter rather than at the end of the document. Investor studies showed that proximity and context are important for questions an investor may have for a financial professional.[178] In addition, some commenters' Feedback Forms requested that questions be placed earlier in the relationship summary document; one specifically suggested that we put the questions with "the appropriate section [with] each section to which it applies." [179] We have determined to follow a similar approach by replacing the Key Questions to Ask section with specified "conversation starters" throughout the document. We are also using some of the proposed questions as topic headings.

There are required questions as conversation starters in each section other than the Introduction.[180] These conversation starters are intended to cover the same topics as the proposed key questions and in many cases are substantially similar in wording to the proposed key questions.[181] For each conversation starter, firms must use text features to make the conversation starters more noticeable and prominent in relation to the other discussion text. For example, they may use larger or different font; a text box around the heading or questions; bolded, italicized, or underlined text; or lines to offset the questions from other sections.[182] We believe the questions will be more helpful to investors when included throughout the document with formatting highlighting the conversation starters and organizing the conversation starters together with the firm's disclosures about a particular topic, providing retail investors clearer context for each question. However, if a required conversation starter is inapplicable to the firm's business, the firm may omit or modify that conversation starter.[183] With these changes, we believe that the conversation starters will better help retail investors initiate and engage in useful and informative conversations with their investment professionals.

As proposed, investment advisers that provide only automated investment advisory services or broker-dealers that provide services only online without a particular individual with whom a retail investor can discuss the conversation starters must include a section or page on their website that answers each of the conversation starter questions and must provide in the relationship summary a means of facilitating access (*e.g.*, by providing a hyperlink) to that section or page.[184] For example, a firm could include a hyperlink, QR Code, or some other equivalent methods or technologies that would enable a retail investor to access that information. One commenter requested clarification that all firms could provide retail investors with the answers to each key question in writing, and then investors could call a call center for follow-up questions.[185] All firms could choose to provide written answers to conversation starters, but the final instructions will only require written responses in these limited circumstances to ensure that retail investors receive responses when they do not have access to a financial professional to ask questions. We continue to believe that the requirement as adopted will encourage investor engagement and make the conversation starters useful where there is no firm representative to answer the question in-person (or by telephone) for the retail investor. In addition, as proposed, if the firm provides automated investment advisory or brokerage services, but also makes a financial professional available to discuss the firm's services with a retail investor, the firm must make the financial professional available to discuss the conversation starters with the retail investor.[186]

Six of the proposed key questions will continue to have analogous "conversation starter" questions in the final Form CRS, which we discuss in each applicable section below.[187] These questions cover services, fees and costs, conflicts, disciplinary information, and information about appropriate contact persons. As described below, we revised the wording for all of these questions.

We did not replace four of the key questions with analogous "conversation starter" questions; the topics raised by these key questions will be addressed in other ways in the relationship summary. First, we have replaced the question requesting financial professionals to "do the math for me" with a different conversation starter.[188] Commenters raised specific concerns about this question for operational and recordkeeping reasons.[189] We are

financial professionals; and two others stated more generally that the relationship summary would encourage dialogue).

[177] *See, e.g.*, Atlanta Roundtable (three investors responded positively to a question as to whether the key questions were helpful, with no dissent to that view); Houston Roundtable (one investor responding that "the questions for me are very, very good.").

[178] *See* Kleimann I, *supra* footnote 19; Kleimann II, *supra* footnote 19 (each recommending question-and-answer format in part to place relevant information together).

[179] *See* Feedback Forms Comment Summary, *supra* footnote 1111 (summary of responses to Question 7); Hoggan Feedback Form ("Maybe you should question at the end of each section—to help frame the issue"); *see also* Hawkins Feedback Form (commenting on obligations section that "[g]iving some examples of types of questions to ask would be beneficial").

[180] *See* Items 2.D. (relationships and services); 3.A.(iv) and 3.B.(iii) (fees, costs, conflicts, and standard of conduct); 4.D.(ii) (disciplinary history); and 5.C. (additional information) of Form CRS.

[181] For example, the proposed Key Question 6 ("How will you choose investments to recommend for my account?") has been included in the final relationship summary as a conversation starter to the Relationships and Services section ("How will you choose investments to recommend to me?"). For discussion of additional conversation starter questions, *see infra* Section II.A.4 *See also* Proposed Item 8.6 of Form CRS and Item 2.D.(iv) of Form CRS.

[182] *See* General Instruction 4.A. to Form CRS.

[183] *See* General Instruction 2.B. to Form CRS.

[184] General Instruction 4.B. to Form CRS. As proposed, such advisers or broker-dealers would have provided a hyperlink in the relationship summary to the appropriate section or page. *See* Proposed Item 8 of Form CRS. In response to comments supporting electronic access more broadly, we broadened the instruction to allow for other means of facilitating access. We also changed the term "automated advice" from the proposed instructions to "automated investment advisory services" in the final instructions to underscore the ongoing nature of the investment advisory relationship.

[185] *See* LPL Financial Letter.

[186] General Instruction 4.B. to Form CRS.

[187] *See infra* Sections II.B.2 (relating to Item 2.D. of Form CRS), II.B.3.a (relating to Item 3.A.(iv) of Form CRS), II.B.3.b (relating to Item 3.B.(iii) of Form CRS); II.B.4 (relating to Item 4.D.(ii) of Form CRS), and II.B.5 (relating to Item 5.C. of Form CRS).

[188] *See* Proposed Item 8.2 of Form CRS ("Do the math for me. How much would I pay per year for an advisory account? How much for a typical brokerage account? What would make those fees more or less? What services will I receive for those fees?").

[189] *See, e.g.*, Comment Letter of Edward D. Jones and Co., L.P. (Aug. 7, 2018) ("Edward Jones Letter") ("[G]iven the range of services available, it would be very difficult for financial professionals to fully address this question at the outset of the [customer] relationship, particularly for investors selecting transaction-based services."); SIFMA Letter ("[M]ost firms do not currently have systems in place to allow the financial professionals to answer questions such as customer-specific 'Do the math for me' requests."); John Hancock Letter ("We further believe that the costs and operational hurdles associated with providing personalized fee information have been underestimated, and encourage the SEC to provide that any "do the math"-type questions may be answered through the use of examples."). In part to avoid recordkeeping requirements on behalf of a financial professional, one commenter suggested reframing the questions as reflecting questions back to an investor with a prompt to ask the representative for help if the investor was unsure as to a response to the questions. *See* Primerica Letter.

Continued

instead requiring that firms include a conversation starter question prompting retail investors to ask their financial professional to help them understand how the fees and costs might affect their investments and the potential impact of fees and costs on a $10,000 investment.[190] As we note below, our intent with the proposed "Do the math for me" question was that it serve as a prompt to encourage retail investors to ask about the hypothetical amount they would pay per year for an account, what would make the fees more or less, and what services they would receive for those fees. The question was not intended to require firms to generate individualized cost estimates for each particular retail investor. We believe that the newly worded conversation starter makes that more clear. Additionally, the required discussion of fees, costs, and conflicts, together with the conversation starter question, will better serve as an initial basis for understanding how fees affect investment returns and the fees that they will pay than the "Do the math for me" key question.[191]

Two other proposed key questions regarding costs associated with an account and how firms make money[192] covered information that the relationship summary as adopted requires to be disclosed under the section on fees, costs, conflicts, and standard of conduct.[193] Specifically, firms must (i) summarize the principal fees and costs that retail investors will incur from their services (including how frequently they are assessed and the conflicts of interest they create) and (ii) describe any other fees related to their brokerage or investment advisory services in addition to those principal fees that the retail investor will incur.[194] Additionally, the new conversation starter question included in Item 3 is intended to elicit similar points of discussion with the following wording: "Help me understand how these fees and costs might affect my investments. If I give you $10,000 to invest, how much will go to fees and costs, and how much will be invested for me?" Finally, unlike the proposal, the relationship summary must include a description of the ways in which the firm and its affiliates make money from brokerage or investment advisory services and investments it provides to retail investors as well as material conflicts of interest.[195] As a result of these disclosure requirements, the separate questions from the proposal are not necessary.

Finally, we are not adopting a conversation starter question analogous to the proposed key question asking "How often will you monitor my account's performance and offer investment advice?", because the Relationships and Services section of the adopted relationship summary requires disclosure about the services and advice or recommendations that firms offer and whether or not they monitor accounts, including the frequency and any material limitations on any such monitoring.[196]

5. Presentation of Relationship Summaries by Dual Registrants and Affiliated Firms

We are modifying the proposed instructions in order to encourage a dual registrant to prepare one combined relationship summary discussing both its brokerage and advisory services, but a dual registrant will be permitted to provide two separate relationship summaries, each describing one type of service.[197] The proposal would have required a dual registrant to prepare one relationship summary, presenting most of the required items under standardized headings and in a tabular format, with brokerage services described in one column and advisory services described in another.[198] We also are adding a new instruction permitting affiliates to prepare a single relationship summary describing both brokerage and investment advisory services that they offer or to prepare separate relationship summaries, one for each type of service.[199] In comparison, the proposed instructions did not permit affiliates to deliver one combined relationship summary, but did allow them to state that they offer retail investors their affiliates' brokerage or advisory services, as applicable.[200]

We are not adopting the definitions of "standalone broker-dealer" and "standalone investment adviser" as proposed, because they are no longer necessary given the streamlining of the instructions relative to the proposal.[201] Under the final instructions, however, we are defining a dual registrant as "[a] firm that is dually registered as a broker-dealer under section 15 of the Exchange Act and an investment adviser under section 203 of the Advisers Act and offers services to retail investors as both a broker-dealer and an investment adviser", substantially as proposed. To clarify, a firm that is dually registered as both a broker-dealer and an investment adviser but does not offer both brokerage and investment advisory services to retail investors would not fall within the definition of dual registrant. For example, a firm that is dually registered and offers investment advisory services to retail investors, but offers brokerage services only to institutional customers, would be required to prepare, file, and deliver the relationship summary only in accordance with the obligations of an investment adviser offering services to retail investors.[202]

Dual Registrants. Investor studies and surveys showed mixed results in connection with the dual-column, combined relationship summary. For example, when presented with screen shots of each separate section in dual-column format, 85% of RAND 2018 survey respondents indicated that the side-by-side comparison format helped them decide whether a broker-dealer or investment adviser account would be right for them, but during qualitative interviews, some participants had difficulty with the two column

For additional discussion of recordkeeping, *see infra* Section II.E.

[190] *See* Item 3.A.(iv) of Form CRS.

[191] *See infra* Section II.B.3.

[192] *See* Proposed Items 8.3 ("What additional costs should I expect in connection with my account?") and 8.4 ("Tell me how you and your firm make money in connection with my account. Do you or your firm receive any payments from anyone besides me in connection with my investments?") of Form CRS.

[193] *See* Item 3 of Form CRS. The Item 3.C. disclosure combined with the conversation starter included therein would similarly cover information intended to be discussed in response to the fifth proposed key question ("What are the most common conflicts of interest in your advisory and brokerage accounts? Explain how you will address those conflicts when providing services to my account."). *See infra* Section II.B.3.b.

[194] *See* Items 3.A.(i) and 3.A.(ii) of Form CRS; *see also infra* Section II.B.3.

[195] *See* Item 3.B.(ii) of Form CRS; *see also infra* Section II.B.3.

[196] *See* Item 2.B.(i) of Form CRS ("Explain whether or not you monitor the performance of *retail investors'* investments, including the frequency and any material limitations. Indicate whether or not the services described in response to this Item 2.B.(i) are offered as part of your standard services."); *see also infra* Section II.B.2.

[197] General Instruction 5.A. to Form CRS.

[198] Proposed General Instruction 1.(e) to Form CRS.

[199] General Instruction 5.B. to Form CRS.

[200] Proposed Item 2.D. of Form CRS. This disclosure only applied in the context of an affiliate of the firm. This item was not intended to describe disclosure of a financial professional's outside business activities, such as an outside investment advisory business of a broker-dealer registered representative. *Cf.* Comment Letter of Northwestern Mutual Life Insurance Company (Aug. 7, 2018) ("Northwestern Mutual Letter") (interpreting Proposed Item 3 to prohibit the mention of affiliate services).

[201] *See supra* footnote 8.

[202] *See also* Advisers Act Rule 204–5; Exchange Act Rule 17a–14(a); General Instructions to Form CRS ("If you do not have any *retail investors* to whom you must deliver a relationship summary, you are not required to prepare or file one."); General Instruction 11.C to Form CRS.

format.[203] On Feedback Forms, some indicated that they liked the side-by-side or grid presentation.[204] One Feedback Form commenter said the dual-column format was confusing, however.[205] An interview-based study also indicated that both the formatting and the language in the dual-column format in our proposed sample relationship summary contributed to investor confusion about differences between broker-dealers' and investment advisers' services.[206] Both industry representatives and commenters representing investors also expressed concerns about the proposed formatting requirements for dual registrants' relationship summaries.[207] Two commenters supported using visual formatting to help investors understand the options dual registrants provide, but argued that the proposed content or design should be changed.[208]

Several commenters suggested letting dual registrants choose whether to prepare one combined relationship summary or two separate ones.[209] Commenters argued that providing information about both brokerage and investment advisory services as proposed would confuse investors.[210] Another suggested requiring dual registrants to prepare and deliver different relationship summaries to retail investors depending on whether the investors enter into an advisory or brokerage relationship, and to highlight the availability and link to the relationship summary of the other type of service.[211] One commenter argued that dual registrants needed flexibility to maintain two separate disclosures to allow each financial professional associated with the dual registrant to provide a tailored disclosure to his/her customer, without including services that he/she is not licensed to provide.[212]

We encourage dual registrants to prepare a single disclosure, designed in a manner that facilitates comparison between their brokerage and advisory services. Informed by comments, we have determined that two separate disclosures might be appropriate, depending on the different ways firms and their financial professionals offer services and on the particular facts and circumstances. For example, financial professionals with licenses to offer services as a representative of a broker-dealer and investment adviser may offer services through a dual registrant, affiliated firms, or unaffiliated firms, or only offer one type of service notwithstanding their dual licensing.[213] Financial professionals who are not dually licensed may offer one type of service through a firm that is dually registered. Accordingly, the final instructions permit dual registrants and affiliates to prepare a single relationship summary, or alternatively, two separate ones, to describe their brokerage and investment advisory services in a way that accurately reflects their business models and will be the most helpful to retail investors. The instructions explicitly encourage preparation of a single relationship summary, however, given that a number of investors and commenters reacted positively to this presentation.[214]

A firm preparing a single relationship summary will be required to employ design elements of its own choosing to promote comparability; however, we are not prescribing the two-column format, as proposed. We agree that making retail investors aware of a range of options is important to help them make an informed choice,[215] but we recognize the potential limits of a tabular format, as illustrated by results from some investor studies and surveys,[216] and we have concluded that firms are generally in a better position than the Commission to determine a format and design that facilitates comparison of their specific brokerage and investment advisory services. Whether a firm prepares a single relationship summary or two separate ones, the final instructions require a firm to present the information with equal prominence and in a manner that clearly distinguishes and facilitates comparison of the two types of services.[217] For example, a firm could use a tabular format; text features such as text boxes; bolded, italicized, or underlined text; or lines to clearly indicate similarities and differences in its services.

While we are providing this flexibility, we believe investors should see a range of options. Accordingly, the final instructions provide that a firm preparing two separate relationship summaries must provide a means of facilitating access to each relationship summary (*e.g.,* include cross-references or hyperlinks) and deliver both with equal prominence and at the same time to each retail investor, whether or not that retail investor qualifies for those retail services or accounts.[218] We disagree with commenters suggesting that dual registrants should have the option to deliver to retail investors a relationship summary describing only one type of service if, for example, that

[203] *See* RAND 2018, *supra* footnote 13, at 22; *see also id.,* at 46 ("Some participants grasped that the document was organized into two columns, each corresponding to an account type. Some others did not realize this immediately but grasped it once it was pointed out by an interviewer.").

[204] *See, e.g.,* Anonymous03 Feedback Form ("a side by side chart with u's [sic] to say which type of account offers which service"); Anonymous14 Feedback Form ("recommend chart structure"); Anonymous28 ("Presenting the differences in parallel columns gives the best chance for people new ot [sic] investing to understand what is involved"); Baker Feedback Form ("the double column format, comparing the two classes, was clear and easy to follow"); and Smith1 Feedback Form ("I like the side by side comparisons").

[205] *See* Anonymous02 Feedback Form ("Maybe a bit hard to read the columns.").

[206] *See* Kleimann I, *supra* footnote 19, at 30–31 ("Most participants tried to read the CRS by looking first at one column, usually the Broker Dealer Services, and then at the second column . . . when they turned to the second column they then tried to match the bullets . . . . Sometimes this matching was relatively easy to do, as in the Types of Relationships and Services section because the bullets aligned almost exactly. They struggled and found the misaligned bullets confusing in subsequent sections . . . Some participants simply took information from the first bullet they read or from bolded words or phrases.").

[207] *See* AARP Letter; CFA Letter I; TIAA Letter; Fidelity Letter; MassMutual Letter; LPL Financial Letter; SIFMA Letter; Comment Letter of BlackRock, Inc. (Aug. 7, 2018) ("BlackRock Letter") (expressing concern that investors may be confused if dual registrants were required to disclose all of their advisory and brokerage services in a single relationship summary); *see also* Schwab Letter II ("Dual-registrant firms recommend flexibility because of real-world concerns that the side-by-side comparison will not be effective.").

[208] *See* AARP Letter ("[a]lthough the visual formatting is helpful, the substantive information laid out within the table remains technical and is likely to be confusing to the average retail investor"); CFA Letter I (emphasizing that investors must see all available options in order to make an informed decision, and that the Commission consult with disclosure design experts toward developing a form that is most likely to result in informed investor choice.").

[209] *See* Schwab Letter III (providing sample Form CRS instructions that permit dual registrants either to prepare a single, comparative relationship summary, or two separate relationship summaries describing each type of service and providing links to each other); TIAA Letter; Fidelity Letter; MassMutual Letter; LPL Financial Letter; SIFMA Letter; BlackRock Letter.

[210] *See, e.g.,* TIAA Letter (a combined relationship summary would confuse customers of dually registered firms that provide only one type of service and would overwhelm them with information not relevant to the relationship); LPL Financial Letter; SIFMA Letter; BlackRock Letter.

[211] *See* IAA Letter I.

[212] *See* MassMutual Letter.

[213] *See, e.g.,* LPL Financial Letter.

[214] *See, e.g.,* RAND 2018, *supra* footnote 13 (reporting that 85% of survey respondents found the side-by-side comparison format to be helpful for purposes of deciding between a broker-dealer and investment adviser); *see also* CFA Letter I (stating it supported using one document to provide comparing brokerage and investment advisory services); Fidelity Letter (stating that a single Form CRS for a dual-registered firm could accomplish its objective); Schnase Letter (supporting the idea of having a unique form for dual registrants).

[215] *See supra* footnote 208 and accompanying text; *infra* footnote 1046 and accompanying text (discussing studies concerning the availability and presentation of comparative information on decision making).

[216] *See supra* footnotes 203–206 and accompanying text.

[217] General Instruction 5.A. to Form CRS.

[218] General Instruction 5.A. to Form CRS.

investor does not qualify for one of the services.[219] Retail investors should be able to learn about and compare the range of options a firm offers to retail investors, even if the financial professional does not believe that the retail investor meets the requirements for or is considering certain services at that time. For example, a retail investor may initially seek ongoing advice through an advisory account, but after learning about both brokerage and advisory services and speaking with a financial professional, may decide that a brokerage account is a better choice. Or a retail investor may not qualify for certain accounts at the time of receiving the relationship summary, *e.g.*, by not being able to meet an account opening minimum, but may qualify for them in the future, or may qualify for a particular service at one firm but not another. Furthermore, a retail investor may initially make the financial professional aware of only certain asset holdings (for example, he or she approaches a firm to rollover an IRA). On that basis, the firm may believe the investor only qualifies for certain of the firm's services. However, the investor may also have substantial other asset holdings and thus qualify for a variety of accounts that the firm offers. Knowing about the alternative brokerage and investment advisory options that a firm offers will help retail investors to compare firms' offerings and consider whether to adjust the relationship or services as investors' financial circumstances change.

Affiliate Services. As discussed above, the proposed instructions did not permit affiliates to prepare a combined relationship summary, but did permit firms with affiliates offering retail investors brokerage or advisory services to disclose these services.[220] Several commenters recommended that affiliates should have the same flexibility to prepare one or two relationship summaries as dual registrants.[221] We agree that this flexibility is appropriate for affiliates and are modifying the instructions to permit, but not require, delivery of a single relationship summary. Affiliates preparing a single relationship summary will provide the same comparative benefits for investors as dual registrants doing so. As with dual registrants, some affiliated firms market their services together and have financial professionals who hold licenses through each firm. We recognize, however, that not all affiliates operate in the same way. Some affiliated firms operate independently, do not market their services together, and do not share financial professionals. The different ways in which financial professionals affiliate with firms to provide services also warrant this flexibility. For example, some commenters noted that many financial professionals are licensed representatives of a brokerage firm and are also licensed through an affiliated investment advisory firm or an unaffiliated investment advisory firm (sometimes as a sole proprietor) separately registered with the Commission or one or more States.[222] Depending on the relationship among affiliates and their financial professionals, a single relationship summary or two separate summaries may be more appropriate.[223]

Many dually licensed financial professionals offer services on behalf of two affiliates, similar to dually licensed financial professionals offering services for a dual registrant. One commenter requested that the Commission provide clarity that all references to dual registrants apply to broker-dealers and investment advisers organized under a single corporate structure as affiliated entities.[224] Consistent with our discussion above, we believe that retail investors seeking services from dually licensed financial professionals should receive information about all of the services the financial professional offers, even if the services are through two affiliated SEC-registered firms. As a result, if two affiliated SEC-registered firms prepare separate relationship summaries, and they provide brokerage and investment advisory services through dually licensed financial professionals, the final instructions require the firms to deliver to each retail investor both firms' relationship summaries with equal prominence and at the same time, without regard to whether the particular retail investor qualifies for those retail services or accounts. To provide clarity, we have added a definition for dually licensed professionals in the final instructions that was not included in the proposal.[225] The final instructions also provide that each of the relationship summaries must cross-reference and link to the other.[226] If the affiliated firms are not providing brokerage and investment advisory services through dually licensed financial professionals, they may choose whether or not to reference each other's relationship summary and whether or not to deliver the affiliate's relationship summary with equal prominence and at the same time.[227]

Finally, we modified the instructions to explicitly permit a firm to acknowledge other financial services the firm provides in addition to its services as a broker-dealer or investment adviser registered with the SEC, such as insurance, banking, or retirement services, or investment advice pursuant to state registration or licensing.[228]

[219] *See* IAA Letter I; Fidelity Letter.

[220] Proposed Item 2.D. of Form CRS.

[221] *See* Fidelity Letter; LPL Financial Letter ("[D]ual-hatted financial professionals may either (i) provide brokerage and advisory services on behalf of LPL or (ii) provide brokerage services on behalf of LPL while providing advisory services on behalf of an unaffiliated RIA that is separately registered . . . . [In the latter case, an investor] would receive a dual registrant relationship summary from LPL and a standalone investment adviser relationship summary from the RIA" without knowing which entity would be providing advisory services."). Other commenters suggested that the instructions clarify whether the requirements for dual registrants apply to affiliated broker-dealers and investment advisers. Comment Letter of State Farm Mutual Automobile Insurance Company (Aug. 6, 2018) ("State Farm Letter") ("[T]he SEC did not provide a template or otherwise discuss whether affiliated broker-dealers and investment advisers can use blended or combined Form CRS"); Cambridge Letter (requesting that the Commission clarify that all references to dual registrants are applicable to broker-dealers and registered investment advisers organized under a single corporate structure as affiliated entities).

[222] *See, e.g.*, LPL Financial Letter.

[223] One commenter described arrangements in which a dual-hatted financial professional may provide brokerage services on behalf of a dual registrant and advisory services on behalf of an unaffiliated investment adviser. The commenter expressed concern that an investor may be confused if the dual registrant's and unaffiliated investment adviser's relationship summaries both describe investment advisory services. *See* LPL Financial Letter. We believe the flexibility for dual registrants and affiliated firms to prepare combined or separate relationship summaries under the final instructions should address this concern, and firms can determine which presentations are most helpful for investors.

[224] *See* Cambridge Letter.

[225] General Instruction 11.B. to Form CRS (defining "dually licensed financial professional" as "A natural person who is both an associated person of a broker or dealer registered under section 15 of the Exchange Act, as defined in section 3(a)(18) of the Exchange Act, and a supervised person of an investment adviser registered under section 203 of the Advisers Act, as defined in section 202(a)(25) of the Advisers Act.").

[226] General Instruction 5.B. to Form CRS. As discussed above, as is the case for dual registrants, affiliates preparing separate relationship summaries must deliver them to each retail investor with equal prominence and at the same time, without regard to whether the particular retail investor qualifies for those retail services or accounts. Each of the relationship summaries must reference and provide a means of facilitating access to the other. General Instruction 5.B.(ii).a. to Form CRS.

[227] General Instruction 5.B.(ii).b. to Form CRS. Firms that are unaffiliated will be treated as standalone broker-dealers and standalone investment advisers, each with an independent responsibility to create and deliver its own relationship summary in accordance with the final instructions.

[228] General Instruction 5.C. to Form CRS. This would also permit a broker-dealer that is registered with one or more states as an investment adviser to refer to such advisory services.

Firms may include a means of facilitating access (*e.g.*, cross-references or hyperlinks) to additional information about those services.[229] Some commenters encouraged the SEC to allow firms to disclose services of other affiliates, even if those services are not regulated by the SEC, such as investment advisory services offered by an affiliated thrift savings institution.[230] In response to our request for comment asking whether we should permit firms to include wording regarding other types of services and lines of businesses, several commenters submitting mock-ups of relationship summaries included language referencing banking and insurance services or products.[231] We found these comments persuasive and believe that permitting firms to reference financial services not necessarily regulated by the Commission so that retail investors can see the range of options available to them can benefit their decision-making, as discussed above.[232] This new instruction supports and expands upon the commenters' suggestions. Given that the focus of the relationship summary is on brokerage and/or advisory services, however, information pertaining to other services should not obscure or impede understanding of the information that must be disclosed in accordance with the Form CRS instructions.[233]

We believe that, together, these requirements for dually registered firms, financial professionals, and affiliates will enhance comparability while providing flexibility for them to present their services and relationships in the way the firm believes to be the clearest.

B. Items

The relationship summary is principally designed to provide succinct information about (i) relationships and services the firm offers to retail investors; (ii) fees and costs that retail investors will pay, conflicts of interest, and the applicable standard of conduct; and (iii) disciplinary history. The proposed relationship summary included this information as well as additional topics that we are eliminating, as explained further below. In determining the scope of the relationship summary, we balanced the need for robust disclosures with the risk of "information overload" and reader disengagement, a theme in comment letters, investor feedback at roundtables and in the Feedback Forms, and observations reported in the RAND 2018 report and other surveys and studies.

Some of the key changes from the proposal include:

- We have modified the sections to place substantively related information generally together. We believe this will facilitate comprehension, leading to a better-informed decision-making process and selection of a firm, financial professional, account type, services, and investments.
- The final instructions simplify the introduction; highlight disciplinary history in a separate section; and integrate key questions, now characterized as "conversation starters," among the remaining sections of the relationship summary.
- After reviewing the comments and observations reported in the RAND 2018 report and other surveys and studies, we have determined to remove prescribed generalized comparisons between brokerage and investment advisory services.

1. Introduction

The relationship summary will include a standardized introductory paragraph. The instructions will require a firm to: (i) State the name of the broker-dealer or investment adviser and whether the firm is registered with the Securities and Exchange Commission as a broker-dealer, investment adviser, or both; (ii) indicate that brokerage and investment advisory services and fees differ and that it is important for the retail investor to understand the differences; and (iii) state that free and simple tools are available to research firms and financial professionals at the Commission's investor education website, *Investor.gov/CRS,* which also provides educational materials about broker-dealers, investment advisers, and investing.[234]

The introduction's instructions as adopted differ from the proposal, which would have required prescribed wording in the introduction that differed for broker-dealers, investment advisers, and dual registrants. Specifically, the prescribed wording in the proposed introduction was intended to highlight in a generalized sense and make investors aware that broker-dealers and investment advisers are different, and that investors needed to carefully consider this choice. We received one comment specifically addressing the introduction. It stated that the prescribed wording would not capture the attention of retail investors and failed to adequately convey information regarding differences between investment advisers and broker-dealers.[235] In addition, several of the mock-ups commenters submitted included other suggestions for beginning the relationship summary, many of which had an introduction that was generally shorter and included less discussion about generalized business models than the proposed relationship summary.[236] In response to the comment and the mock-ups, a number of which we found conveyed useful information in a more concise manner than the proposed prescribed wording, we simplified and standardized the introductory paragraph, eliminating or replacing most of the prescribed wording we proposed, as discussed further below. In addition, we added a requirement to provide a link to *Investor.gov/CRS* in the Introduction to highlight the tools and educational resources available to retail investors. This dedicated page on *Investor.gov* will provide information specifically tailored to educate retail investors about financial professionals, including search tools in order to research firms and financial professionals and information about broker-dealers and investment advisers and their different services, fees, and conflicts. We believe the changes and the new page will better focus retail investors on how the relationship summary can be most helpful to them, while providing a link to resources to more general investor education information at the front of the relationship summary.

We made the following specific changes to the introduction: First, the final instructions require all firms to include certain information without prescribing the specific words that firms

[229] General Instruction 5.C. to Form CRS.

[230] *See* Northwestern Mutual Letter (seeking flexibility to disclose advisory services offered through an affiliated thrift because this would be in the clients' best interest); ACLI Letter (asserting that Form CRS is not flexible enough to describe in a meaningful and accurate way investment advisory services provided by insurance affiliates such as banks or thrifts).

[231] *See* ASA Letter; Primerica Letter; Comment Letter of Stifel Financial (Aug. 7, 2018) ("Stifel Letter") (referencing bank sweep accounts and also providing: "Banks and insurance brokers and agents may also provide access to financial planning and advice services, but these services are beyond the scope of this document."); Cetera Letter I (referencing bank sweep programs).

[232] *See supra* footnotes 215, 218–219, and accompanying text.

[233] *See* General Instruction 5.C. to Form CRS.

[234] *See* Item 1 of Form CRS. Firms also must include the date prominently at the beginning of the relationship summary, for example, in the header or footer of the first page or in a similar location for a relationship summary provided electronically. *See id.*

[235] *See* CFA Letter I. The commenter argued that the introduction would best be used to convey additional basic information about the differences between services offered by broker-dealers, investment advisers, and dual registrants. *See id.*

[236] *See, e.g.,* Primerica Letter; Schwab Letter I; SIFMA Letter.

must use.[237] The proposed relationship summary would have required prescribed wording that differed for standalone investment advisers, standalone broker-dealers, and dual registrants.[238] These changes correspond with the general approach throughout the final instructions of permitting more flexibility for firms to tailor the wording of their relationship summaries to enhance the relationship summary's accuracy, clarity, usability, and design.[239]

Second, we eliminated the proposed requirement that standalone investment advisers state that they do not provide brokerage services, and *vice versa*.[240] We believe this information is more succinctly conveyed by including the firm's registration status.[241] Additionally, commenters pointed out that the choice of financial services providers is not binary—there are more than two types of services offered that could apply.[242] We agree that the proposed wording could be viewed as unduly constricting and potentially misleading.

Third, we excluded the statement for dual registrants that, depending on an investor's needs and investment objectives, the firm can provide services in a brokerage account, investment advisory account, or both at the same time. We believe that this information is conveyed more effectively by the statement of a firm's registration status and the information provided elsewhere in the relationship summary, such as in the description of services that the firm provides.[243] In addition, requiring a statement of a firm's registration status at the beginning of the relationship summary helps obviate a need for the Affirmative Disclosures under the Exchange Act and the Advisers Act proposed specifically to require a broker-dealer and an investment adviser to prominently disclose that it is registered as a broker-dealer or investment adviser, as applicable, with the Commission in print or electronic retail investor communications.[244] As discussed below, we are not adopting the Affirmative Disclosures.[245] In response to our request for comment relating to the Affirmative Disclosures,[246] several commenters stated that the proposed rules were duplicative of other disclosure obligations (*e.g.*, Form ADV, Regulation Best Interest, Form CRS)[247] and that such rules were costly and difficult to implement and supervise.[248]

Fourth, we have included an instruction that allows (but does not require) reference to FINRA or Securities Investor Protection Corporation ("SIPC") membership in a manner consistent with other rules and regulations (*e.g.*, FINRA rule 2210).[249]

We are not adopting the proposed requirements to include statements that: (i) There are different ways an investor can get help with investments; (ii) an investor should carefully consider which types of accounts and services are right for him or her; (iii) the relationship summary gives an investor a summary of the types of services the firm provides and how the investor pays; and (iv) an investor should ask for more information with a specific reference to the key questions.[250] We believe that this information is not necessary in the introduction and is better conveyed through the revised question-and-answer structure of the relationship summary and a more streamlined introduction highlighting that it is important for retail investors to understand the difference between brokerage and investment advisory services and fees and referencing *Investor.gov/CRS*.[251] The conversation starters more directly prompt discussion between retail investors and their investment professionals than a generalized statement to ask for more information, and the conversation starters relating to the Relationships and Services item convey that an investor should carefully consider which types of accounts and services are appropriate. In addition, several commenter mock-ups demonstrated that removing the prescribed wording from each of these changes results in a shorter introduction and promotes additional white space in the relationship summary. Our adopted instructions remove required text that might be unnecessary for investors, similar to introductions in mock-ups that were typically shorter with less discussion about generalized business models than the proposed relationship summary.[252] As a result, we believe these changes will enhance the relationship summary's clarity, usability, and design.

Finally, we added a requirement to provide a link to *Investor.gov/* CRS and state that free and simple search tools are available at *Investor.gov/CRS* in order to research firms and financial professionals. Firms also will state that the page provides educational materials about broker-dealers, investment advisers, and investing. These materials include information about the different services and fees that broker-dealers and investment advisers offer. We believe a focus on *Investor.gov* and specifically the *Investor.gov/CRS* page at the beginning of the relationship summary will be more helpful to retail investors than the proposed relationship summary introduction. *Investor.gov* provides various resources that can assist with investor education relating to firms and their professionals. Among other components, *Investor.gov* currently provides resources prepared by Commission staff for retail investors to:

- Review the background of their investment professional;
- Educate themselves about investment products, including the risks and unique characteristics of many products;
- Perform fee calculations;
- Review Investor Alerts and Bulletins;
- Find contact information for the Commission; and

[237] *See* Item 1 of Form CRS.

[238] *See* Proposed Items 1.B. (standalone broker-dealers); 1.C. (standalone investment advisers); and 1.D. (dual registrants) of Form CRS.

[239] *See supra* footnote 83 and accompanying text.

[240] In bold font, a standalone broker-dealer would have been required to state: "We are a broker-dealer and provide brokerage accounts and services rather than advisory accounts and services." Proposed Item 1.B. of Form CRS. Likewise, a standalone investment adviser would have been required to state in bold font: "We are an investment adviser and provide advisory accounts and services rather than brokerage accounts and services." Proposed Item 1.C. of Form CRS. Dual registrants would have included a similar statement in bold font: "Depending on your needs and investment objectives, we can provide you with services in a brokerage account, investment advisory account, or both at the same time." Proposed Item 1.D. of Form CRS.

[241] As noted and discussed further *infra*, the Introduction will also refer retail investors to *Investor.gov/CRS* for further information regarding broker-dealers and investment advisers.

[242] *See, e.g.*, ACLI Letter (describing the "binary approach that the SEC has taken, which is not entirely accurate for the distribution of variable annuity and variable life products").

[243] *See infra* Section II.B.2.

[244] *See* Proposing Release, *supra* footnote 5, at Section III.D.

[245] *See infra* Section III.

[246] *See* Proposing Release, *supra* footnote 5, at Section III.D.

[247] *See, e.g.*, LPL Financial Letter; SIFMA Letter; IRI Letter; Committee of Annuity Insurers Letter; Trailhead Consulting Letter; *see also infra* Section III.

[248] *See, e.g.*, LPL Financial Letter; Bank of America Letter; IRI Letter; SIFMA Letter; Comment Letter of Altruist Financial Advisors LLC (Aug. 7, 2018) ("Altruist Letter"); *see also infra* Section III.

[249] *See* Item 1.A. of Form CRS.

[250] *See* Proposed Items 1.B. (standalone broker-dealers); 1.C. (standalone investment advisers); and 1.D. (dual registrants) of Form CRS.

[251] Similarly, we eliminated the reference to suggested questions on a specified page because the key questions are now included throughout the relationship summary.

[252] *See, e.g.*, Primerica Letter; Schwab Letter I; SIFMA Letter.

• Review educational information regarding broker-dealers and investment advisers.[253]

The *Investor.gov/CRS* page will bring together these types of educational materials about investment professionals, along with broader tools and other content specifically tailored for retail investors on *Investor.gov,* which will help them to more easily learn about different types of firms and find information about specific firms and financial professionals.

As discussed further below, we are removing discussions in the proposed relationship summary that were more generalized or educational in nature, including the comparison sections for standalone broker-dealers and investment advisers and other statements comparing these two different types of financial services and fees. Many commenters indicated that the Commission is generally better-positioned to provide investor education materials as compared to firms.[254] As a result, the revised introduction provides the *Investor.gov/CRS* link at the beginning of the relationship summary to direct retail investors to the Commission staff's resources and highlights the importance of investor education.[255]

Investors and commenters also supported highlighting *Investor.gov* more generally. Investor feedback at roundtables generally indicated that *Investor.gov* was a useful website for retail investors and should be prominent in the relationship summary.[256] Comment letters were supportive of the Commission providing educational materials to retail investors generally and *Investor.gov* specifically.[257] Observations in surveys and studies also indicated that many retail investors would seek information at *Investor.gov* and would trust that information because it is a government site.[258] Some investor studies, however, indicated that retail investors did not understand what information was available at *Investor.gov.*[259] Moving the link to *Investor.gov/CRS* and the related explanation to the front of the relationship summary (from the "Additional Information" section at the end of the relationship summary, as proposed) will address this issue by making the website more prominent and by concentrating information helpful to retail investors on one dedicated page on *Investor.gov.*

2. Relationships and Services

As proposed, after the introduction firms will be required to summarize the relationships and services that they offer to retail investors. They will use a revised heading, "What investment services and advice can you provide me? ", which follows the new question-and-answer format.[260] Several commenters used this question or a similar heading in mock-ups they provided.[261] Generally as proposed, we are requiring firms to provide information about specific aspects of their brokerage and investment advisory services, with modifications from the proposal to permit firms to use their own wording to cover these topics.

We proposed separate instructions for firms to describe brokerage account services and investment advisory account services. Firms would have used a mix of prescribed wording and their own wording to provide a summary overview of fees and certain required topics, including the scope of advice services, investment discretion, monitoring, and significant limitations on investments available to retail investors.[262] We received feedback from the observations in the RAND 2018 report, other surveys and studies and on Feedback Forms that relationships and services is an important area to cover,[263] and that investors learned important information from the prescribed wording on relationships and services.[264] In addition, the IAC recommended that the Commission adopt a uniform, plain English disclosure for retail investors that would include basic information "about the nature of services offered," among other

[253] *See* Investor Bulletin: Ten Ways to Use *Investor.gov* (Mar. 8, 2017), *available at https://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/investor-bulletin-ten-ways-use-investorgov; see also* Brokers, *available at https://www.investor.gov/research-before-you-invest/methods-investing/working-investment-professional/brokers;* Investment Advisers, *available at https://www.investor.gov/research-before-you-invest/methods-investing/working-investment-professional/investment-advisers.*

[254] *See supra* footnote 40 and accompanying text.

[255] Certain commenters provided mock-ups that did not include any introductory wording. *E.g.,* Fidelity Letter; IAA Letter I. In our view, these mock-ups either did not include, or, at minimum, did not appropriately highlight, important information regarding the registration status of the firm or the availability of additional information for retail investors.

[256] *See* Denver Roundtable (Investor Nine: "Yeah, I went there [to *Investor.gov*], that's good." Ms. Siethoff: "Did you think that sort of thing should be highlighted more?" Investor Nine: "More, yes. More"); Philadelphia Roundtable (Investor Four: "I went to those websites [including *Investor.gov*] and I found them very useful."). Some Feedback Form commenters also indicated that a link to *Investor.gov* or a similar educational website would be helpful. *See, e.g.,* Baker Feedback Form ("I found the document overall extremely useful and learned, most importantly, to refer to the *sec.gov* website often"); Shepard Feedback Form ("An *investing.gov* [sic] website seems to be a useful source"); Smith2 Feedback Form ("would like to see a link included to a site or sites that contain general investment information").

[257] *See, e.g.,* MassMutual Letter ("The SEC provides a wealth of information at *www.investor.gov* for educational purposes . . . Providing general information about broker-dealers and investment advisers in a consistent and readily-accessible [sic] space on the SEC's website would allow each firm to use the space available in Form CRS to accurately describe its brokerage and advisory services, with tailored language to reflect its business model, products and services offered and conflicts of interest.").

[258] *See* Kleimann II, *supra* footnote 19 ("Many participants said that they would use the *investor.gov* site . . . [and] that they would put a high level of trust in whatever information would be on the site because it was a government site."); RAND 2018, *supra* footnote 13 (finding that two-thirds of investors would be "very likely" or "somewhat likely" to click on a hyperlink for investor education materials).

[259] *See* Kleimann I, *supra* footnote 19 ("None [of the study participants] had a clear idea of the information that would be provided at *Investor.gov.*"); *see also* Kleimann II, *supra* footnote 19 ("Many participants said that they would use the *investor.gov* site to research the firm, but few knew what specific information would be at that site . . .").

[260] Item 2.A. of Form CRS.

[261] *See, e.g.,* IAA Letter I; LPL Financial Letter; Primerica Letter ; SIFMA Letter; Wells Fargo Letter; Fidelity Letter; Schwab Letter I (mock-up). We proposed requiring the heading, "[Types of] Relationships and Services." As discussed above, many commenters recommended that the relationship summary use a question-and-answer format as a more engaging approach for retail investors.

[262] *See, e.g.,* Proposed Item 2.B. of Form CRS ("If you are a broker-dealer that offers brokerage accounts to *retail investors,* summarize the principal brokerage services that you provide to *retail investors.*"); and Proposed Item 2.C. of Form CRS ("If you are an investment adviser that offers investment advisory accounts to *retail investors,* summarize the principal investment advisory services that you provide to *retail investors.*").

[263] *See* RAND 2018, *supra* footnote 13 (next to fees and costs, survey participants responded the relationships and services section was one of the most informative; more than 56% of survey participants said to keep the section the same length); *see also* Cetera Letter II (Woelfel) *supra* footnote 17 (85% of survey participants responded that this section was very or somewhat important); Schwab Letter I (Koski) *supra* footnote 21 (54% of survey participants selected "a description of the investment advice services the firm will provide to me" from a menu of 11 subjects as one of the four most important things for firms to communicate). In addition, nearly 90% of Feedback Form commenters graded this section as "very useful" or "useful." *See* Feedback Forms Comment Summary *supra* footnote 11 (summary of responses to Question 2(a)).

[264] *See* RAND 2018, *supra* footnote 13 (in qualitative interviews, participants appeared to have "a general understanding that this section describes two different services or accounts that a client would choose"); Kleimann I, *supra* footnote 19 (while study authors found that participants had difficulty with "sorting out the similarities and differences," this study also reports that "[n]early all participants easily identified a key difference between the Brokerage Accounts and Advisory Accounts as the fee structure either being tied to transactions or to assets. Some further identified as a key difference who had the final approval on all transactions, seeing the Brokerage Account as giving them more control on making the final decision.").

things.[265] However, some commenters expressed concern that, without more educational content, this approach would not sufficiently inform or would confuse retail investors.[266] One commenter pointed out that the proposed instructions dictated different ways for broker-dealers and investment advisers to describe similar services.[267] These commenters suggested including more explanatory wording or definitions to cover what services are typically associated with brokerage accounts and investment advisory accounts, to provide more background information to help retail investors understand the firm-specific disclosures.[268] At the same time, commenters noted that summary, prescribed wording for this section may not accurately describe the services of every broker-dealer or investment adviser.[269] Results of the RAND 2018 survey reflected these concerns and showed that almost a quarter of survey respondents (22.2%) described the relationships and services section as "difficult" or "very difficult" to understand.[270] Comments from participants in qualitative interviews reported in the RAND 2018 report, as well as comments from roundtable participants and on Feedback Forms, indicated that prescribed terms such as "transaction-based fee," "asset-based fee," "discretionary account," and "non-discretionary account" contributed to this difficulty.[271]

As discussed in Section II.A.1. above, we are sensitive to the potential inaccuracies and confusion that the prescribed wording can create. We also recognize that in some cases, providing instructions that require broker-dealers and investment advisers to describe similar services in different ways can create confusion. Accordingly, we have revised the instructions to allow firms to use more of their own wording. We also eliminated the separate instructions for brokerage account services and investment advisory account services, and instead are adopting one set of instructions that generally applies the same requirements to all firms.[272] To facilitate comparison of firms' relationships and services, however, we have retained the concept of specific sub-topics that each firm must cover in this section.[273]

Another change from the proposed instructions relates to a concern regarding how accounts were delineated. The proposed instructions would have applied based on whether or not broker-dealers and investment advisers offered brokerage accounts or investment advisory accounts to retail investors and would have included some prescribed language referencing accounts.[274] Insurance and variable annuity providers commented that this focus on accounts would not allow them to accurately describe insurance offerings and would be confusing, particularly to investors whose insurance or annuity products are held directly with an issuing insurance company.[275] We agree and have replaced references to accounts in this section with references to "services, accounts, or investments you make available to retail investors." [276]

a. Description of Services

The final instructions have an overarching requirement to state that the firm offers brokerage services, investment advisory services, or both, to retail investors, and to summarize the principal services, accounts, or investments the firm makes available to retail investors.[277] A firm also must include any material limitations on those services.[278] The final instructions require firms to include certain

[265] *See* IAC Broker-Dealer Fiduciary Duty Recommendations, *supra* footnote 10; and IAC Form CRS Recommendation, *supra* footnote 10.

[266] *See* CFA Letter I ("We believe the Commission should . . . require firms to be crystal clear about the nature of the services they offer. Simply telling [investors] that the account is a brokerage account or an advisory account doesn't necessarily convey useful information."); CFA Institute Letter I ("Given the similarities to what investment advisers offer, CRS disclosure of these additional services will likely confuse investors without language clarifying that they are outside of their usual broker-dealer duties and would typically require a separate contract.").

[267] CFA Letter I.

[268] *See* CFA Letter I (suggesting prescribed wording for how typical broker-dealers and investment advisers might describe their services); CFA Institute Letter I (suggesting alternative wording for how broker-dealers might describe their services). Commenters on Feedback Forms also asked for explanatory wording and definitions. *See* Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 4) (seven commenters asked for definitions of terms such as transaction-based fee, asset-based fee or wrap fee; 10 asked for a definition or better explanation of the term "fiduciary"); *see also*, Bhupalam Feedback Form ("The definition of a broker dealer [sic] and investment advisory [sic] is not very clear."); Daunheimer Feedback Form ("For a novice investor, all terms that seasoned investors take for granted, are new to them. Consider making the language as simple as possible."); Margolis Feedback Form ("wording is very confusing and not very accurate"); Anonymous27 Feedback Form ("define better"), *but see* Baker Feedback Form ("the discussion of differences among the relationships is very useful as it describe [sic] the differences in services provided . . . and most importantly, the difference between a commission-based fee and an 'asset-value' fee"); Hawkins Feedback Form ("Summary does a good job of explaining the basis [sic] services for a brokerage vs advisory account. Some clearer examples could help."); Rohr Feedback Form ("Makes clear how a discretionary account differs from a brokerage account").

[269] *See, e.g.,* MassMutual Letter (explaining that the prescribed wording that a customer will pay a commission each time a security is bought and sold is not universally true, *e.g.,* for mutual funds and variable annuities with internal exchange programs, which allow a customer to switch from one investment to another without paying a commission); CFA Letter I (recognizing that a generalized description of portfolio management services, included for purposes of educating investors, does not apply to all business model among registered investment advisers).

[270] RAND 2018, *supra* footnote 13. In the RAND 2018 qualitative interviews, participants noted several phrases that raised concerns such as "additional services" and "might pay more" and identified terms that needed further definition. *Id.* Another interview-based investor study found that "[p]articipants were quite mixed in their understanding about the advice and monitoring that was offered in the two accounts" when presented with the proposed sample dual registrant relationship summary. Kleimann I, *supra* footnote 19.

[271] RAND 2018, *supra* footnote 13; *see also* Betterment Letter I (Hotspex) *supra* footnote 18 (finding that "respondents found certain terminology (*e.g.,* 'fiduciary,' 'asset-based,' 'ETF') to be unclear or lack sufficient detail"). Roundtable discussions found similar results. *See, e.g.,* Philadelphia Roundtable (participant finding "transaction-based fee" to be complex); Miami Roundtable (participant stating that "most people don't really understand" what fiduciary duty means); *see also* Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 4) (Seven Feedback Forms included narrative comments that asked for definitions of terms such as "transaction-based fee," "asset-based fee" or "wrap fee;" 10 asked for explanation or definition of the term "fiduciary"); Anonymous06 Feedback Form ("Definitions might not be understood transaction based vs asset based fee"); Baker Feedback Form ("It may be more helpful to have detailed definitions (Ex. "transaction-based fee") that, unfortunately, result in a longer document."); Bhupalam Feedback Form ("definition of a broker dealer [sic] and investment advisory [sic] is not very clear"); Starmer2 Feedback Form ("Spell out . . . best interest").

[272] *See, e.g.,* Item 2.B. of Form CRS (requiring all firms to summarize their principal services but requiring broker-dealers to state whether or not they offer recommendations and investment advisers to state the particular types of advisory services they offer).

[273] As discussed in Section II.A.2 above, we are not requiring that these sub-topics follow a prescribed order, so firms are able to tailor the presentation of their services, as well as include additional information about their brokerage or advisory services, so long as the description covers all applicable topics. *See supra* footnote 121 and accompanying text.

[274] *See, e.g.,* Proposed Items 2.B.2. ("If you offer accounts in which you offer recommendations to retail investors, state that the retail investor may select investments or you may recommend investments for the retail investor's account . . . .") and 2.C.4. ("If you significantly limit the types of investments available to retail investors in any accounts, include the following . . . .") of Form CRS. In addition, some of the prescribed wording included language specific to accounts. *See, e.g.,* Proposed Item 2.B.1. of Form CRS. Broker-dealers would state, "If you open a brokerage account, you will pay us a transaction-based fee, generally referred to as a commission, every time you buy or sell an investment."

[275] *E.g.,* ACLI Letter; Committee of Annuity Insurers Letter; IRI Letter; MassMutual Letter; New York Life Letter; Northwestern Mutual Letter.

[276] Item 2.B. of Form CRS.

[277] Item 2.B. of Form CRS.

[278] Item 2.B. of Form CRS.

information in their descriptions. Similar to the proposal, broker-dealers must state the particular types of principal brokerage services the firm offers to retail investors, including buying and selling securities, and whether or not they offer recommendations to retail investors (*i.e.*, to distinguish execution-only services).[279] Investment advisers must state the particular types of principal advisory services they offer to retail investors, including, for example, financial planning and wrap fee programs.[280] The final instructions do not, however, require prescribed wording to describe the particular characteristics of these services, as did the proposed instructions.[281] Commenters argued that the proposed prescribed wording may not accurately describe the services of every broker-dealer or investment adviser.[282] As discussed in Section II.A.1 above, given that investors may be confused by information that does not directly relate to the firm's offerings, we are allowing firms to use their own wording to describe their own services. Therefore, unlike the proposal, the final instructions do not prescribe specific wording for firms to describe the particular characteristics of these services.[283]

Some commenters raised concerns about investor confusion if both broker-dealers and investment advisers discuss the advice they provide in the relationship summary. To mitigate that confusion, some commenters called for an explicit statement that broker-dealers are in sales relationships.[284] In response to these concerns, we added the explicit requirement that broker-dealers state that they buy and sell securities, in order to clarify their principal services.[285] We also have included a note in the final instructions that broker-dealers offering recommendations should consider the applicability of the Investment Advisers Act of 1940, consistent with SEC guidance.[286]

The final instructions require all firms to address the following topics in the description of their services: (i) Monitoring; (ii) investment authority; (iii) limited investment offerings; and (iv) account minimums and other requirements.[287] As discussed further below, the final instructions require firms to include much of the same substantive information as proposed, but rely less on prescribed wording and assumptions regarding typical brokerage and investment advisory accounts.[288] In response to comments, we added a new requirement for firms to disclose whether or not they have account minimums.[289] Commenters recommended that we include information about account minimums in the relationship summary.[290] In addition, a number of commenters submitting mock-ups included disclosures on account minimums in their forms.[291] We agree this information is important to investors when they are deciding on account types and services, particularly as they consider the amount of funds they are planning to invest and whether they may incur any fees or become ineligible for certain services if their accounts fall under certain dollar thresholds. We also removed requirements to discuss fees at the beginning of this section[292] and are consolidating these requirements with other related ones in the fees, costs, conflicts, and standard of conduct section, as discussed below.[293] We also are not adopting a proposed requirement to describe any regular communications with retail investors.[294] Neither the RAND 2018 report nor other surveys and studies suggested that this information was important to investors, as compared to fees. Mock-ups submitted by commenters also did not include this disclosure, underscoring the relative importance of other topics. Given the goal of limiting the length of the relationship summary so that investors remain engaged and are not overwhelmed by the information, we decided to prioritize requiring other information in the relationship summary.

Monitoring. The final instructions require both broker-dealers and investment advisers to explain whether or not they monitor retail investors' investments, including the frequency and any material limitations of that monitoring, and if so, whether or not the monitoring services are part of the firm's standard services.[295] In the proposal, different instructions concerning monitoring applied to broker-dealers and investment advisers. Broker-dealers would have stated whether they monitored the performance of retail investors' accounts, and if so, how frequently they performed such monitoring, whether it constituted additional services or was part of the broker-dealer's standard services, and whether a retail investor would pay more for it.[296] Investment advisers

[279] Item 2.B. of Form CRS.

[280] Item 2.B. of Form CRS.

[281] *See, e.g.*, Proposed Item 2.B.2. of Form CRS (requiring broker-dealers (i) that only offer accounts in which they offer recommendations to retail investors to state that the retail investor may select investments or the broker-dealer may recommend investments for the retail investor's account, but the retail investor "will make the ultimate investment decision regarding the investment strategy and the purchase or sale of investments" and (ii) that do not offer recommendations to state that the retail investor "will select the investments" and "will make the ultimate investment decision regarding the investment strategy and the purchase or sale of investments").

[282] *See, e.g.*, MassMutual Letter (explaining that the prescribed wording that a customer will pay a commission each time a security is bought and sold is not universally true, *e.g.*, for mutual funds and variable annuities with internal exchange programs, which allow a customer to switch from one investment to another without paying a commission); CFA Letter I (recognizing that a generalized description of portfolio management services, included for purposes of educating investors, does not apply to all business models among registered investment advisers).

[283] *See generally* Items 2.B.(i) through 2.B.(v) of Form CRS.

[284] *See, e.g.*, CFA Institute Letter I; Consumers Union Letter; *see also* Kleimann II, *supra* footnote 19 (alternative wording for redesigned relationship summary described broker-dealer services as a "sales relationship").

[285] *See* Item 2.B of Form CRS ("For broker-dealers, state the particular types of principal brokerage services you offer, including buying and selling securities, and whether or not you offer recommendations to *retail investors*.").

[286] *See* Item 2.B.(ii) to Form CRS. *See* Solely Incidental Release, *supra* footnote 47.

[287] Item 2.C. of Form CRS.

[288] In the proposed instructions, assistance with developing or executing the retail investor's strategy and monitoring the performance of the retail investor's account were characterized as additional services for broker-dealers. The final instructions do not make this distinction and instead permit firms more flexibility to describe their services accurately. *See* Proposed Item 2.B.3. of Form CRS.

[289] Item 2.B.(iv) to Form CRS ("Explain whether or not you have any requirements for *retail investors* to open or maintain an account or establish a relationship, such as minimum account size or investment amount.").

[290] *See, e.g.*, NASAA Letter ("Form CRS should specify minimum account size and include information on miscellaneous fees different categories of investors can expect to pay."); Cetera Letter I (Form CRS should include "[w]hether or not the firm has established standards for the minimum or maximum dollar amount of various account types.").

[291] *See, e.g.*, Primerica Letter and Cetera Letter I.

[292] *See* Proposed Items 2.B.1. (broker-dealers) ("If you open a brokerage account, you will pay us a transaction-based fee, generally referred to as a commission, every time you buy or sell an investment."); and 2.C.1. (investment advisers) ("State the type of fee you receive as compensation if the retail investor opens an investment advisory account. For example, state if you charge an on-going asset-based fee based on the value of cash and investments in the advisory account, a fixed fee, or some other fee arrangement. Emphasize the type of fee in bold and italicized font. If you are a standalone adviser, also state how frequently you assess the fee.") of Form CRS.

[293] *See infra* footnotes 373–375 and accompanying text.

[294] *See* Proposed Items 2.B.3. (broker-dealers) and 2.C.2. (investment advisers) of Form CRS ("Briefly describe any regular communications you have with retail investors, including the frequency and method of the communications.").

[295] Item 2.B.(i) of Form CRS.

[296] Proposed Item 2.B.3. of Form CRS.

would have stated how frequently they monitor retail investors' accounts.[297]

One commenter objected to the requirement for broker-dealers to describe additional services, including monitoring, on the basis that the information would add little value.[298] On the other hand, several commenters suggested that understanding the degree to which firms monitor the performance of their investments can be important to investors.[299] One of these commenters noted that broker-dealers and investment advisers have different legal obligations to monitor accounts, and that differences would remain even under Regulation Best Interest.[300] Observations from surveys and studies indicated that investors are interested in or may benefit from clarification of monitoring services.[301] For example, an overwhelming majority of participants in the OIAD/RAND study believed that a financial professional required to act in an investor's best interest would monitor the investor's account on an on-going basis.[302] In qualitative interviews in the RAND 2018 report, participants seemed to distinguish brokerage and investment advisory accounts and assess which type of relationship was a better fit for different investors based on assumptions concerning monitoring.[303] Other surveys and studies also showed that participants varied in their understanding of monitoring and whether they should expect firms to monitor their account.[304]

We disagree with the comment that requiring broker-dealers to describe monitoring services would add little value. As we also state in the Regulation Best Interest Release, we believe that it is important for retail customers to understand (1) the types of monitoring services (if any) a particular broker-dealer provides, and (2) whether the broker-dealer will be monitoring the particular retail customer's account.[305] We also agree with commenters that monitoring is an important distinguishing feature of different investment services and believe that retail investors should have accurate expectations of the types of monitoring firms offer. We are therefore requiring firms to explain whether or not they monitor retail investors' investments, and if so, the frequency, material limitations, and whether or not monitoring is offered as part of the firm's standard services.[306]

The proposal provided different instructions for broker-dealers and investment advisers concerning monitoring, requiring broker-dealers to discuss monitoring of account performance only if they offered it, and requiring investment advisers to disclose how frequently they monitor retail investors' accounts, as monitoring is generally part of ongoing advisory services.[307] Even with the different wording for broker-dealers and investment advisers as proposed, some participants in investor studies still assumed that the level of monitoring was the same between broker-dealers and investment advisers.[308] As discussed above, we believe it is important for firms to describe more accurately and precisely the monitoring that they actually do for retail investors. Therefore, we are retaining, with slight modifications, the obligation to disclose monitoring services, applying the same instruction to both broker-dealers and investment advisers, and eliminating the prescribed wording. The final instructions pertain to monitoring services generally and are not limited to monitoring for account performance only; to the extent firms describe monitoring services, they must include the frequency and any material limitations on these services and whether or not they are offered as part of the firm's standard services. We believe that subjecting firms to the same requirements to describe their own monitoring services, including a specific statement that they do not provide monitoring, if that is the case, will better facilitate investor understanding of whether any monitoring is provided and if so, the scope and type of such service. This approach also may result in more comparable information so that retail investors can understand the key differences among monitoring services by different firms based on firm-specific descriptions.

Investment Authority. The final instructions require investment adviser firms that accept discretionary authority to describe those services and any material limitations on that authority. Broker-dealers may, but are not required, to state whether they accept limited discretionary authority. Both investment advisers that offer non-discretionary services and broker-dealers must explain that the retail investor makes the ultimate decision regarding the purchase or sale of investments.[309]

Commenters and results from the RAND 2018 qualitative interviews suggested modifications to the proposed investment authority disclosures in the relationship summary but generally supported including this topic.[310] In

[297] Proposed Item 2.C.2. of Form CRS.

[298] *See* Wells Fargo Letter (recommending elimination of broker-dealer description of additional services because it could take up substantial space and adds little value for the investor).

[299] *See, e.g.,* Comment Letter of the St. John's Law School Securities Arbitration Clinic (Aug. 7, 2018) ("St. John's Law Letter"); CFA Letter I (discussing investors' expectations of a fiduciary duty based on whether and to what degree a firm or financial professional provides monitoring services); Comment Letter of the Commonwealth of Massachusetts (Aug. 7, 2018) ("Massachusetts Letter") (suggesting that the payment of ongoing compensation, such as a trail commission, indicates an ongoing relationship and should carry ongoing duties to monitor the investment); IAA Letter I (stating that, just as an adviser's duty to monitor extends to all personalized advice it provides a client, so should investors expect a similar duty from broker-dealers when providing monitoring services).

[300] *See* CFA Letter II.

[301] *See, e.g.,* RAND 2018, *supra* footnote 13 (in qualitative interviews, "participants were sometimes unclear on how a financial professional would monitor an account" and "some participants were unclear on how frequently monitoring would occur").

[302] *See* OIAD/RAND (finding that 69% of all participants in the survey, 75% of a specialized group defined as "investors," and 86% of a specialized group defined as "investment advice consumers" believed that best interest required ongoing monitoring).

[303] *See* RAND 2018, *supra* footnote 13 (in qualitative interviews, "some felt that brokerage accounts are better for those with investment expertise and time to dedicate to investing, whereas advisory accounts are better for those who have less expertise and/or less time to monitor investments"; one participant was confused by a statement that the firm could provide "additional services to assist you and monitor performance" and wanted to know up front which services would be included and which would cost extra.).

[304] *See* Kleimann I, *supra* footnote 19 ("Participants assumed that the level of advice and monitoring provided in the two accounts would be the same. They defined monitoring as constant looking at the market and their accounts and making sure their accounts were making money"); Betterment Letter I (Hotspex) *supra* footnote 18 (among survey participants reviewing a standalone adviser relationship summary designed to follow the proposal sample, only 37% correctly identified as "false" a statement that broker-dealers typically monitor client's portfolios and provide advice on an ongoing basis).

[305] *See* Regulation Best Interest Release, *supra* footnote 47; *see also* Solely Incidental Release, *supra* footnote 47.

[306] Item 2.B.(i) of Form CRS.

[307] *See* Fiduciary Release, *supra* footnote 47.

[308] *See* Kleimann I, *supra* footnote 19, at 10 ("Some participants assumed that the advice and level of monitoring was the same."); Betterment Letter I (Hotspex) *supra* footnote 18 (among survey participants reviewing a standalone investment adviser's relationship summary designed to follow the proposal, only 37% correctly identified as "false" a statement that broker-dealers typically monitor client's portfolios and provide advice on an ongoing basis).

[309] Item 2.B.(ii) of Form CRS.

[310] *See* CFA Letter I (stating that it is necessary for firms to describe the various types of discretionary and/or non-discretionary accounts they offer with specificity for such information to be useful to investors in choosing among providers for financial services); CFA Institute (suggesting that investment advisers only be required to discuss the type of accounts they offer (*i.e.*, discretionary and/or nondiscretionary accounts) because discussing both—when not both are offered—would

addition, various commenters submitting their own mock-ups included disclosures on investment authority in their relationship summaries.[311] One commenter also alluded to disputes that can arise when investors misunderstand the investment authority the financial professional exercises for different accounts.[312] One investor study indicated that only a few investors understood from the proposed sample dual-registrant relationship summary that non-discretionary advisory accounts offer investors the ability to approve recommendations.[313] Some RAND 2018 interview participants indicated that further definitions of "discretionary account" and "non-discretionary account" would be helpful.[314]

We continue to believe that it is important for investors to understand whether they or the firm or financial professional ultimately makes the investment decision in the relationship or service that they are considering. Accordingly, the final instructions generally require disclosure of the same substantive information on this topic as the proposed instructions, but in a less prescriptive way. As discussed in Section II.A.1, above, we believe that allowing firms to use their own wording to describe their discretionary and non-discretionary offerings and explaining what that means to retail investors in terms of who makes the ultimate investment decisions can lead to disclosures that are more meaningful and less confusing. We recognize that some investor feedback suggested that further definitions of "discretionary account" and "non-discretionary account" would be useful. While the final instructions do not require prescribed wording including these terms, as the proposed instructions would have required, the final instructions do require investment advisers that accept discretionary authority to use their own wording to explain similar information.[315]

The final instructions provide that investment advisers that accept discretionary authority will be required to describe these services and any material limitations on that authority.[316] Additionally, any such summary must include the specific circumstances that would trigger that discretionary authority and any material limitations.[317] Investment advisers may, for example, explain whether they seek the retail investor's approval before implementing or changing investment strategies or executing certain transactions. In comparison, the proposed instructions took a more prescriptive approach.[318] For example, the proposed instructions prescribed wording for investment advisers to include in their relationship summaries if they offer a discretionary account.[319] We believe that the more general final instruction provides investment advisers with the flexibility to describe their discretionary offerings more accurately.

For broker-dealers, the final instructions provide that they may, but are not required to, state whether they accept limited discretionary authority.[320] We have made this disclosure optional for broker-dealers because of our understanding that these services may not be a significant part of broker-dealers' services.[321] Accordingly, describing them here may detract from disclosure of other items that better characterize the firm's business and would be more helpful to investors. If limited discretion services are a significant part of a broker-dealer's business, for example, if limited discretion services constitute material facts relating to the scope and terms of the relationship with the retail customer that need to be disclosed under Regulation Best Interest, that broker-dealer may wish to include in its relationship summary a statement that it offers limited discretion services.

Finally, both broker-dealers and investment advisers that offer non-discretionary services must explain that the retail investor makes the ultimate decision regarding the purchase or sale of investments.[322] Under the proposed instructions, firms would have been required to explain whether they offer non-discretionary services and what that means, but using prescribed wording. Investment advisers would have been required to state that they give advice and the retail investor decides what investments to buy and sell.[323] Broker-dealers would have been required to state that the retail investor will make the ultimate investment decision regarding the investment strategy and the purchase or sale of investments, in addition to other prescribed wording to distinguish execution-only accounts from those in which the broker-dealer would offer recommendations.[324] The final

be confusing to customers); Betterment Letter I (stating that some of the prescribed language concerning investment authority may lead to more confusion than it clarifies); RAND 2018 report, *supra* note 13 (participants in qualitative interviews stated that it would be helpful if the relationship summary provided clearer definitions of "discretionary account" and "non-discretionary account"); *see also* Kleimann I, *supra* note 19 (noting that some "identified a key difference as who had final approval on all transactions, seeing the Brokerage Account as giving them more control" and only a few "recognized that non-discretionary advisory accounts also offer this option."). One Feedback Form commenter also noted that explanation of non-discretionary accounts was not clear. *See* Shaffer Feedback Form (broker-dealer recommendation and investment adviser "non-discretionary" account seem very similar. I was asking: "what's the difference."), *but see* Asen Feedback Form ("The Relationship and Services section for BDs is clear in that the investment decision is the customer's . . ."); Rohr Feedback Form ("makes clear how a discretionary account differs from a brokerage account").

[311] *See, e.g.,* Stifel Letter; AALU Letter; Wells Fargo Letter; Cetera Letter I; LPL Financial Letter; IAA Letter I; Primerica Letter; ASA Letter.

[312] *See* St. John's Law Letter (describing an arbitration case in which investor was not informed of a change in investment authority when the account type changed).

[313] *See* Kleimann I, *supra* footnote 19 (noting that some "identified a key difference as who had final approval on all transactions, seeing the Brokerage Account as giving them more control" and only a few "recognized that non-discretionary advisory accounts also offer this option.").

[314] *See* RAND 2018, *supra* footnote 13 (participants in qualitative interviews stated that it would be helpful if the relationship summary provided clearer definitions of "discretionary account" and "non-discretionary account").

[315] Item 2.B.(ii) to Form CRS.

[316] Item 2.B.(ii) of Form CRS.

[317] Item 2.B.(ii) of Form CRS.

[318] *Compare* Item 2.B.(ii) of Form CRS *with* Proposed Item 2.C.3 of Form CRS ("State if you offer advisory accounts for which you exercise discretion (*i.e.,* discretionary accounts), accounts where you do not exercise discretion (*i.e.,* non-discretionary accounts), or both. Emphasize the type of account (discretionary and non-discretionary) in bold and italicized font.").

[319] *See* Proposed Item 2.C.3. of Form CRS ("If you offer a discretionary account, state that it allows you to buy and sell investments in the retail investor's account, without asking the retail investor in advance.").

[320] *Compare* Item 2.B.(ii) of Form CRS *with* Proposed Item 2.B.2, which instructed broker-dealers: "If you offer accounts in which you offer recommendations to retail investors, state that the retail investor may select investments or you may recommend investments for the retail investor's account, but the retail investor will make the ultimate investment decision regarding the investment strategy and the purchase or sale of investments. If you only offer accounts in which you do not offer recommendations to retail investors (*e.g.,* execution-only brokerage services), state that the retail investor will select the investments and the retail investor will make the ultimate investment decision regarding the investment strategy and the purchase or sale of investments."

[321] *See* discussion on discretionary authority in Solely Incidental Release, *supra* footnote 47; *see also* footnotes 284–286 and accompanying text.

[322] Item 2.B.(ii) of Form CRS.

[323] *See* Proposed Instruction to Item 2.C.3. of Form CRS ("If you offer a non-discretionary account, state that you give advice and the *retail investor* decides what investments to buy and sell.").

[324] *See* Proposed Item 2.B.2. of Form CRS ("If you offer accounts in which you offer recommendations to *retail investors,* state that the *retail investor* may select investments or you may recommend investments for the *retail investor's* account, but the *retail investor* will make the ultimate investment decision regarding the investment strategy and the purchase or sale of investments. If you only offer

Continued

instructions require firms to explain to retail investors that they make the ultimate investment decision in non-discretionary accounts, but do not include requirements to use prescribed wording or references to account types. This change is consistent with our general approach described above that such prescribed wording may be confusing or may not sufficiently cover the discretionary and non-discretionary services a firm may offer.[325]

Limited Investment Offerings. The final instructions require firms to explain whether or not they make available or offer advice only with respect to proprietary products, or a limited menu of products or types of investments. If so, they must also describe the limitations.[326] In comparison, the proposed instructions included prescribed wording for firms to include if they significantly limit the types of investments in any accounts.[327] Specifically, broker-dealers would have stated, "We offer a limited selection of investments. Other firms could offer a wider range of choices, some of which might have lower costs." [328] Investment advisers would have stated, "Our investment advice will cover a limited selection of investments. Other firms could provide advice on a wider range of choices, some of which may have lower costs." [329] The proposed instructions gave examples of what might constitute a significant limitation on the types of investments, specifically, offering only one type of asset (*e.g.,* mutual funds, exchange-traded funds, or variable annuities); mutual funds or other investments sponsored or managed by the firm or an affiliate, *i.e.,* proprietary products; or only a small number of investments.[330] If these limits applied only to certain accounts the proposed instructions would have required firms to identify those accounts.[331]

Comments were mixed on the proposed instruction concerning limited investment offerings. Several commenters acknowledged the importance of investors understanding limitations on investments.[332] Results of RAND 2018 qualitative interviews also indicated that investors would like to understand limits on investment offerings.[333] Some commenters expressed concerns that the proposed disclosure would not be of sufficient value to investors.[334] A number of commenters, whether or not they supported generally requiring firms to discuss limitations on investments, expressed concerns that the scope of "significantly limits" in the proposed instructions or "limited selection of investments" was not sufficiently clear.[335] Furthermore, a few commenters expressed concern that the prescribed wording ("Other firms could offer a wider range of choices, some of which might have lower costs.") unduly prioritized cost over other investment product features or characteristics.[336]

We continue to believe that firms that limit product menus—such as offering only proprietary products or a specific asset class—should be required to describe those limitations in the relationship summary.[337] Other examples include limitations based on products that involve third-party arrangements, such as revenue sharing and mutual fund service fees. We agree with commenters who advocated for helping investors before entering into a relationship with a firm to understand whether a firm limits its product offerings, and to what extent.[338] In light of comments, we have determined, however, that the proposed prescribed wording may not allow all firms to describe limited investment offerings, if applicable, in a way that is accurate and helpful to investors, and are not requiring it in the final instructions.[339] Accordingly, we are revising the instructions to require firms to address whether or not they make available or offer advice only with respect to proprietary products or a limited menu of products or types of investments, and if so, to describe such limitations.[340] We believe that the final instructions address the same types of limitations on investments that the proposed instructions sought to address, but in a less prescriptive way, and allow firms to describe their investment offerings more accurately to reflect their scope of products and services.

Account Minimums and Other Requirements. The final instructions also include a requirement to explain whether or not the firm has any requirements for retail investors to open or maintain an account or establish a relationship, such as minimum account

accounts in which you do not offer recommendations to *retail investors* (*e.g.,* execution-only brokerage services), state that the *retail investor* will select the investments and the *retail investor* will make the ultimate investment decision regarding the investment strategy and the purchase or sale of investments.").

325 *See, e.g.,* CFA Letter I (suggesting that Form CRS should require advisers to discuss only what they offer in terms of discretionary or nondiscretionary accounts, because discussing both types when they offer only one would confuse investors); IAA Letter I (suggesting that the proposed prescribed wording would not cover sufficiently the variety of discretionary or non-discretionary advisory services a firm may offer and offering alternative language).

326 Item 2.C.(iii) of Form CRS.

327 The Proposed Items stated, "If you significantly limit the types of investments available to *retail investors* in any accounts, include the following . . . ." Proposed Items 2.B.4. and 2.C.4. of Form CRS.

328 Proposed Item B.4. of Form CRS.

329 Proposed Item C.4. of Form CRS.

330 Proposed Items B.4. and C.4. of Form CRS.

331 Proposed Items B.4. and C.4. of Form CRS.

332 *See* CFA Letter I; CFA Institute Letter I; New York Life Letter; *see also* mock-ups submitted by commenters that included the "limited selection of investments" wording or substantially similar wording. *See* Fidelity Letter; IAA Letter I; IRI Letter. These mock-ups did not elaborate on what the limitations are.

333 *See* RAND 2018, *supra* footnote 13 (from qualitative interviews, finding that "[p]articipants reacted strongly to the notion of being offered limited investment options").

334 *See* CFA Letter I ("[W]e fear the proposed disclosure provides too little information to be of value to the investor."); CFA Institute Letter I (suggesting that the disclosure expressly state that performance may be lower due to higher costs).

335 *See* CFA Letter I ("But simply stating they offer "limited" investments is not enough, as that will mean different things to different investors."); Prudential Letter ("It is unclear what 'significantly limits' means for firms that offer predominantly, but not exclusively, proprietary products. It is also unclear what constitutes a 'small choice of investments.' Additional examples or more prescriptive instructions regarding when firms must disclose such limitations would be helpful."); CFA Letter I ("[F]irms should have to describe how they limit the selection of investments."); Wells Fargo Letter ("This requirement appears to be overly broad as no firm can offer all investments and we therefore recommend that this be limited to those broker-dealers that only offer one type of product.").

336 *See, e.g.,* New York Life Letter ("[T]he Commission's exclusive emphasis on cost in this prescribed sentence does not provide consumers of insurance products with clear and complete information."); Mutual of America Letter ("We believe that this focus on cost alone is not necessarily in the best interest of retail consumers, who may benefit from high-value products, such as variable annuities."); Lincoln Financial Group Letter (suggesting that either the Form CRS or Regulation Best Interest disclosure obligation should allow for descriptions of product benefits to retail investors as well as costs). Another commenter noted that the prescribed wording about other firms' offerings could raise First Amendment concerns. *See* CFA Letter I ("[R]equiring firms to compare their own services unfavorably to those of their competitors may raise First Amendment concerns."). *See supra* footnotes 77–85 and accompanying text.

337 The proposed instructions stated, "If you significantly limit the types of investments available to *retail investors* in any accounts, include the following . . ." Proposed Items 2.B.4. and 2.C.4. of Form CRS. In order to give firms more flexibility to describe limitations on products or investment types in the context of their business models, and to avoid potential confusion with the materiality threshold of Regulation Best Interest (which requires disclosure of all material facts relating to the type and scope of services provided to the retail customer, including any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer), we have eliminated the word "significantly" from the final instructions. Regulation Best Interest Release, *supra* footnote 47.

338 *See* CFA Letter I; CFA Institute Letter I.

339 *See supra* footnotes 77–85 and accompanying text.

340 Item 2.C.(iii) of Form CRS.

size or investment amount, which is a change from the proposal.[341] In response to our request for comments on such possible requirements, commenters recommended that we include this information in the relationship summary.[342] In addition, a number of commenters submitting mock-ups included disclosures on account minimums in their forms.[343]

We agree that this is important for retail investors to understand because many firms offer a number of services that are only available to investors with higher account balances.[344] Furthermore, fee schedules may be tiered based on account balances.[345] Investors benefit from being aware of and seeing a range of options in the same context, as discussed above. We believe investors can use information about different account requirements for both current and future decision-making purposes. Thus, the final instructions require firms to address whether or not they have any requirements for retail investors to open or maintain an account or establish a relationship, such as a minimum account size or investment amount.

b. Additional Information

In a change from the proposal we are requiring firms to provide specific references to more detailed information about their services that, at a minimum, include the same or equivalent information to that required by the Form ADV, Part 2A brochure (Items 4 and 7 of Part 2A or Item 4.A and 5 of Part 2A Appendix 1) and Regulation Best Interest, as applicable.[346] Broker-dealers that do not provide recommendations subject to Regulation Best Interest (*e.g.,* execution-only broker-dealers) are not required to prepare more detailed information about their services, but to the extent they do, must include references to such information in their relationship summaries.[347] The final instructions require firms to use text features to make this additional information more noticeable and prominent in relation to other discussion text.[348]

As with other references to additional information, firms may include hyperlinks, mouse-over windows, or other means of facilitating access to this additional information and to any additional examples or explanations of such services.[349] This allows firms to summarize their services while making available more detailed and fulsome information for retail investors, in keeping with the design of the relationship summary as a short, succinct disclosure with links to additional information, as commenters and investors asked. We believe that requiring firms to make retail investors aware of the services they offer, at a high level, and where retail investors can obtain more detailed information through layered disclosure, will best engage retail investors and help them make more informed decisions when choosing from among firms, services, or accounts.

c. Conversation Starters

Firms will include in this section of the relationship summary three prescribed conversation starters for retail investors to ask their financial professional.[350] As discussed in Section II.A.4, these questions are taken from the Key Questions to Ask section in the proposed relationship summary, which a considerable majority of investors indicated were helpful.[351] Broker-dealers and investment advisers that are not dual registrants will include, respectively, "Given my financial situation, should I choose a brokerage service? Why or why not?" or "Given my financial situation, should I choose an investment advisory service? Why or why not?"[352] Dual registrants will include "Given my financial situation, should I choose an investment advisory service? Should I choose a brokerage service? Should I choose both types of services? Why or why not?"[353] These questions are largely the same as the first proposed Key Question but replace the terms "brokerage account" and "advisory account" with "brokerage service" and "investment advisory service," respectively.[354] This revision addresses comments that the concept of "accounts" may not align with all firms' business models and may cause investor confusion.[355] In addition, some commenters stated that it was inappropriate for the Commission to require firms to describe products and services that they do not offer and about which they may have limited or no expertise.[356] Although the proposed instructions permitted firms to modify the first Key Question to reflect the type of accounts they offer to retail investors, we are replacing it with three formulations that are explicitly tailored to firm type in order to clarify that firms are obligated to discuss only the services that they offer. Finally, we have rephrased the questions as "Should I choose [a/an brokerage/advisory] service? Why or why not?" rather than "Why should I choose [a/an brokerage/advisory] service?" to avoid a presumption that the relevant service will always be an appropriate service for the retail investor. The questions are designed to prompt a conversation relevant to the specific retail investor's circumstances.

All firms also will include the questions "How will you choose investments to recommend to me?" and "What is your relevant experience, including your licenses, education and other qualifications? What do those qualifications mean?"[357] These questions are nearly identical to proposed Key Questions numbers six and nine except, again, for the removal of the account concept from proposed Key Question number six, and a minor revision to proposed Key Question number nine to encourage retail investors to ask a broader question regarding the financial professional's

[341] Item 2.C.(iv) of Form CRS.

[342] *See, e.g.,* NASAA Letter (stating that Form CRS should include a disclosure, specifying the minimum account size and include information on miscellaneous fees different categories of investors can expect to pay); *see also* Cetera Letter I (stating that firms should disclose as material conflict of interest whether or not they have established standards for the minimum or maximum dollar amount of various account types).

[343] *See, e.g.,* Primerica Letter; Cetera Letter I.

[344] *See, e.g.,* SIFMA Letter (stating that investment advisory services typically require a minimum account balance); ACLI Letter; Comment Letter of the National Association of Insurance and Financial Advisors (Aug. 2, 2018) ("NAIFA Letter").

[345] *See, e.g.,* Cetera Letter II (mock-up) (explaining tiered fee schedule).

[346] Item 2.C. of Form CRS. *See* Regulation Best Interest Release, *supra* footnote 47, at Section II.C.1.

[347] Item 2.C. of Form CRS. *See* Regulation Best Interest Release, *supra* footnote 47, at Sections II.A., II.C.1.

[348] General Instruction 4.C. to Form CRS. For example, firms could use larger or different font; a text box around the heading or questions; bolded, italicized, or underlined text; or lines to offset the information from other sections.

[349] Item 2.C. of Form CRS.

[350] Item 2.D. of Form CRS. Firms should keep in mind the applicability of the antifraud provisions of the federal securities laws, including section 206 of the Advisers Act, section 17(a) of the Securities Act, and section 10(b) of the Exchange Act and rule 10b–5 thereunder, in preparing the relationship summary, including statements made in response to the relationship summary's "conversation starters." *See supra* footnote 98 and accompanying text.

[351] *See supra* footnotes 174–178 and accompanying text.

[352] Items 2.D.(i) and 2.D.(ii) of Form CRS.

[353] Item 2.D.(iii) of Form CRS.

[354] *Cf.* Proposed Item 8.1 of Form CRS ("Given my financial situation, why should I choose an advisory account? Why should I choose a brokerage account?"). We did not receive specific comments on this question, though some commenters included it or a variation thereof in their mock-ups. *See, e.g.,* Betterment Letter I; IRI Letter.

[355] *See supra* footnote 80 and accompanying text.

[356] *E.g.,* ACLI Letter; IAA Letter I.

[357] Items 2.D.(iv) and 2.D.(v) of Form CRS.

qualifications.[358] We believe that answers to these questions will be helpful to retail investors as they make their choices. In addition, a significant majority of participants from the RAND 2018 survey indicated that they would feel comfortable asking any of the Key Questions.[359] Although fewer participants indicated that they would feel "very comfortable" asking about the financial professional's experience and qualifications, compared with the other two questions,[360] we believe that including this question serves as a useful reminder both to investors who would feel comfortable and as encouragement to those who are hesitant that asking such a question is acceptable.

Requirements Removed from the Proposed Instructions. The final instructions do not include several specific requirements that were proposed in this item. First, the proposal would have required firms to describe their transaction-based fees and asset-based fees in this section, in addition to the more specific fee information required in a separate fee section.[361] We learned from an investor study submitted by commenters that dispersing information on the same topic throughout several sections of the relationship summary or separating that information with an unrelated topic could confuse investors.[362] This illustrated the importance of establishing sufficient context and increasing the salience of related information by ensuring that it is kept together in the relationship summary. We agree that fee information should be provided together, and have eliminated fee disclosures from the Relationship and Services section to locate it with other fee information in an effort to reduce investor confusion.

In addition, the final instructions do not require firms to describe regular communications with retail investors, including frequency and method, as proposed. Comments were mixed on the proposed instruction. One commenter expressed the view that proposed Form CRS suggested that firms should contact advisory clients by phone or email every quarter and disagreed with this implication. The commenter recommended that instead of mandating the form or frequency of contact with clients, the Commission should continue to give advisory clients flexibility to communicate how and when they want, as long as investment advisers are meeting their obligations under the Advisers Act.[363] Another commenter noted that misunderstandings concerning broker-dealers' duty or intention to monitor accounts can be avoided by proper communications, most importantly at the time the relationship is formed.[364] Mock-ups submitted by commenters generally did not refer to or describe communications between the firm or financial adviser and the investor.[365] The proposal was not designed to mandate the form or frequency of contact with clients. Nonetheless, given these mixed responses, our goal of keeping the relationship summary focused on a limited amount of information, and to allow more flexibility for firms to describe their services more accurately and meaningfully, firms will not be required to describe the frequency and method of their regular communications with retail investors. Firms may include this information, however, to help investors better understand the services provided.

3. Summary of Fees, Costs, Conflicts, and Standard of Conduct

In response to comments, feedback from investors at roundtables and on Feedback Forms, and observations reported by the RAND 2018 report and other surveys and studies, we are adopting changes to the relationship summary's required discussion of fees, costs, conflicts of interest, and standard of conduct. Commenters generally supported the Commission's goal of providing investors with reliable and straightforward information about the fees they pay, the standard of conduct applicable to financial professionals, and conflicts of interest relating to financial professional compensation.[366] Some suggested that the fee disclosure should be more prominent in the proposed relationship summary and located towards the front of the relationship summary and also suggested modifications to sections of the relationship summary addressing financial professional conflicts of interest and standards of conduct.[367]

Results of the RAND 2018 report and other surveys and studies showed that investors view information about fees and costs as one of the most important of the proposed sections of the relationship summary.[368] Investor

[358] Proposed Key Question number six asked "How will you choose investments to recommend for my account?" Proposed Key Question number nine asked "What is your relevant experience, including your licenses, education and other qualifications? Please explain what the abbreviations in your licenses are and what they mean." Proposed Items 8.6 and 8.9 of Form CRS.

[359] RAND 2018, *supra* footnote 13 (finding that at least two-thirds and up to 85% of survey participants indicated that they would be "somewhat comfortable" or "very comfortable" asking any of the Key Questions, including which account to choose and why, how investments would be selected for them, and what the financial professional's experience and qualifications were); *see also* Betterment Letter I (Hotspex) *supra* footnote 18 (reporting that 93% of survey participants who viewed a version of the sample standalone adviser relationship summary in the proposal indicated that they were somewhat or very likely to ask the suggested questions.).

[360] RAND 2018, *supra* footnote 13.

[361] *See* Proposed Items 2.B.1. ("Include the following (emphasis required): "If you open a brokerage account, you will pay us a *transaction-based fee*, generally referred to as a commission, every time you buy or sell an investment.") and 2.C.1. ("State the type of fee you receive as compensation if the *retail investor* opens an investment advisory account. For example, state if you charge an on-going asset-based fee based on the value of cash and investments in the advisory account, a fixed fee, or some other fee arrangement. Emphasize the type of fee in bold and italicized font. If you are a *standalone adviser*, also state how frequently you assess the fee.") of Form CRS.

[362] *See* Kleimann I, *supra* footnote 19 ("[W]hile the Brokerage Account was defined as using transaction-based fees and the Investment Advisory Account as using asset-based fees in the first section, in the Costs and Fees section, the Investment Adviser Services column also discusses transaction fees. This 'contradictory' repetition was confusing to participants.").

[363] *See* Edward Jones Letter.

[364] *See* Schnase Letter.

[365] *But see* Cetera Letter II ("Regardless of the program chosen, your IAR is responsible for ongoing review of your account(s), regular communication with you . . . .").

[366] *See, e.g.,* CFA Institute Letter I (noting that "we support efforts to help retail investors educate themselves on the differences between broker-dealers and investment advisers—in terms of services offered, fees they charge, conflicts of interest, and importantly, the standard of care under which each operates"); Fidelity Letter ("Form CRS should . . . inform investors of the types of fees they may incur and direct them, via a link, to more detailed disclosure."); Comment Letter of the Investment Adviser Association (Dec. 4, 2018) ("IAA Letter II") (describing "fees and expenses to be paid, legal obligations, conflicts of interest" as disclosure items that are "more critical than others"); Comment Letter of the University of Miami School of Law (Aug. 2, 2018) ("Investors should be provided with clear and concise information that fully and fairly discloses the specific charges he or she will incur as a result of the particular recommendation."); NAIFA Letter (agrees that clients should receive "early in the client-advisor relationship—all of the information in the SEC's proposal" which would include: "fees and charges . . . material conflicts of interest associated with a recommendation (to the extent known at the time of disclosure); [and] standards of conduct applicable to the services offered"); *see also* AARP Letter (recommending reformatting of Form CRS to meet "critical core components" including that "standard of care should be clear, concise and defined" [and] "fee structure should be straightforward and avoid technical jargon"); CCMC Letter (in connection with investor polling, notes that investors identify explaining "fees and costs," "own compensation," and "conflicts of interest" as "issues that matter most" to investors).

[367] *See, e.g.,* mock-ups in IAA Letter I; Robinson Letter; SIFMA Letter; Fidelity Letter; Schwab Letter I.

[368] RAND 2018, *supra* footnote 13 (more than 70% of survey respondents selected the fees and costs section as one of the most informative; this

feedback at roundtables and through Feedback Forms also showed the importance of fees and cost information to investors.[369] However, the RAND 2018 survey and other surveys and studies also indicated that the proposed relationship summary presentation of fee and cost information could be difficult for investors to understand.[370] The RAND 2018 survey and other surveys and studies also suggested that investors found sections in the proposed relationship summary covering the obligations of financial professionals and conflicts disclosure less informative,[371] and indicated that investors could have difficulty understanding and synthesizing information about the obligations of financial professionals and the impact of conflicts of interest.[372] As discussed more fully below, we considered all of this feedback, as well as comments received, in redesigning the disclosures related to the topics.

A new Item 3 will require the relationship summary to cover three areas: (i) Fees and costs; (ii) standard of conduct and conflicts of interest; and (iii) financial professional compensation and related conflicts of interest. Some of the key elements of these disclosures include:

• *Integrated sections covering fees, costs, conflicts of interest, and standard of conduct.* We have modified the proposal by combining the fees and costs section and the sections discussing conflicts of interest and standard of conduct into one Item 3 that will require three consecutive sections. These sections will help illustrate the interconnectedness of fees, costs, conflicts, and standard of conduct, and will keep these related disclosures close in proximity to each other.

• *Distinct summaries of principal fees and costs other fees and costs, and other ways the firm makes money.* We are also requiring separate sections discussing certain fees and costs, with one section discussing principal fees and costs, another section discussing other fees and costs related to the firm's services and investments, and another section discussing other ways the firm and its affiliates make money. We are not requiring firms to discuss all of the fees and costs together as proposed, to address comments and feedback that the section was complicated and overwhelming. We are also requiring a firm to include cross-references to more detailed information about the firm's fees.

• *A description of the standard of conduct with conflicts.* We are placing the description of the standard of conduct under the same heading as a summary of conflicts in order to help retail investors better understand the relationship between the standard of conduct and conflicts.

• *Broadening the types of conflicts disclosure.* We are requiring firms to disclose information on the topics that were required in the proposal—*i.e.*, proprietary products, third-party payments (shelf space and revenue sharing arrangements), and principal trading. But we are requiring firms without these conflicts to disclose at least one material conflict. We are also requiring a firm to include cross-references to more detailed information about the firm's conflicts of interest.

• *Financial professional compensation.* We are adding a separate section that will require a firm to highlight how its financial professionals are compensated and the conflicts of interest those payments create. This disclosure will distinguish firm-level from financial professional-level conflicts.

The proposal would have included one section summarizing fees and costs, one section summarizing conflicts of interest, and one section discussing the applicable standards of conduct. The principal fees were also discussed at the beginning of the services section, and for standalone investment advisers and broker-dealers, the section discussing fees and costs and the section discussing conflicts of interest were separated by a section discussing comparisons between investment advisers and broker-dealers. Commenters suggested locating fee and conflict disclosures more closely together, and several sample relationship summaries submitted by commenters placed the fees and conflicts sections in close proximity to each other.[373] As noted, we learned from an interview-based study submitted by a commenter that investors could have trouble connecting related information when those sections were not closely located.[374] Observations in the RAND 2018 qualitative interviews and comments submitted on Feedback Forms also suggested that investors' level of understanding varied significantly with regard to the relationship between the applicable standard of conduct and conflicts, and that investors might be more confused by this relationship when the relationship summary placed these sections far apart from one

section was least likely to be selected as not informative); *see also* Cetera II Letter (Woelfel) *supra* footnote 17 (reporting that 88% of survey respondents agreed that it is very or somewhat important to cover "fees and costs associated with those services"); Schwab Letter I (Koski) *supra* footnote 21 (reporting that 63% of survey respondents ranked "costs I pay for investment advice" as one of the four most important things for firms to communicate); CCMC Letter (investor polling) *supra* footnote 21(describing "explaining fees and costs" as one of three issues that "matter most" to investors).

[369] *See, e.g.*, Houston Roundtable; Atlanta Roundtable; Philadelphia Roundtable; Miami Roundtable; Washington, DC Roundtable; Denver Roundtable; Baltimore Roundtable; CFA Letter I; *see also* Feedback Forms Comment Summary, *supra* footnote 11 (responses to Question 2(c)) (over 80% of commenters graded the section on fees and costs as "very useful" or "useful").

[370] RAND 2018, *supra* footnote 13 (40% of survey respondents rated fees and costs section difficulty as "just right" while 35% rated the fees and cost section as difficult or very difficult; in qualitative interviews, participants generally found the section to be important, but also overwhelming and had trouble with language); *see also* Kleimann I, *supra* footnote 19 ("Participants expected to pay for transactions in a Brokerage Account or the quarterly fee for an Advisory Account, but they were surprised by the proliferation of additional fees . . . commented on the introduction of many new terms and wanted definitions. . ."); Cetera Letter II (Woelfel) *supra* footnote 17 (78% of survey respondents agreed strongly or somewhat agreed that fees and costs were clearly described, well below ratings for clarity of information about services and obligations).

[371] *See* RAND 2018, *supra* footnote 13 (almost one quarter of survey respondents selected "our obligations to you" as one of the least informative sections, only one third selected the section as one of the two most informative; the conflicts of interest section was selected as one of the two most informative by only 15% of respondents and as one of the least informative by more than a third); *see also* Cetera Letter II (Woelfel), *supra* footnote 17 (largest percent of survey respondents (88%) strongly or somewhat agreed that the "our obligations to you" topic was important; smallest percent (81%) strongly or somewhat agreed that conflicts of interest was important); CCMC Letter (investor polling) *supra* footnote 21(describing "explaining fees and costs," "explaining own compensation," and "explaining conflicts of interest" as three issues that "matter most" to investors).

[372] *See* RAND 2018, *supra* footnote 13 (in qualitative interviews, some participants struggled with understanding differing obligations for different account types and reconciling information in the conflicts of interest section with the "our obligations to you" section); Kleimann I, *supra* footnote 19 ("Few participants could define "fiduciary standard"; participants explaining firms' financial relationships that could create potential conflicts "had difficulty explaining how firms earned money from these relationships . . . often absent from these explanations was a discussion of the negative impact that these practices would have on them."); Betterment Letter I (Hotspex), *supra* footnote 18 (reporting survey results indicating that some investors viewing a version of the sample proposed standalone adviser relationship summary had difficulty answering correctly questions about financial professional obligations and conflicts of interest).

[373] *See, e.g.*, LPL Financial Letter; Betterment Letter I; Primerica Letter; SIFMA Letter; Wells Fargo Letter; Schwab Letter I.

[374] *See supra* footnote 362 and accompanying text.

another.[375] We agree that it is important to illustrate the relationship between fees, conflicts, and standards of conduct. We are therefore combining in Item 3 of the final instructions the discussions on fees and costs with discussions of firms' conflicts of interest, and combining the standard of conduct discussion with the discussion of certain other conflicts of interest.

a. Description of Principal Fees and Costs and Other Fees

Similar to the proposal, firms will be required to summarize the principal fees and costs that retail investors incur with respect to their brokerage and investment advisory accounts, and the conflicts of interest they create.

As noted above, commenters generally supported the Commission's goal of providing investors with reliable and straightforward information about the fees they pay and suggested making this information more prominent and located towards the front of the relationship summary.[376] Similarly, observations in the RAND 2018 report, and other surveys and studies, and comments from investors at roundtables and in Feedback Forms, overwhelmingly supported including fee disclosure in the relationship summary and showed that investors believe that information about fees and costs is important to understanding their relationship with a financial professional.[377] The RAND 2018 survey reported, however, that survey participants were more likely to rate the proposed relationship summary section on fees and costs as "difficult" or "very difficult" to understand and would add more detail.[378] In the RAND 2018 qualitative interviews, participants generally understood that this section would provide information on the types of fees they could possibly pay, but also found the section overwhelming with the number of various types of fees and had some difficulty with language, including certain terms.[379] Some participants also did not appear to synthesize information about fees and conflicts of interest to be able to apply it.[380] Other surveys and studies, and comments provided on Feedback Forms, also indicate that investors both want additional information about fees and costs and found this information difficult to understand.[381] Several commenters also said that information on fees and costs was not straightforward and used too much technical jargon.[382] In addition, the IAC recommended that the Commission adopt a uniform, plain English document that covers basic information about fees and compensation, among other topics.[383] The Feedback Form commenters and observations reported in the RAND 2018 report and other surveys and studies reaffirms our view that it is critical for retail investors to better understand the fees and costs incurred with their investments and related conflicts of interest. This section has been revised to further our policy objective of helping investors better understand such fees, costs, and conflicts of interest.

Description of Principal Fees and Costs. First, using the heading "What fees will I pay?",[384] firms will summarize their principal fees and costs that retail investors will incur for brokerage or investment advisory services, including how frequently such fees are assessed and the conflicts of interest they create.[385] Broker-dealers must describe their transaction-based fees [386] and investment advisers must describe their ongoing asset-based fees, fixed fees, wrap fee program fees, or other direct fee arrangements.[387] The fees described by investment advisers should align with the type of fee(s) disclosed in response to Form ADV Part 1A, Item 5.E, but they should be summarized in a way that provides retail investors a high-level overview.[388]

Although the proposal required firms to include information about their principal fees and costs, much of the wording was prescribed. For instance, the proposed instructions included prescribed wording to describe transaction-based fees and asset-based fees and the incentives that each of those fees create.[389] The proposed instructions also required firms to use technical terms and explain their definitions (*e.g.*, "mark-up" or "mark-

[375] *See* RAND 2018, *supra* footnote 13 (in qualitative interviews, participants struggled to reconcile information in the conflicts of interest section with obligations section). Among commenters on Feedback Forms who indicated that the relationship summary was too technical or that topics could be improved, many commented that sections addressing fees and costs, obligations and conflicts of interest needed clarification or better explanation. *See* Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 4). Some Feedback Form commenters suggested changes to the order of information about fees, conflicts and obligations or offered other comments suggesting that the order of the topics was confusing. *See* Anonymous28 Feedback Form ("Conflicts of Interest should come right after Obligations to You."); Asen Feedback Form ("Somewhat I would prefer to see conflicts before fees"); Lee2 Feedback Form (comment responding to Question 3(b), whether order is appropriate, "[c]onflicts seems buried too deeply"); Smith1 Feedback Form ("The transactions comment in the fees section seems like it would also fall under the conflicts of interst [sic] section").

[376] *See supra* footnotes 366–367 and accompanying text.

[377] *See supra* footnotes 368–369 and accompanying text.

[378] *See* RAND 2018, *supra* footnote 13 (in the RAND 2018 survey about 40% rated the difficulty of the section on fees and costs as "just right" and 35% rated the section on fees and costs as "difficult" or "very difficult"; about 30% of survey respondents suggested adding more detail).

[379] *See* RAND 2018, *supra* footnote 13 ("Participants struggled with terms in this section. . . . Words that participants flagged include 'markup,' 'markdown,' 'load,' 'surrender charges,' 'wrap fee' and 'custody.' ").

[380] *See* RAND 2018, *supra* footnote 13 ("[O]ne participant could clearly put differences in fees related to each type of account [but] when asked about which type of financial professional has an incentive to encourage investors to buy and sell securities frequently . . . incorrectly answered.").

[381] *See* Kleimann I, *supra* footnote 19 (finding that "[p]articipants expected to pay for transactions in a Brokerage Account or the quarterly fee for an Advisory Account, but they were surprised by the proliferation of additional fees. . . . Participants also commented on the introduction of many new terms); Cetera Letter II (Woelfel) *supra* footnote 17 (78% of survey respondents strongly or somewhat agreed that information on fees and costs was clearly presented, rating below sections describing the firm's obligations and the services that the firm provides.); Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 4) (41 commenters on Feedback Forms (44%) indicated that one or more topics on the relationship summary is too technical or could be improved; 23 included comments indicating that information about fees and costs is too technical or needed to be more clear).

[382] *See e.g.*, IAA Letter I (stating that retail investors are unlikely to understand the use of "technical terms and industry jargon" with respect to fees in the relationship summary); *see also* AARP Letter; Fidelity Letter.

[383] *See* IAC Broker-Dealer Fiduciary Duty Recommendations, *supra* footnote 10.

[384] Item 3.A. of Form CRS.

[385] Item 3.A.(i) of Form CRS.

[386] Item 3A.(i)(a) of Form CRS.

[387] Item 3.A.(i)(b) of Form CRS.

[388] Item 3.A.(i)(b) of Form CRS. In addition, investment advisers must include information about each type of fee they report in Form ADV that is responsive to Item 3.A. of Form CRS.

[389] Dual registrant broker-dealers, for example, were required to include the following wording on transaction based fees: "You will pay us a fee every time you buy or sell an investment. This fee, commonly referred to as a commission, is based on the specific transaction and not the value of your account." Proposed Item 4.B.1. of Form CRS. Dual registrant investment advisers were required to include the following wording on asset-based fees: "You will pay an on-going fee [at the end of each quarter] based on the value of the cash and investments in your advisory account." If the asset manager charged another type of fee instead of an asset-based fee, it was required to briefly describe that fee and how frequently it was assessed. Investment advisers that charged an ongoing asset-based fee would have been required to include the following: "The more assets you have in the advisory account, including cash, the more you will pay us. We therefore have an incentive to increase the assets in your account in order to increase our fees. You pay our fee [insert frequency of fee (*e.g.*, quarterly)] even if you do not buy or sell." Broker-dealers would have been required to include the following: "The more transactions in your account, the more fees we charge you. We therefore have an incentive to encourage you to engage in transactions." Proposed Items 4.B.5. and 4.C.8. of Form CRS.

down," "load," and "custody").[390] Additionally, firms providing advice about investing in wrap fee programs were required to include several more prescribed sentences.[391] Finally, dual registrants were required to state when a retail investor may prefer a brokerage or investment advisory service from a cost perspective,[392] and wrap fee program providers had to explain when a retail investor may prefer a wrap fee program.[393] Commenters argued that in many cases the prescribed wording was confusing and not accurate.[394] For example, several commenters indicated the proposed fee discussion was unnecessarily technical and suggested the relationship summary avoid the use of jargon (*e.g.,* terms like "asset-based fee" and "load") in this section.[395] Several roundtable participants also said that they did not understand these terms,[396] as did some participants in investor studies and surveys.[397] Other commenters noted that the wording in the proposal was too binary.[398] Another commenter argued that certain prescribed wording was obvious to retail investors and did not add value to the retail investor.[399]

In an effort to balance the goal of educating retail investors with the need to provide firms with enough flexibility to tailor the disclosure to their services and investments, we have decided to remove from the Instructions the prescribed wording we proposed about fees and costs.[400] Specifically we are replacing the prescribed wording with a requirement to describe the firm's principal fees and the conflicts of interest they create. We have also included examples in the instructions of statements that would describe certain principal fees. We have concluded, based on consideration of the comments and investor feedback, that the proposed requirements did not reflect the fees for all firms and, depending on firms' business models, could be confusing. Instead the relationship summary will focus on a high level summary of fees. Having considered comments, we believe this more flexible approach will better facilitate meaningful disclosure in the relationship summary, as well as conversations between the retail investor and his or her financial professional, and help the retail investor decide on the types of services that are right for him or her. Additionally, we believe that certain definitions and concepts explained in the proposed relationship summary can be better explained in other ways, such as through layered disclosure that explain technical terms as appropriate for the specific firm (*e.g.,* "hovers").[401] Further, requiring firms to draft their own descriptions will allow them to tailor the description to their particular business models, including the fees their prospective customers and clients will most commonly incur, which will make the discussion more accurate and relevant and further help facilitate retail investors' comprehension.

In addition, we are not including the proposed prescribed wording with respect to wrap fee programs.[402] Instead, investment advisers that offer these services to retail investors should include disclosure about the relevant fees and conflicts of interest, and explain the program. We are including instructions encouraging investment advisers with wrap fee programs to explain that asset-based fees associated with the wrap fee program will include most transaction costs and fees to a broker-dealer or bank that has custody of these assets, and therefore are higher than a typical asset-based advisory fee.[403]

We also removed the proposed disclosures about which type of service or account is better for a retail investor. Specifically, the proposal would have required firms to include prescribed wording about when a retail investor may prefer paying a transaction-based fee or an asset-based fee.[404] Although

[390] Broker-dealers were required to state the following (emphasis required): "With stocks or exchange-traded funds, this fee is usually a separate commission. With other investments, such as bonds, this fee might be part of the price you pay for the investment (called a '*mark-up*' or '*mark down*'). With mutual funds, this fee (typically called a '*load*') reduces the value of your investment." Proposed Item 4.B.2.(a) of Form CRS. Investment advisers were required to state, if applicable, that "a retail investor will pay fees to a broker-dealer or bank that will hold the retail assets and that this is called custody." Proposed Item 4.C.6. of Form CRS.

[391] Investment advisers that provided advice to retail investors about investing in wrap fee programs were required to include the following (emphasis required): "We offer advisory accounts called *wrap fee programs*. In a *wrap fee program*, the asset-based fee will include most transaction costs and fees to a broker-dealer or bank that will hold your assets (called '*custody*'), and as a result wrap fees are typically higher than non-wrap advisory fees." If the investment adviser offered a wrap fee program as well as another type of advisory account, it was required to include: "For some advisory accounts, called *wrap fee programs*, the asset-based fee will include most transaction costs and custody services, and as a result wrap fees are typically higher than non-wrap advisory fees."

[392] Dual registrants were required to include the following: "An asset-based fee may cost more than a transaction-based fee, but you may prefer an asset-based fee if you want continuing advice or want someone to make investment decisions for you." Proposed Item 4.C.10. of Form CRS.

[393] Investment advisers that provided advice to retail investors about investing in wrap fee programs were required to include the following (emphasis required): "You may prefer a wrap fee program if you prefer the certainty of a [insert frequency of the wrap fee (*e.g.,* quarterly)] fee regardless of the number of transactions you have." Proposed Item 4.C.10. of Form CRS.

[394] *See, e.g.,* CFA Institute Letter I (suggesting that the Commission revise the proposed wording to reflect the effect on costs in a more even-handed manner); ACLI Letter (stating that the prescriptive nature of the disclosures does not sufficiently allow for diverse business models to be explained); IAA Letter I (stating that the prescribed language comparing investment advisers to broker-dealers does not include important information and may confuse retail investors, and that the prescribed language associated with fees based on assets under management, while technically correct, misses an important point—namely that an adviser earns more when the client's portfolio performs better and earns less when the portfolio performs less well aligns the adviser's interest with the client's interest, rather than the reverse); FSI Letter I (stating that prescribing language in the relationship summary may confuse retail investors); Comment Letter of Paul Hynes (Jul. 31, 2018) ("Paul Hynes Letter") (stating that the prescribed wording is inaccurate by suggesting that investment advisers can sell variable annuities); ACLI Letter (stating that the Fees and Costs section is replete with required statements that may be unnecessary/misleading).

[395] CFA Letter I; AARP Letter; IAA Letter I.

[396] *See, e.g.,* Miami Roundtable; Houston Roundtable; Philadelphia Roundtable.

[397] *See* RAND 2018, *supra* footnote 13 (in qualitative interviews participants asked for definitions of "transaction-based fee," asset-based fee," and struggled with terms such as "mark-up," "mark-down," "load," surrender "charges" and "wrap fee"); *see also* Kleimann I, *supra* footnote 19.

[398] *See, e.g.,* CFA Letter I; Margolis Feedback Form (stating that the wording assumed that a retail investor would pay either a transaction-based fee or an asset-based fee for a brokerage or advisory account, respectively, and did not capture other fee structures).

[399] *See* Wells Fargo Letter.

[400] As discussed further below, we are not eliminating all prescribed wording for this section and are requiring firms to include the following statement: "You will pay fees and costs whether you make or lose money on your investments. Fees and costs will reduce any amount of money you make on your investments over time. Please make sure you understand what fees and costs you are paying.".

[401] Firms are also encouraged to fully explain any technical terms that they use to describe their fees. We also believe that *Investor.gov* can be a resource for this information, and the relationship summary will highlight *Investor.gov/CRS* where educational material is available.

[402] The proposal required certain prescribed wording describing wrap fee programs. *See* Proposed Item 4.C.3. of Form CRS.

[403] Item 3.A.(i)(b) of Form CRS.

[404] The proposal required standalone investment advisers and standalone broker-dealers to state that a retail investor may prefer paying "a transaction-based fee from a cost perspective, if you do not trade often or if you plan to buy and hold investments for longer periods of time." or "an asset-based fee if you want continuing advice or want someone to make investment decisions for you, even though it may cost more than a transaction-based fee." Proposed Items 5.A.4. and 5.B.6. of Form CRS. Dual registrant broker-dealers were required to include the following: "From a cost perspective, you may prefer a transaction-based fee if you do not trade often or if you plan to buy and hold investments for longer periods of time." Proposed Item 4.B.6. of Form CRS. Dual registrant investment advisers that charged an ongoing asset-based fee were required to include the following: "An asset-based fee may cost more than a

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some commenters did not object to the proposed prescribed wording and some included it in their mock-ups,[405] several commenters raised concerns.[406] For example, one commenter argued that the required wording could be false and misleading, noting that the required statements do not take into account that transaction-based fees are not necessarily more affordable for buy-and-hold investors who do not trade often, many broker-dealers offer higher-cost investment products (*e.g.*, variable annuities, non-traded REITs, and private placements), and many investment advisers recommend investments with lower operating expenses than those sold by brokers.[407] We have concluded that the proposed required wording did not capture all of the information that, in certain circumstances, would be necessary to help retail investors reasonably assess whether a particular service and its associated fees will be better for them. Instead, the relationship summary provides information about what the firm offers and encourages discussion with conversation starters. Such a discussion—facilitated by Form CRS—is more appropriate between the financial professional and the retail investor about the firm's specific offerings and associated fees and conflicts, and the retail investor's specific circumstances.

The proposal also required firms to state whether their fees vary and are negotiable and to describe the key factors that would help a reasonable retail investor understand the fee that he or she is likely to pay for services.[408] In the RAND 2018 qualitative interviews, some participants were confused by the statement about fees being negotiable and most mock-ups commenters submitted did not include this disclosure.[409] We did not include this requirement in the final instruction. It is important to instead focus the relationship summary on information about fees that retail investors identified as important to their assessment of firms. Given the comments and investor testing results showing that the fee section was technical and difficult to understand, we believe that the final instructions will help investors focus on the information the final instructions do require. We believe that removing information about negotiability should help achieve this objective.

In another modification from the proposal, we are requiring firms to discuss the conflicts of interest created by their principal fees and costs rather than prescribing specific wording about those conflicts. We are making this change in response to commenters, who pointed out that the conflicts of interest created by principal fees can vary in more ways than our prescribed wording contemplated.[410] Instead of prescribed wording, the final instructions include a requirement that firms explain the conflict of interest their principal fees create, as well as examples of how a firm may communicate certain conflicts of interest. These examples are the same conflicts the proposed instructions required. For instance, a broker-dealer could disclose its conflicts of interest related to transaction-based fees by stating that a retail investor would be charged more when there are more trades in his or her account and that the firm may therefore have an incentive to encourage a retail investor to trade often.[411] Investment advisers that charge an asset-based fee could disclose related conflicts of interest by stating that the more assets in a retail investor's advisory account, the more the retail investor will pay in fees, and the firm may therefore have an incentive to encourage the retail investor to increase the assets in his or her account.[412] Firms that offer variable annuity and variable life insurance products could disclose that they have a financial incentive to offer a contract that includes optional benefit features, which may entail additional fees on top of the base fee associated with the contract, that they may encourage contract owners to select investment options with relatively higher fees, or that they may offer the contract owner a new contract in place of the one that he or she already owns. Finally, we also have included a note in the final instructions that an investment adviser receiving compensation in connection with the purchase or sale of securities should consider the applicability of the broker-dealer registration requirements of the Exchange Act and any applicable state securities statutes.[413]

Description of Other Fees and Costs. Firms also will be required to describe other fees and costs related to their brokerage and investment advisory services and investments, in addition to the firm's principal fees and costs, that the retail investor will pay directly or indirectly. Firms must list examples of the categories of the most common fees and costs that their retail investors will pay directly or indirectly.[414] Those fees and costs may include, for example, custodian fees, account maintenance fees, fees related to mutual funds and variable annuities, and other transactional fees and product-level fees.[415] With regard to product-level fees, in particular, firms may wish to highlight certain fees such as distribution fees, platform fees, shareholder servicing fees and sub-transfer agency fees, in order to enhance the retail investor's understanding of these fees to the extent applicable to the customer's transactions, holdings, and accounts.

We recognize that the fees and costs that a firm determines to be the most common will vary and depend on particular products and services the firm offers and the fee arrangements associated with those products and services. Generally, in making this determination, firms should consider, for example, the amount of the fee (including whether the fee varies based on options the investor may select such as optional benefits and the investment options that a contract owner may select in the context of variable annuities and variable life insurance products), the likelihood that the fee will be applicable, whether the fee is ordinarily assessed on a significant number of the firm's clients, whether the fee is associated with a product or service that the firm frequently recommends or provides, whether the fee is contingent

transaction-based fee, but you may prefer an asset-based fee if you want continuing advice or want someone to make investment decisions for you." Proposed Item 4.C.10. of Form CRS.

[405] *See, e.g.*, LPL Financial Letter; Betterment Letter I; IRI Letter.

[406] *See supra* footnote 394.

[407] *See* CFA Letter I.

[408] Proposed Items 4.B.3. and 4.C.5 of Form CRS. The instructions included examples of such key factors (for a broker-dealer, this may be how much the retail investor buys or sells, what type of investment the retail investor buys or sells, and what kind of account the retail investor has with a firm; for an investment adviser, this may include the services the retail investor receives and the amount of assets in the retail investor's account). Investment advisers were also required to state that a retail investor could be required to pay fees when certain investments are sold (*e.g.*, surrender charges for selling variable annuities).

[409] *See* RAND 2018, *supra* footnote 13 (noting that the phrase stating that fees are negotiable and may vary concerned participants, and many noted that it made them feel as if they pay too much). Similarly, *see* Anonymous28 Feedback Form ("If fees are negotiable, when is this done?"); *see also* mock-ups in IAA Letter I; Robinson Letter; Primerica Letter; LPL Financial Letter, SIFMA Letter; Schwab Letter I; Fidelity Letter.

[410] *See, e.g.*, Comment Letter of Invesco Advisers, Inc. (Aug. 7, 2018) ("Invesco Letter"); Committee of Annuity Insurers Letter; IAA Letter I; *see also* CFA Institute Letter I (noting that investors "will most likely focus on the fees and costs discussion and should be alerted to the fact that in addition to different fee arrangements and structures, different practices and conflicts may also result in higher costs.").

[411] Item 3.A.(i).a. of Form CRS.

[412] Item 3.A.(i).b. of Form CRS.

[413] *See* Item 3.A.(i).b of Form CRS. This statement is consistent with Part 2A of Form ADV.

[414] Item 3.A.(ii) of Form CRS.

[415] Item 3.A.(ii) of Form CRS.

upon certain events the investor should be made aware of, the effect on returns, and the magnitude of the conflict of interest it may create. For example, an investment adviser should consider discussing commissions that are charged when an investment is bought or sold. A firm that commonly offers an investment that includes a surrender fee—for example, a variable annuity or variable life insurance contract is sold as a long-term investment that may entail relatively high surrender fees—should consider disclosing that a retail investor could be required to pay fees when certain investments are sold.

The proposal similarly required firms to state that retail investors will pay other fees in addition to the firm's principal fees. Like the final instructions, the proposal required disclosure of the other fees related to the services or account such as custodian fees, account maintenance fees, and account inactivity fees, and included these other fees in the same section discussing the firm's principal fees.[416] The proposal also required that all firms disclose that certain investments imposed additional fees, including fees that reduce the value of investments over time (*e.g.,* mutual funds and variable annuities) and fees paid when an investment is sold (*e.g.,* surrender charges for selling variable annuities).[417] Observations reported from RAND 2018 qualitative interviews and another study indicated that some investors could become overwhelmed with the number of various types of fees and many were surprised that so many different types of fees could apply in addition to a firm's principal fee.[418] At the same time, investors participating in surveys and studies and investors providing comments on Feedback Forms have indicated that more information would be helpful.[419] Industry commenters, commenters representing investors, and commenters on Feedback Forms, and roundtable participants supported some disclosure regarding product-level fees, though commenters differed in the level of suggested detail on such fees.[420] For instance, one commenter stated that the relationship summary should reveal all fees and commissions for all purchases.[421] Other commenters, however, believed that a link to the prospectus should sufficiently satisfy disclosure requirements regarding mutual fund fees and expenses.[422] Another urged the Commission to provide a list of examples of transaction-based fees.[423]

We agree that understanding these fees is important so that retail investors have the necessary information to evaluate between firms, firm types (*i.e.,* investment adviser, brokerage, or dually registered), and firm services, accounts, and products so that they can select what is right for them. We continue to believe drawing retail investors' attention to these additional fees is important because they have an impact on investors' investment returns over time. Accordingly, we are requiring disclosure of these types of fees and listing examples of categories as proposed. The final instructions, however, make clear that firms can use their own wording, and only require examples of the most common fees and costs. As discussed below, firms will be required to include cross-references to more specific information, and will be permitted to use tools to help investors learn about these fees and costs in an interactive way without overwhelming retail investors with the additional information. We believe that this approach balances providing short, understandable disclosures about additional fees and costs with investors' interest in understanding more about fees and costs.

Additional Information. Finally, in a change from the proposal, firms will be required to state: "You will pay fees and costs whether you make or lose money on your investments. Fees and costs will reduce any amount of money you make on your investment over time. Please make sure you understand what fees and costs you are paying." [424] The first sentence replaces a statement in the proposal that some investments impose additional fees that will reduce the value of the retail investor's investment over time. Given the importance of assisting investors to understand the impact of fees and costs, we are requiring prescribed wording in this instruction. The prescribed wording discloses to investors a key term under which a service will be offered, namely the fact that the service will not be free and that the cost of using the service will exist regardless of investment performance.[425]

Firms must also include specific cross-references to more detailed information about their fees and costs.[426] The cross-reference must, at a minimum, include the same information as, or contain information equivalent to that required by, the Form ADV Part 2A brochure (specifically Items 5.A., B., C., and D.) and Regulation Best Interest, as applicable.[427] If the firm is a broker-dealer that does not provide recommendations subject to Regulation Best Interest, to the extent it prepares more detailed information about its fees, it must include specific references to such information.[428] The final instructions require firms to use text features to make this additional information more noticeable and prominent in relation to other discussion text.[429] Firms may choose to

[416] Proposed Items 4.B.4. and 4.C.6. of Form CRS. Specifically, the proposal required broker-dealers to state, if applicable, that a retail investor will pay other fees in addition to the firm's principal fees, including, but not limited to, custodian fees, account maintenance fees and account inactivity fees. The proposal required investment advisers to state, if applicable, that a retail investor will pay transaction-based fees when it buys and sells an investment for the retail investor and that retail investors will pay, if applicable, custodian fees, and other fees such as those for account maintenance services.

[417] Proposed Items 4.B.2.(b) and 4.C.4. of Form CRS.

[418] RAND 2018, *supra* footnote 13 (qualitative interview results); Kleimann I, *supra* footnote 19. Similarly, *see* Anonymous02 Feedback Form ("Do companies charge all these fees? Maybe use words like 'may charge' "); Anonymous28 Feedback Form ("The section on fees might better be presented in a chart—no mention is made of front and backend loads.").

[419] *See* RAND 2018, *supra* footnote 13 (qualitative interview results), Kleimann I, *supra* footnote 19; Kleimann II, *supra* footnote 19 (in study testing investor reaction to alternate design of relationship summary, participants continued to focus on additional fees and wanted additional information on fees); *see also* Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 5) (of 48 Feedback Forms with narrative comments suggesting additional information to be required in the relationship summary, 29 suggested that additional information about fees and costs would be helpful).

[420] *See* Fidelity Letter; CFA Letter I; *see also* Anonymous11 Feedback Form (". . . disclose specific fees for different types of securities"); Caddess Feedback Form ("description of brokers buying one 'loaded' fund and then selling it soon after to buy a more 'suitable loaded' fund is not vivid enough."); Fontaine Feedback Form ("More on the mutual fund loads and class shares Load"); Malone Feedback Form ("Suggest fees monthly associated with each fund by type"); Mennella Feedback Form ("In addition to paying a management fee what is the cost of the underlying investments such as mutual funds, liquid alternatives, seperately [sic] managed accounts, transaction costs, etc.?"); Houston Roundtable; Philadelphia Roundtable.

[421] Comment Letter of Tony Greiner (Jul. 14, 2018).

[422] Comment Letter of Oppenheimer Funds (Aug. 7, 2018) ("Oppenheimer Letter"); TIAA Letter.

[423] Comment Letter of the Investment Company Institute (Aug. 7, 2018) ("ICI Letter").

[424] Item 3.A.(iii) of Form CRS.

[425] *See Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626, 651 (1985) (upholding required disclosure of factual information about terms of service, including that clients would still be liable to litigation costs even if their lawsuits were unsuccessful).

[426] Item 3.A.(iii) of Form CRS.

[427] Item 3.A.(iii) of Form CRS.

[428] Item 3.A.(iii) of Form CRS.

[429] General Instruction 4.C to Form CRS. For example, firms could use larger or different font; a

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provide a hyperlink, or other means of facilitating access, that leads directly to the relevant Regulation Best Interest disclosure or section of Form ADV, or they may choose to create an additional page that contains the same or equivalent information.[430] For example, a firm may decide to include information on a different website.

The proposed instructions did not include a specific cross-reference to additional fee disclosure, but the proposal required a cross-reference in the Additional Information section about where the retail investor could find information about the services offered, and we requested comment on whether to require firms to include a fee schedule.[431] In the RAND 2018 survey, a potential hyperlink to information on fees, however, generated the most interest among survey participants.[432] Some industry commenters suggested that the relationship summary should permit hyperlinks to fee schedules, arguing that additional information would be helpful for retail investors, but that including the fee schedule itself would be unwieldy.[433] Another commenter, however, suggested requiring a fee schedule that includes typical breakpoints and information on likely and/or maximum fees.[434]

Given the feedback from investors that fee information is important, we believe that requiring specific references to more detailed information about fees balances the goals of the relationship summary, to highlight information covering several topics, with investors' interest in understanding more about fees. This approach will give retail investors information about the types of fees at a higher level and then offer more details, permitting the relationship summary to cover other important topics as well.[435] Including a fee schedule in the relationship summary could make it more difficult to also cover the other topics while maintaining short, digestible disclosures. Instead, we are not including a fee schedule in the relationship summary but are requiring cross references to balance providing a shorter document with giving retail investors easy access to more detailed information.

Conversation Starter. We are also adopting a conversation starter that is designed to prompt a more personalized discussion regarding the fees and costs that will impact the particular retail investor's account. A firm must include the following question for the retail investor to ask his or her financial professional: "Help me understand how these fees and costs might affect my investments. If I give you $10,000 to invest, how much will go to fees and costs, and how much will be invested for me?"[436]

As discussed above, the proposal included the following "Key Question," which was intended to serve as a conversation starter between the retail investor and the financial professional and to provide the investor an opportunity to receive a quantitative example of the impact of fees: "Do the math for me. How much would I expect to pay per year for an advisory account? How much for a typical brokerage account? What would make those fees more or less? What services will I receive for those fees?"[437] The Proposing Release discussed the option of including an example of the impact of fees in the relationship summary, and requested comment on whether we should require an example showing how sample fees and charges apply to a hypothetical advisory account and a hypothetical brokerage account, as applicable.[438] We also requested comment on what assumptions firms should make in preparing such an example and how the information should be presented.[439]

Feedback from the RAND 2018 report, other surveys and studies, roundtables, and the Feedback Forms showed that retail investors want more information about fees and the impact of those fees on their investments.[440] At some of the roundtables, for example, participants discussed the utility of adding a hypothetical example in the relationship summary to illustrate fees.[441] Commenters on Feedback Forms also asked for more specific information about the impact of fees on their investments, such as example fee calculations or ranges of fees.[442] Commenters supported including a question highlighting fees a retail investor pays.[443] Commenters, including commenters representing investors and individual investors, also overwhelmingly supported requiring

text box around the heading or questions; bolded, italicized, or underlined text; or lines to offset the information from other sections.

430 While drafting these disclosures for Form CRS, investment advisers also are encouraged to consider whether they can describe the information about fees more clearly in the Form ADV brochure in a more reader-friendly format. *See also* General Instructions 3. and 4. of Form CRS (instructions applicable to electronic delivery). For further discussion of these provisions, *see supra* Section II.A.3. and footnotes 156 and 158 and accompanying text, and Section II.B.2.(b) and footnotes 348–349.

431 Proposed Item 7.E. of Form CRS.

432 *See* RAND 2018, *supra* footnote 13 (58% of participants selecting "very likely" and another 32% selecting "somewhat likely" to click on a hyperlink relating to fees; no other potential hyperlink generated a majority with "very likely" usage among any investor or education subgroup). Other investor studies indicated that participants wanted descriptions of the hyperlinks to be more concrete in terms of what information they would find, and that, while some participants were interested in additional information, others admitted they would not follow the links because it was extra effort, they were uninterested, or the link did not itself suggest what would be there. *See* Kleimann II, *supra* footnote 19. In addition, numerous commenters supported layered disclosure. *See supra* footnote 31 and accompanying text.

433 *See* CFA Letter I; IAA Letter I; LPL Financial Letter.

434 *See* Morningstar Letter.

435 *See supra* Section II.A.3.

436 Item 3.A.(iv) of Form CRS.

437 Proposed Item 8 of Form CRS.

438 Proposing Release, *supra* footnote 5.

439 Proposing Release, *supra* footnote 5.

440 *See e.g.*, RAND 2018, *supra* footnote 13 (noting survey results finding that the fees and costs section was "the section for which the largest share of respondents suggest adding more detail" and investors were more likely than non-investors to suggest adding more detail to the section on fees and costs (31 percent versus 25 percent), and in qualitative interviews, "participants expressed that this section is overwhelming . . . and at the same time felt more information would be helpful."); Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 5) (narrative answers on 29 Feedback Forms indicated that additional information about fees and costs would be helpful).

441 *See* Washington, DC Roundtable (an investor stated that it would be useful for comparing understanding costs if hypothetical examples were given about how cost affects the investor's returns); Atlanta Roundtable (an investor stated that it would be helpful to know the cost of investing a hypothetical amount of money); and Philadelphia Roundtable (an investor stated that it would be helpful to see hypothetical broker and investment adviser fee arrangements for a given investment portfolio to aid in determining which arrangement may be more appropriate for the investor).

442 *See, e.g.*, Lee1 Feedback Form ("fees should tell me the fees I can expect to pay"); Anonymous03 Feedback Form ("Create a calculator . . . where the investor fills in the amount and the fees for both scenarios are calculated"); Anonymous06 Feedback Form ("Provide monetary examples. If you invest $100, then your fees are . . ."); Anonymous24 Feedback Form (requesting "more specific examples showing specific costs"); Baker Feedback Form ("Graphic and hypothetical examples could be helpful. Mary invests $50,000 with a broker-dealer and Jane invests $50,000 with an investment adviser and present some scenarios with each . . . As fees, commissions, etc. may vary and be negotiable, a *range* of typical, usual, main-stream commission charges and asset-based fees would be helpful to alert the client to possible overcharges."); Bhupalam Feedback Form ("What would make it better is if it has samples of costs in particular with each firm a client is dealing with."); Hawkins Feedback Form ("Including some ranges as to what to expect in fees could help. Also, including information as to the impact that increased fees have on investment returns, long term, would help the average investor."); Mennella Feedback Form ("I want to know what an investment is going to cost me over my time horizon . . . .").

443 *See* IAA Letter I; LPL Financial Letter; New York Life Letter; Primerica Letter; RAND 2018, *supra* footnote 13 (91% of participants indicated they were "very likely" or "somewhat likely" to ask a supplemental question that addressed the amount of a $1,000 investment that would go to fees and costs rather than being invested for them).

more information to help retail investors understand the fees and costs associated with their investments, particularly specific examples about how those fees could affect them.[444] Several commenters, however, objected to the inclusion of the key question addressed above because of the operational challenges present in answering such a question with respect to a particular retail investor.[445] Some argued that anticipated fees are unknown for broker-dealer customers, while others believed that it is too difficult for firms to build out systems for individualized fees.[446] Other commenters suggested eliminating this particular key question and instead requiring firms to include links to investor education materials prepared by the Commission.[447] Many commenters were concerned that this key question would impose new disclosure or recordkeeping requirements.[448]

Commenters that supported more fee disclosure had a range of suggestions as to how to include the additional information. For example, one commenter believed that if hypothetical or personal fee disclosures are included in the relationship summary, such disclosures should focus on helping investors understand the effect expenses have on an investment and should make clear that such an example is for educational purposes.[449] One individual advocated for more transparent fee information, suggesting the relationship summary provide individualized fees or a specific range of fees.[450] Another commenter noted that, in response to a previously commissioned report revealing participants' lack of knowledge about fees as well as their desire for a better understanding of fees, a general chart or graph that depicts the effects of fees on an account would be helpful for investors.[451] Another commenter included a sample mock relationship summary with a numerical example of how the fees might impact a hypothetical account.[452]

Given the importance of fees, we want to encourage retail investors and their financial professionals to have a conversation to further discuss the particular fees and costs that would apply to the retail investor, and the impact fees and costs could have on the retail investor's investment returns over time, in order to promote investor understanding. After consideration of the comments received, we are adopting a conversation starter that is designed to elicit a more personalized discussion regarding the fees and costs that will impact the particular retail investor's account, while mitigating the concerns regarding the proposed "Do the math for me" question posed.[453] We believe that this conversation starter will allow financial professionals to tailor the conversation to the particular retail investor even if the financial professional does not provide precise fee information for that individual during the conversation. For instance, if the financial professional intends to recommend mutual funds to the retail investor, he or she may choose to discuss firm- and product-level fees that may apply. The financial professional should be in a position to explain the fees and costs relevant to that particular retail investor if the investor chooses a certain type of account and certain investment, even if the financial professional provides examples and estimated ranges rather than a precise prediction of how much the investor will pay. In addition, the financial professional should explain how those fees and costs will work (for example, whether they are upfront charges, taken out of the initial investment amount, taken out over time, future charges, or charged in another manner) and how the fees and costs could impact the retail investor's investment returns over time. Firms may consider including calculators, charts, graphs, tables, or other graphics or text features to enhance an investor's understanding of these fees. Firms may also consider reviewing with their retail investors the impact of fees on the retail investor's account on a periodic basis.[454]

While we agree that examples are important to illustrate the potential impact of fees, we decline to require firms to provide a hypothetical example in the relationship summary.[455] Our intent with the proposed "Do the math for me" question was that it serve as a conversation starter and a prompt to encourage the retail investor to ask about the amount she would typically pay per year for the account, what would make the fees more or less, and what was included in those fees.[456] We believe that the conversation starter that is being adopted here is consistent with the proposal's intent to prompt retail investors to have a conversation with their financial professional about fees that may impact their investments and account while also addressing the concerns raised by commenters. We encourage firms to consider ways to provide more personalized disclosures to retail investors, and we will continue to consider whether to require more personalized fee disclosure, particularly as operational and technological costs fall.

b. Other Ways of Making Money, Standard of Conduct, and Conflicts of Interest

Firms will be required to include disclosure under a single heading describing their standard of conduct and a summary of certain firm-level conflicts, including the specific conflicts the proposal required.[457] The proposal required disclosure on both conflicts and the standard of conduct, but in separate sections. The final relationship summary requires discussion in one section of other firm-level revenues and conflicts of interest,

[444] *See, e.g.,* CFA Institute Letter I; CFA Letter I; Betterment Letter I; Morningstar Letter; John Hancock Letter; Comment Letter of Barbara Greenwald (Jul. 12, 2018). *See, e.g.,* Anonymous25 Feedback Form ("give examples with numbers, showing examples of hypothetical accounts"); Baker Feedback Form ("Graphic and hypothetical examples would be helpful"); Coleman Feedback Form ("Need simple examples"); Manella Feedback Form ("I want to know what an investment is going to cost me over my time horizon"); Schreiner Feedback Form ("Provide a hypothetical example with industry standard fees . . ."); *see also* Atlanta Roundtable; Houston Roundtable; Washington, DC Roundtable.

[445] *See supra* footnote 189.

[446] *See* NSCP Letter; Edward Jones Letter (noting that given the range of services available, it would be very difficult for financial professionals to fully address this question at the outset of the relationship, particularly for investors selecting transaction-based services); TIAA Letter; LPL Financial Letter; Primerica Letter; ICI Letter; SIFMA Letter (noting most firms do not currently have systems in place to allow financial professionals to answer customer-specific questions).

[447] *See* Prudential Letter.

[448] *See* Edward Jones Letter; *see also supra* Section II.A.4.

[449] *See* Invesco Letter (stating that this could be achieved by, for example, a side-by-side bar graph showing the growth of an investment gross of costs and net of costs).

[450] *See* Wahh Letter.

[451] *See* AARP Letter.

[452] *See* Betterment Letter I (Hotspex), *supra* footnote 18 (noting that investors who viewed a redesigned version of the standalone adviser relationship summary appeared to appreciate the example of how fees would impact a hypothetical account).

[453] *See supra* Section II.A.4.

[454] *See* Regulation Best Interest Release, *supra* footnote 47, at Section II.C.1.a.

[455] *See infra* Section IV.D.4 (Alternatives to the Relationship Summary) for a discussion on the inclusion of a hypothetical fee example.

[456] Proposing Release, *supra* footnote 5.

[457] Item 3.B. of Form CRS. For broker-dealers, the heading will state "What are your legal obligations to me when providing recommendations? How else does your firm make money and what conflicts of interest do you have?"; for investment advisers, the heading will state "What are your legal obligations to me when acting as my investment adviser? How else does your firm make money and what conflicts of interest do you have?"; and for dual registrants that prepare a single relationship summary, the heading will state "What are your legal obligations to me when providing recommendations as my broker-dealer or when acting as my investment adviser? How else does your firm make money and what conflicts of interest do you have?".

and the applicable standard of conduct.[458]

We are placing these disclosures together, including the related conversation starter, because we believe they will more effectively allow retail investors to understand the standards of conduct for broker-dealers and investment advisers.[459] We are also modifying the requirements for the standard of conduct and conflict of interest disclosures, as discussed in more detail below.

We continue to believe it is important to highlight the presence of conflicts and their interconnectedness with how the firm makes money. We recognize that investment advisers, broker-dealers, and their financial professionals have conflicts that affect their retail investor clients and customers and believe it is important to underscore this for retail investors.[460] Similarly, we continue to believe that it is important to provide retail investors with disclosure regarding a broker-dealer or investment adviser's legal obligations regarding the required standard of conduct in a way that is understandable for retail investors.

Standard of Conduct. As proposed, we are adopting a requirement that firms describe their legal standard of conduct using prescribed wording (the "standard of conduct disclosure").[461] In a change from the proposal, however, the final instructions modify both the content of the standard of conduct disclosure[462] and its placement in the relationship summary. As discussed in more detail below, the final instructions require broker-dealers, investment advisers, and dual registrants to include a brief statement of the applicable standard of conduct.[463] In addition, as discussed above, this disclosure is required to be included in the conflicts of interest section rather than a separate standard of conduct section.

Most commenters did not object to the proposal's requirement that broker-dealers and investment advisers provide disclosure regarding their standards of conduct or that such disclosure be standardized.[464] Results of the RAND 2018 report and other investor studies and surveys indicate that retail investors view this information as helpful.[465] Similarly, commenters on Feedback Forms indicated that this information was useful.[466] In addition, the IAC recommended that investors would benefit from receiving uniform, plain-English disclosure documents with topics, such as, to the extent the Commission does not adopt a uniform fiduciary standard, "what is your legal obligation to me?"[467] Certain commenters, however, suggested that the Commission discuss generally applicable information, including standards of conduct, in investor educational materials instead of requiring firms to do so in their relationship summaries.[468] A number of these commenters argued that this wording might unintentionally create an implied contractual relationship subject to a customer's private right of action.[469] The prescribed language describing the standard of conduct broker-dealers and investment advisers owe to their customers and clients is not intended to create a private right of action.

Many commenters, however, found that the specific wording we proposed[470] did not effectively address investor confusion concerning legal duties applicable to broker-dealers and investment advisers. Commenters indicated that the proposed wording in this section was confusing and did not clarify the applicable legal standards.[471] Some commenters argued that this section included legal jargon inaccessible to retail investors.[472] Others believed that retail investors are unlikely to understand the difference between "best interest" and "fiduciary," with some suggesting that relationship summaries more clearly define the applicable legal standards or communicate the differences between "fiduciary" and "best interest."[473] Investment advisers also expressed concern that retail investors may "wrongly" view "best interest" as a higher standard of conduct as compared to the fiduciary standard.[474]

Investor feedback through surveys and studies and in comments at roundtables and on Feedback Forms also showed some confusion. For example, some participants in investor studies and at one of the roundtables did not understand why conflicts of interest existed if broker-dealers and investment advisers were held to the standards of conduct described.[475] Investor studies and surveys showed

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[458] *Id.*

[459] In addition, retail investors may learn more about investment advisers, broker-dealers, and investing at *Investor.gov/CRS,* which will be referenced in a relationship summary's introduction. *See* Instruction to Item 1.B. of Form CRS.

[460] *See infra* footnote 495 and accompanying text.

[461] Under the proposal, broker-dealers that offer brokerage accounts to retail investors would have been required to include the following: "[We must act in your best interest and not place our interests ahead of yours when we recommend an investment or an investment strategy involving securities.] When we provide any service to you, we must treat you fairly and comply with a number of specific obligations. Unless we agree otherwise, we are not required to monitor your portfolio or investments on an ongoing basis." The bracketed wording would have been included only if the broker-dealer offered recommendations subject to Exchange Act Rule 15*l*–1. *See* Proposed Item 3.B.(1) of Form CRS. In addition, such broker-dealers would have had to include the following: "Our interests can conflict with your interests. [When we provide recommendations, we must eliminate these conflicts or tell you about them and in some cases reduce them]." The bracketed wording would only have been included if the broker-dealer offered recommendations subject to Regulation Best Interest. *See* Proposed Item 3.B.(2) of Form CRS.

Under the proposal, investment advisers that offer investment advisory accounts to retail investors would have had to include the following: "We are held to a fiduciary standard that covers our entire investment advisory relationship with you. [For example, we are required to monitor your portfolio, investment strategy and investments on an ongoing basis.]" The bracketed wording would have been omitted if the investment adviser did not provide ongoing advice. *See* Proposed Item 3.C.(1) of Form CRS. In addition, such investment advisers would have had to include the following: "Our interests can conflict with your interests. We must eliminate these conflicts or tell you about them in a way you can understand, so that you can decide whether or not to agree to them." *See* Proposed Item 3.C.(2) of Form CRS.

The section also required a statement that the firm's interests may conflict with a retail investor's interests and explain the firm's obligations with respect to those conflicts using prescribed wording. *See* Proposed Item 3 of Form CRS.

[462] Form CRS also includes a conversation starter regarding broker-dealers and investment advisers' standards of conduct. *See infra* footnote 495 and accompanying text.

[463] Item 3.B.(i) of Form CRS.

[464] *See, e.g.,* AARP Letter; CFA Institute Letter I; IAA Letter II.

[465] *See* RAND 2018, *supra* footnote 13 (almost one third of survey respondents selected this section as one of the two most useful; almost 60% would keep the length as is and over 15% would add detail); Cetera Letter II (Woelfel), *supra* footnote 17 (88% of survey respondents somewhat or strongly agreed "the firm's obligations to you" is a "very or somewhat important" topic); *see also* Schwab Letter I (Koski), *supra* footnote 21 ("obligations of the firm" ranked third where survey participants were asked to identify four topics as most important for a firm to communicate").

[466] Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 2(b)) (36 commenters (39%) graded the "Our Obligations to You" section of the relationship summary as "very useful" and 42 commenters (45%) graded this section as "useful").

[467] IAC Broker-Dealer Fiduciary Duty Recommendations, *supra* footnote 10.

[468] *See, e.g.,* Primerica Letter.

[469] *See* ASA Letter; Primerica Letter; Transamerica Letter (requesting a statement from the Commission that any such private right of action was not intended).

[470] *See supra* footnote 461.

[471] *See, e.g.,* AARP Letter; Betterment Letter I; CFA Letter I.

[472] *See* Comment Letter of Fisher Investments (Jul. 31, 2018) ("Fisher Letter"); *see also* Kleimann I, *supra* footnote 19; RAND 2018, *supra* footnote 13; Kleimann II, *supra* footnote 19.

[473] *See, e.g.,* AARP Letter; CFA Letter I; Comment Letter of the Financial Planning Coalition (Aug. 7, 2018) ("Financial Planning Coalition Letter").

[474] *See, e.g.,* Betterment Letter I; Fisher Letter; IAA Letter I; IAA Letter II.

[475] *See* RAND 2018, *supra* footnote 13 (in qualitative interviews, participants felt that the conflicts of interest section contradicted the "Our Obligations to You" section); Miami Roundtable.

that participants varied in their understanding of differing obligations for different account types, some viewing brokerage accounts and advisory accounts as subject to similar standards of conduct but others interpreting the section as conveying that the two account types are subject to different standards.[476] Observations reported by the RAND 2018 report, other surveys and studies and comments received on Feedback Forms demonstrated that many participants did not understand the meaning of the word "fiduciary" in particular.[477] Investor studies also further observed that, when presented with alternative mock-ups of a relationship summary designed to clarify this section, some investors still struggled with understanding the legal obligations of brokers and advisers.[478]

We proposed this section to address investor confusion concerning legal duties applicable to broker-dealers and investment advisers and, in combination with the key questions about the financial professional's legal obligations, to encourage a conversation between the retail investor and the financial professional about applicable standards of conduct.[479] The prescribed wording was intended to promote consistency in communicating these standards to retail investors.[480]

We continue to believe that it is appropriate for the final instructions to require broker-dealers and investment advisers to describe their standards of conduct to investors, because, as discussed above, we believe that it is important to promote retail investors' understanding of these obligations. We also agree with commenters that requiring these firms to include prescribed disclosure regarding these standards of conduct is important in achieving this goal.[481] While the final instructions generally do not require prescribed disclosure in other contexts,[482] we believe that investors should be provided with a consistent articulation of their firm's legal obligations regarding their standard of conduct and that the rationale for allowing firms flexibility to tailor their disclosure in other aspects of the relationship summary does not apply with respect to the standard of conduct. In this regard, some commenters stated that Form CRS should be an educational document, which would be a standardized document published and maintained by the Commission.[483] While the content of disclosure regarding a firm's standard of conduct should be uniform, this disclosure should appear in the relationship summary, which must be delivered to all retail investors, rather than a separate SEC-staff-created and maintained publication. In addition, prescribing language for this disclosure does not raise the same concerns that commenters raised about prescribed language generally. For example, we are permitting more flexibility in how firms describe their fees and services in response to comments that some of the prescribed wording, for example, was not necessarily applicable to their business and could make investors confused.[484]

By contrast, a legal standard of conduct, whether through an investment adviser's fiduciary duty, Regulation Best Interest, or both, will apply to all firms delivering the relationship summary that provide recommendations or investment advice, and prescribing language will avoid investor confusion when describing the applicable standard. Indeed, it may be confusing to investors comparing relationship summaries among prospective firms to see the same legal standard described differently among these firms. The required statements about the legal standard of conduct are disclosures of purely factual information about the terms under which the firms' services will be made available to investors.[485]

We have determined, however, that the proposed standard of conduct disclosure may not have appropriately addressed investor confusion. While the proposal was intended to provide retail investors with simple, easily understood disclosure, we agree with commenters and results from investor studies and surveys,[486] that the relationship summary could be revised in a manner that would be more beneficial to retail investors,[487] especially in light of the similarity between broker-dealers' and investment advisers' legal obligations to retail investors with respect to their standards of conduct when providing recommendations or advice under the rules and interpretations we are adopting concurrently.[488] In this regard, we have modified the standard of conduct disclosure to include it within the conflicts of interest section of the relationship summary and to contain simplified wording that is short, plain language, and user-friendly but still describes the key components of a broker-dealer's or investment adviser's standard of conduct when providing recommendations or advice.[489]

First, we are modifying the standard of conduct disclosure so that it is required to be provided under a modified heading[490] in the conflicts of

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[476] *See* RAND 2018, *supra* footnote 13; *see also* Kleimann I, *supra* footnote 19 ("Most participants did not draw a parallel between the 'best interest standard' of the Broker-Dealers and the 'fiduciary standard' of Investment Advisers. Rather, they drew a parallel between 'specific obligations' with Broker-Dealers and 'fiduciary standards' with Investment Advisers . . . [and] saw these two as similar regulatory obligations."); Betterment Letter I (Hotspex), *supra* footnote 18 (in a survey that tested participant's comprehension after viewing a version of the proposed sample standalone adviser relationship summary, only 26% correctly identified as false a statement that broker-dealers are held to a fiduciary standard; 71% correctly identified as true that an adviser (Betterment) would be held to a fiduciary standard).

[477] *See, e.g.,* RAND 2018, *supra* footnote 13 ("Some participants had never heard of the word, whereas others had heard it but did not know what it meant in this context. Others thought the word "fiduciary implies acting in best interest . . ."); Kleimann I, *supra* footnote 19 ("Few participants could define 'fiduciary standard' "); *see also* Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 4) (On 10 Feedback Forms, commenters specifically asked for a definition or better explanation of the term "fiduciary.").

[478] *See, e.g.,* Kleimann II, *supra* footnote 19 (explains that, after redesign of obligations section participants still struggled to understand the implications of the fiduciary standard for advisers compared to the best interest standard for broker-dealers); Betterment Letter I (Hotspex), *supra* footnote 20 (almost one half of survey participants reviewing a version of the standalone adviser relationship summary designed by Betterment did not correctly identify as false a statement that broker-dealers are held to a fiduciary standard).

[479] *See* Proposing Release, *supra* footnote 5, at n.114 and accompanying text.

[480] Proposing Release, *supra* footnote 5, at n.115 and accompanying text.

[481] *But see* footnotes 468–469 and accompanying text.

[482] As discussed in more detail above, many commenters who believed that the final instructions should not require prescribed disclosure focused on other aspects of the relationship summary, such as disclosure regarding a description of a firm's services. *See supra* Section II.A.1.

[483] *See, e.g.,* Primerica Letter.

[484] *See supra* Section II.A.1. One commenter noted that requiring prescribed disclosure in some circumstances may not be accurate for all business models and could mislead investors. *See* CFA Letter I.

[485] *See Zauderer*, 471 U.S. at 651; *Milavetz*, 559 U.S. at 250.

[486] *See supra* Section II.A.

[487] *See, e.g.,* AARP Letter.

[488] *See* Fiduciary Release, *supra* footnote 47; Regulation Best Interest Release, *supra* footnote 47.

[489] The final instructions provide that if a required disclosure or conversation starter is inapplicable or specific wording required by the instructions is inaccurate, firms may omit or modify that disclosure or conversation starter. *See* General Instruction 2.B. to Form CRS. We note that, like the proposal, the standard of conduct disclosure distinguishes between broker-dealers that provide recommendations subject to Regulation Best Interest and broker-dealers that do not provide recommendations subject to Regulation Best Interest. *See infra* footnote 507 and accompanying text.

[490] Item 3.B. of Form CRS; *see also supra* footnote 457.

interest section.[491] While broker-dealers' and investment advisers' legal obligations regarding their standard of conduct apply not just in the context of conflicts of interest,[492] we believe that requiring this disclosure to be included in the conflicts of interest section will provide a retail investor with a greater ability to discern how a particular legal obligation regarding a standard of conduct may affect him or her by describing the application of that obligation in the context of conflicts of interest, which was a primary concern for retail investors and commenters alike.[493] In addition, this placement is supported by observations reported in the RAND 2018 qualitative interviews and another study, which indicated that some participants struggled with how to reconcile the conflicts of interest section with the legal obligations section because they were discussed separately.[494]

Second, in the conversation starter relating to this section, we are requiring firms to include the following question: "How might your conflicts of interest affect me, and how will you address them?"[495] As discussed above, we believe that including questions for investors to ask their financial professionals is an important component of the relationship summary. This question also underscores for retail investors that investment advisers and broker-dealers have conflicts that may create incentives to put their interests ahead of the interests of their retail clients and customers.[496] As a corollary, it also underscores for retail investors how investment advisers and broker-dealers address these conflicts of interest in discharging their legal obligations regarding their standards of conduct to these investors. We believe that this requirement will improve a retail investor's understanding of the standard of conduct owed by his or her financial professional by helping the investor to better understand its application to him or her.

Unlike the proposal,[497] the final instructions do not require prescribed disclosure summarizing how a firm's standard of conduct would require it to address conflicts of interest. As discussed above, commenters found the proposal's standard of conduct disclosure confusing.[498] After considering comments and observations reported in surveys and studies, we recognize that the proposed disclosures were confusing, particularly the prescribed disclosure attempting to explain concepts of full and fair disclosure, mitigation, and informed consent.[499] Accordingly, we are removing this wording to shorten the disclosure and to provide more focus on the rest of the disclosure required in this section, as we believe this should improve investor comprehension. We believe that clearly disclosing to investors that firms have an obligation to act in the best interest of a client or customer and also simultaneously have conflicts of interest is more important than describing the particular aspects of firms' general duty to disclose, mitigate, or obtain informed consent to conflicts, as applicable. Instead of this disclosure, we are requiring a conversation starter to encourage firms to discuss with retail investors how their standards of conduct require them to address conflicts of interests. In addition, we believe that the discussion prompted by the conversation starter accompanied by examples of conflicts of interest[500] will provide retail investors with specific illustrations of how a firm's standard of conduct can apply, which could encourage investors to ask more detailed questions about how firms address their conflicts.

Finally, we have modified the standard of conduct disclosure for broker-dealers and investment advisers to reduce the amount of required disclosure,[501] to focus the disclosure on the standard of conduct that applies to the provision of recommendations and advice,[502] and to require that portions of the disclosure be presented in bold and italicized font.[503] We believe that streamlining the standard of conduct disclosure and tailoring the disclosure to the type of firm providing such disclosure will clarify for retail investors the applicable legal standard of conduct to which their particular firm is subject when providing recommendations or advice or when providing broker-dealer services without recommendations.

Most commenters found the proposal's standard of conduct disclosure confusing because it included legal or technical words. For example, some commenters, and results from investor studies and surveys, indicated that many did not understand the meaning of "fiduciary" or had never heard of the word.[504] Accordingly, the modified standard of conduct disclosure both eliminates technical words, such as "fiduciary," and describes the standards of conduct of broker-dealers, investment advisers, or dual registrants using similar terminology in a plain-English manner. In particular, the final instructions use the term "best interest" to describe how broker-dealers, investment advisers, and dual registrants must act regarding their retail customers or clients when providing recommendations as a broker-dealer or acting as an investment adviser.[505] We believe that requiring firms—whether broker-dealers, investment advisers, or dual registrants—to use the term "best interest" to describe their applicable standard of conduct will clarify for retail investors their firm's legal obligation in this respect, regardless of whether that obligation arises from Regulation Best Interest or an investment adviser's fiduciary duty under the Investment Advisers Act.[506] The modified language, however, highlights a key difference in when a firm must exercise its obligation—specifically, when providing a recommendation (in the case of a broker-dealer),[507] or when acting as an

[491] Item 3 of Form CRS.

[492] *See* Regulation Best Interest Release, *supra* footnote 47 and Fiduciary Release, *supra* footnote 47.

[493] *See* Proposing Release, *supra* footnote 5, at Section II.B.6; *supra* footnote 475 and accompanying text.

[494] *See, e.g.,* RAND 2018, *supra* footnote 13 (noting that "[s]ome participants expressed appreciation that the firm was being transparent about its conflicts of interest, but many participants struggled with how to reconcile the information in this section with the previous 'Our Obligations to You' section."); Kleimann I, *supra* footnote 19; *see also infra* footnote 505 and accompanying text.

[495] Item 3.B.(iii) of Form CRS.

[496] *See supra* Section II.A.4.

[497] *See* Proposed Items 3.B.2. and 3.C.2. of Form CRS.

[498] *See supra* footnote 471 and accompanying text. *See also* RAND 2018, *supra* footnote 13 (noting that one "participant pointed out that the obligations section had said that any conflicts of interest would be reduced and disclosed [but] the conflicts of interest section does not mention disclosing or reducing conflicts); Kleimann II, *supra* footnote 19 ("Most participants did not understand how conflicts would be resolved . . . they read the disclosure as indicating that Brokerage Accounts were under no obligation to notify clients of a conflict . . .").

[499] *See* Fiduciary Release, *supra* footnote 47 (discussing the concepts of full and fair disclosure, mitigation, and informed consent).

[500] Item 3.B.(ii) of Form CRS.

[501] Items 3.B.(i).a. and 3.B.(i).b. of Form CRS.

[502] Item 3.B. of Form CRS (heading).

[503] Items 3.B.(i).a., 3.B.(i).b., and 3.B.(i).c. of Form CRS.

[504] *See supra* footnote 477 and accompanying text; *see also* CFA Letter I (citing to "man on the street" interviews suggesting that average investors do not understand the term "fiduciary"); Consumer Reports Letter (commenting on the RAND 2018 report).

[505] Item 3.B.(i) of Form CRS.

[506] *See* Fiduciary Release, *supra* footnote 47; Regulation Best Interest Release, *supra* footnote 47.

[507] Item 3.B.(i).a. of Form CRS (requiring broker-dealers that provide recommendations subject to Regulation Best Interest to include (emphasis required): "*When we provide you with a recommendation,* we have to act in your best

investment adviser,[508] or either providing a recommendation or acting as an investment adviser (in the case of a dual registrant).[509] Portions of the modified standard of conduct disclosure also are required to be presented in bold and italicized font.[510] The final instructions are designed to provide retail investors with a clear understanding of when a firm's legal obligations regarding its standard of conduct is required to be discharged. In addition, with respect to broker-dealers, the modified standard of conduct disclosure, like the proposal,[511] distinguishes between broker-dealers that provide recommendations subject to Regulation Best Interest and broker-dealers that do not provide recommendations subject to Regulation Best Interest (*e.g.,* execution-only brokers). The modified standard of conduct disclosure also requires that broker-dealers, investment advisers, and dual registrants to state that conflicts of interest will remain despite the existence of these legal obligations, and to provide examples of these conflicts.[512] This change is designed to address commenters' concerns that we clarify for retail investors the interaction between broker-dealers' or investment advisers' legal obligations regarding their standards of conduct and their conflicts of interest.

Examples of Ways the Firm Makes Money and Conflicts of Interest. Following the standard of conduct prescribed wording, a firm must summarize the following ways in which it and its affiliates make money from brokerage or investment advisory services and investments it provides to retail investors, to the extent they are applicable to the firm.[513] The specific wording is not prescribed, but firms must include specific information to describe each of the applicable conflicts.

- *Proprietary Products:* Investments that are issued, sponsored, or managed by you or your affiliates;
- *Third-Party Payments:* Compensation received from third parties when a firm recommends or sells certain investments;
- *Revenue Sharing:* Investments where the manager or sponsor of those investments or another third party (such as an intermediary) shares with the firm revenue it earns on those investments; and
- *Principal Trading:* Investments the firm buys from a retail investor, and/or investments the firm sells to a retail investor, for or from the firm's own accounts, respectively.[514]

If none of those conflicts apply to the firm, it must summarize at least one of its material conflicts of interest that affect retail investors. Firms will be required to explain the incentives created by each of these examples.[515]

The proposal would have required a firm to discuss these same enumerated topics, to the extent they were relevant. If none of the four specified conflicts applied to a firm, the firm was not required to discuss any other conflicts that applied to its business. The proposal did not require a firm to summarize other ways its affiliates made money from the services and products the firm provides to retail investors.

We are adopting a heading that specifically asks how else the firm makes money in an effort to further highlight the firm's financial incentives and emphasize that they are intertwined with conflicts. In a departure from the proposal, the relationship summary will not include an introductory sentence explaining that the firm benefits from the services it provides to the retail investor because we believe that the new heading and required content of this item make this sentence unnecessary. We are also expanding the required conflicts disclosures to ensure that firms without any of the enumerated conflicts will still summarize at least one other material conflict of interest. Firms will include the four enumerated conflicts (if applicable) that were in the proposal, or otherwise at least one material conflict of interest, and a specific cross-reference to more detailed information about conflicts. Firms with none of the enumerated conflicts should carefully consider their operations in their entirety when selecting a material conflict to disclose to retail investors. While we think it is unlikely that a firm will not have any material conflicts to disclose, if this item is inapplicable, firms may omit or modify this disclosure.[516]

Commenters generally believed that at least some conflicts disclosure was important to include in the relationship summary, but many suggested changes to the approach, including fewer conflicts disclosures and increased use of layered disclosure.[517] Commenters generally supported requiring firms to disclose the types of conflicts of interest related to these financial incentives identified in the proposal, specifically disclosure regarding proprietary products,[518] compensation received

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interest and not put our interest ahead of yours. At the same time, the way we make money creates some conflicts with your interests. You should understand and ask us about these conflicts because they can affect the recommendations we provide you. Here are some examples to help you understand what this means," and broker-dealers that do not provide recommendations subject to Regulation Best Interest to include (emphasis required): "We *do not* provide recommendations. The way we make money creates some conflicts with your interests. You should understand and ask us about these conflicts because they can affect the services we provide you. Here are some examples to help you understand what this means.").

508 Item 3.B.(i).b. of Form CRS (requiring investment advisers to include (emphasis required): "*When we act as your investment adviser,* we have to act in your best interest and not put our interest ahead of yours. At the same time, the way we make money creates some conflicts with your interests. You should understand and ask us about these conflicts because they can affect the investment advice we provide you. Here are some examples to help you understand what this means.").

509 Item 3.B.(i).c. of Form CRS (requiring dual registrants that prepare a single relationship summary and provide recommendations subject to Regulation Best Interest to include (emphasis required): "*When we provide you with a recommendation as your broker-dealer or act as your investment adviser,* we have to act in your best interest and not put our interest ahead of yours. At the same time, the way we make money creates some conflicts with your interests. You should understand and ask us about these conflicts because they can affect the recommendations and investment advice we provide you. Here are some examples to help you understand what this means," and dual registrants that prepare a single relationship summary and do not provide recommendations subject to Regulation Best Interest to include (emphasis required): "We *do not* provide recommendations as your broker-dealer. *When we act as your investment adviser,* we have to act in your best interest and not put our interests ahead of yours. At the same time, the way we make money creates some conflicts with your interest. You should understand and ask us about these conflicts because they can affect the services and investment advice we provide you. Here are some examples to help you understand what this means." Also requiring that *dual registrants* that prepare two separate *relationship summaries* follow the instructions for broker-dealers and investment advisers in Items 3.B., 3.B.(i).a. and 3.B.(i).b.).

510 Items 3.B.(i).a. ("When we provide you with a recommendation" and "do not"), 3.B.(i).b. ("When we act as your investment adviser"), and 3.B.(i).c. ("When we provide you with a recommendation as your broker-dealer or act as your investment adviser," "do not," and "When we act as your investment adviser") of Form CRS.

511 *See* Proposed Item 3.B. of Form CRS.

512 Broker-dealers that do not provide recommendations subject to Regulation Best Interest will be required to include substantially the same conflict disclosure, except that it will reflect that conflicts of interest can affect the services provided, rather than referring to recommendations. *See* Items 3.B.(i).a. and 3.B.i.(c) of Form CRS.

513 Item 3.B.(iv) of Form CRS.

514 Items 3.B.(iv)(a) through 3.B.(iv)(d) of Form CRS.

515 Item 3.B.(iv) of Form CRS.

516 General Instruction 2.B. of Form CRS.

517 *See, e.g.,* IAA Letter I (suggesting leveraging disclosures made elsewhere on Part 2 of Form ADV); SIFMA Letter (suggesting leveraging disclosures that would be required by Regulation Best Interest); Fidelity Letter and Schwab Letter I (suggesting using examples of conflicts, with links to additional disclosure).

518 *See* Fidelity Letter; Schwab Letter I; SIFMA Letter.

from third parties,[519] revenue sharing,[520] and principal trading.[521]

Investor feedback, however, was mixed. Results from the RAND 2018 survey and another survey indicated that many survey participants did not find this section to be as informative as other sections,[522] and some participants in surveys and studies indicated that this section was "difficult" or "very difficult" to understand.[523] About 75% of Feedback Form commenters rated the conflicts of interest section as either "very useful" or "useful," while narrative comments on the Feedback Forms suggested that the conflicts of interest disclosure could be clarified or otherwise improved.[524]

Several commenters suggested that we broaden the disclosures to require a firm to inform its retail investors of all of the conflicts related to its business.[525] Commenters also supported highlighting conflicts of interest stemming from affiliates,[526] and several commenters included disclosure about affiliates in their mock-ups.[527] One industry commenter expressed concern that including solely the proposed conflicts in isolation and on a standalone basis may lead investors to think these are the only meaningful conflicts.[528] Other commenters pointed out that if only the proposed conflicts were required to be included, then some firms would not include any conflicts disclosures because their conflicts do not fall within the requisite categories.[529] Furthermore, one commenter proposed to allow firms to affirmatively state that they did not have any of these conflicts without further disclosure of the firm's other conflicts of interest.[530]

We continue to believe that the conflicts we identified in the proposal should be highlighted to retail investors in the relationship summary. Accordingly, we are including in the final instructions a requirement that firms describe these four conflicts to the extent that any of these conflicts apply to them. Like other sections in the relationship summary, this section will provide firms with more flexibility in the way in which they describe their particular conflicts so that they can tailor the summary to more accurately reflect their specific business. While we are maintaining the proposal's approach of requiring firms to provide information about certain types of conflicts applicable to them, we are not requiring firms to state as many specific details with respect to such conflicts.[531] For example, the proposed instructions would have required firms to provide specific examples of advising on proprietary or affiliated investments or investments paying the firm a share of revenue, and we have removed such requirements from the final instructions. Instead, the relationship summary will focus on four specific ways a firm could make money from retail investors' investments to highlight that firms have conflicts of interest and encourage retail investors to ask and learn more about them.

Additionally, as some commenters pointed out, we agree that not mentioning any conflicts, or permitting the firm to affirmatively state that it has none of the enumerated conflicts, could lead retail investors to conclude that the particular firm does not have any material conflicts. Accordingly, the instructions require a firm that does not have any of the four required categories of conflicts to provide at least one example of the firm's conflicts of interest. Specially, the instructions require a firm to summarize at least one material conflict of interest that affects retail investors.[532] Firms are not expected to disclose every material conflict of interest, and should instead consider what would be most relevant for retail investors to know in deciding whether to select or retain the particular firm.

We determined to require an example of a conflict, rather than broadening the instruction to include all conflicts, as some commenters suggested. The language disclosing firms' standard of conduct and existence of conflicts includes wording to make explicit that the conflicts described in the relationship summary are examples. Firms will disclose at least one of their material conflicts of interest that impact their retail investors, and such a conflict is not limited expressly to financial conflicts. In addition, with respect to broker-dealers, this conflict disclosure (unlike the conflict disclosure obligation in Regulation Best Interest) [533] is not limited to conflicts associated with a recommendation.[534] To determine whether a conflict of interest should be disclosed, a firm could consider, for example, the benefit to the firm or its affiliate or the cost to the retail investor.

[519] *See, e.g.,* IFS Letter; IAA Letter I; Wells Fargo Letter; Primerica Letter (suggesting including in additional layered disclosure).

[520] *See* Fidelity Letter (third-party revenue sharing agreements in mock-up).

[521] *See* mock-ups in IAA Letter I; Primerica Letter; Wells Fargo Letter.

[522] *See* RAND 2018, *supra* footnote 13 (conflicts of interest was selected as one of the two most informative sections by only 15% of survey respondents and selected as one of the two least informative by 36%); Cetera Letter II (Woelfel), *supra* footnote 17 (81% of survey respondents strongly or somewhat agreed that conflicts of interest is an important topic in the relationship summary, fewer than for any other topic); *see also* Margolis Feedback Form (stating that the conflicts of interest section is very confusing, particularly with respect to fee-sharing arrangements and referral fees).

[523] *See* RAND 2018, *supra* footnote 13 (about one third of survey respondents found this section to be difficult or very difficult to understand; in qualitative interviews, participants demonstrated misunderstanding of how this section reconciled with the "obligations to you" section and how conflicts would be resolved); Kleimann I, *supra* footnote 19 (interview participants had difficulty explaining how firms earned money from financial relationships that could cause conflicts and were unclear how conflicts would be resolved); Betterment Letter I (Hotspex), *supra* footnote 18 (noting that further improvements could be made to improve respondents understanding of differences in conflicts).

[524] Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 2(e) and Question 4). Among the 41 Feedback Forms with narrative comments suggesting that one or more topics were too technical or could be improved, 14 included a narrative comment suggesting clarification or more information about conflicts of interest. *See, e.g.,* Baker Feedback Form ("A sampling of possible conflict-of-interest situations is most desirable"); Bhupalam Feedback Form ("It doesn't clearly tell me whether the company will do this or not. In fact, it tells me that the company may do this and I should be fine with it."); Lee2 Feedback Form ("What can I expect and not expect about the independence and conflict-free nature of the advice"); Margolis Feedback Form ("While I agree that fee-sharing arrangements and referral fees need to be disclosed, your wording is confusing"); Schreiner Feedback Form ("highlight implications of conflicts of interest").

[525] *See* CFA Institute Letter I; Trailhead Consulting Letter.

[526] *See* Comment Letter of Jackson, Grant Investment Advisers, Inc. (Aug. 7, 2018) ("Jackson Grant Letter") (stating that other compensation (such as recommending proprietary products and products of affiliates) needs to be addressed for the investor to fully understand the potential for conflicts in any relationship).

[527] *See* SIFMA Letter; Wells Fargo Letter; Schwab Letter I; Comment Letter of Ron A. Rhoades, Western Kentucky University (Dec. 6, 2018) ("Rhoades Letter"); Stifel Letter (mock-up); Cetera Letter I; Betterment Letter I; ASA Letter (mock-up).

[528] IAA Letter I.

[529] *See* Paul Hynes Letter; Betterment Letter I (stating that their business model avoids the proposed conflicts of interest, and proposing an alternate "alignment of interest" section for the section on conflicts of interest).

[530] Betterment Letter I (indicating that the firm had none of the proposed enumerated conflicts).

[531] In addition, the IAC recommended that the Commission adopt a uniform, plain English document that covers basic information about conflicts of interest, among other topics. *See* IAC Broker-Dealer Fiduciary Duty Recommendations, *supra* footnote 10.

[532] As discussed in Section II.A.1. above, if a required disclosure is inapplicable to a firm's business, a firm would be permitted to omit or modify that disclosure. General Instruction 2.B. We believe, however, that most firms will have at least one material conflict of interest that they would need to disclose.

[533] *See* Regulation Best Interest Release, *supra* footnote 47, at Section II.C.1 (Disclosure Obligation).

[534] For instance, broker-dealers may include conflicts that affect product offerings to customers who do not obtain recommendations from the firm.

We believe that an exhaustive list of conflicts in the relationship summary would not as effectively enhance investor understanding of conflicts. More details could inundate investors with information that makes it difficult for them to focus on the fact that conflicts exist and will impact them, and they may not focus on or may not realize the importance of the specific conflicts firms are required to summarize. We also agree with comments that disclosure of all conflicts would be too cumbersome [535] and lengthy for the relationship summary's intended purpose—that is, highlighting certain aspects of a firm and its services to help retail investors to make an informed choice and to find additional information about a topic. The approach we are adopting of requiring firms to provide examples will make retail investors aware that these types of conflicts exist, but will avoid providing a laundry list of conflicts. Taking into account all of these considerations, we believe that these examples of conflicts of interest should be highlighted for the investor. We recognize that this will be a high-level summary of conflicts and generally will not be a complete description. As discussed further below, we are requiring firms to include a link to additional information on their conflicts of interest.[536] This layered disclosure will facilitate investors' ability to review additional information on conflicts while balancing the high-level nature of the relationship summary.

Conversation Starter and Additional Information. To promote access to information about other firm conflicts, as well as to clarify for retail investors the application of their firms' standard of conduct as discussed above, firms will include a conversation starter prompting investors to ask about conflicts and a hyperlink to additional information. Specifically, firms must include the following question as a conversation starter: "How might your conflicts of interest affect me, and how will you address them?" [537]

The proposal included a longer key question asking about the most common conflicts of interest in the firm's advisory and brokerage accounts and how the firm will address those conflicts when providing services to the retail investor.[538] One commenter noted that this key question elicited the same information as provided elsewhere in the relationship summary.[539] We shortened the question to avoid this duplication. In addition, the firm's other conflicts will be disclosed as part of the summary of material conflicts or in the additional conflicts disclosure that firms will cross-reference. The new conversation starter is meant to complement these other disclosures and elicit more information about how specifically the firm's conflicts of interest could affect the retail investor.

Firms will also include specific cross-references to more detailed information about conflicts of interest that, at a minimum, includes the same or equivalent information to that required about a firm by the Form ADV, Part 2A brochure and/or Regulation Best Interest.[540] If a firm is a broker-dealer that does not provide recommendations subject to Regulation Best Interest, to the extent it prepares more detailed information about its conflicts, it must include specific references to such information.[541] Firms may include hyperlinks, mouse-over windows, or other means of facilitating access to this additional information and to any additional examples or explanations of such conflicts of interest.[542]

Over 60% of RAND 2018 survey respondents indicated that they would be "very likely" or "somewhat likely" to click on hyperlinks related to conflicts of interest.[543] While the proposal did not require firms to link to additional information with respect to their conflicts, several commenters suggested that the relationship summary include a link to all conflicts.[544] We believe that using layered disclosure through cross-references to a more detailed discussion of conflicts balances the Commission's objective of concise disclosure while providing interested investors with tools to easily access additional, useful information.

Many industry commenters also suggested that Regulation Best Interest's and Form CRS's conflicts disclosures be coordinated, and that any conflict disclosure obligations under Regulation Best Interest should be satisfied upon delivery of the relationship summary.[545] We recognize that broker-dealers may need to disclose additional conflicts or disclose additional conflicts at a point in time other than at the beginning of the relationship with an investor or other times the relationship summary is required to be delivered.[546] The relationship summary will provide a high-level summary for investors so that they can engage in a conversation with their financial professional about investment advisory or brokerage services, and so that the investors can choose the type of service that best meets their needs. Furthermore, as discussed above in Section II.A (Presentation and Format),[547] we believe it is essential to limit the length of the relationship summary and keep the disclosures focused, highlighting these topic areas while encouraging questions and providing access to additional information. As a result, we believe many firms may not be able to capture all of the necessary disclosures about their conflicts in this short summary disclosure.[548] The layered disclosure approach should strike a balance between alerting investors of these conflicts while keeping with the intended purpose of the relationship summary.

Finally, some commenters argued that the relationship summary should require firms to explain how conflicts will be mitigated or minimized, or that firms should be permitted to state that

[535] *See, e.g.,* CFA Letter I; SIFMA Letter; Prudential Letter.

[536] Item 3.B.(iv) of Form CRS (Firms must include specific references to more detailed information about their conflicts of interest that, at a minimum, include the same or equivalent information to that required by the Form ADV, Part 2A brochure and Regulation Best Interest, as applicable, and broker-dealers that do not provide recommendations subject to Regulation Best Interest, to the extent they prepare more detailed information about their conflicts, must include specific references to such information.).

[537] Item 3.B.(iii) of Form CRS.

[538] Proposed Item 8 of Form CRS. The proposal included the following question: "What are the most common conflicts of interest in your advisory and brokerage accounts? Explain how you will address those conflicts when providing services to my account."

[539] *See* LPL Financial Letter.

[540] Item 3.B.(iv) of Form CRS.

[541] Item 3.B.(iv) of Form CRS.

[542] Item 3.B.(iv) of Form CRS. *See also* General Instructions 3. and 4. of Form CRS (instructions applicable to electronic delivery). For further discussion of these provisions, *see supra* Section II.A.3. and footnotes 156 and 158 and accompanying text, and Section II.B.2.(b) and footnotes 348–349.

[543] RAND 2018, *supra* footnote 13. *But see* Kleimann II, *supra* footnote 19 (only one interview participant said he would use the link in the conflicts of interest section).

[544] *See, e.g.,* Fidelity Letter (mock-up); IAA Letter I (mock-up); *see also* Kleimann II, *supra* footnote 19 (redesigned relationship summary suggests a link to more information about conflicts).

[545] *See, e.g.,* ACLI Letter; Cambridge Letter; Massachusetts Letter; FSI Letter I; MassMutual Letter; Schwab Letter I; SIFMA Letter; Transamerica Letter; *see also* Regulation Best Interest Release, *supra* footnote 47, at n.438 and accompanying text.

[546] *See* Regulation Best Interest Release, *supra* footnote 47.

[547] *See supra* Section II.A (Presentation and Format).

[548] For example, investment advisers must make full and fair disclosure to all clients of all material facts relating to the advisory relationship, including conflicts of interest. *See* Fiduciary Release, *supra* footnote 47; General Instruction 3 to Form ADV Part 2. Broker-dealers subject to Regulation Best Interest must also provide full and fair disclosure of material facts, including all material facts relating to conflicts of interest that are associated with the recommendation. *See* Regulation Best Interest Release, *supra* footnote 47.

a particular firm has fewer conflicts than other firms.[549] While we agree that firms should have increased flexibility to describe conflicts, as discussed above, we are not permitting this additional disclosure. The purpose of this section is to highlight for investors that conflicts of interest exist.

c. Payments to Financial Professionals

Finally, in a change from the proposal, we are adding an additional section to Item 3 that requires a firm to include in its relationship summary the heading "How do your financial professionals make money?" [550] A firm will summarize how its financial professionals are compensated (including cash and non-cash compensation) and the conflicts of interest those payments create.[551] For example, the firm must, to the extent applicable, disclose whether financial professionals are compensated based on factors such as: The amount of client assets they service; the time and complexity required to meet a client's needs; the product sold (*i.e.*, differential compensation); product sales commissions; or revenue the firm earns from the financial professional's advisory services or recommendations.[552]

In the Proposing Release, we asked if the relationship summary should include disclosure of compensation received by financial professionals and the related conflicts of interest such compensation might pose. Several commenters supported including disclosures related to the conflicts of interest that financial professionals' compensation arrangements create.[553] Several commenters suggested featuring financial professionals' compensation in the relationship summary, including in a separate section.[554] A number of commenters illustrated the importance of these disclosures by including sections discussing financial professionals' compensation in their mock-ups.[555] These disclosures generally included more detailed information about how broker-dealers and investment advisers earn money from various sources, in addition to what the retail investor may pay directly.

We have concluded that disclosure of conflicts of interest related to a financial professional's compensation is useful to highlight for retail investors in the relationship summary.[556] In particular, the commenters' mock-up disclosures highlighted the benefit of separately summarizing financial professionals' compensation to help retail investors identify and assess these conflicts of interest that may affect the services they receive.[557] We believe that requiring specific information on financial professional compensation and conflicts related to that compensation will provide improved clarity from the proposal and better help retail investors understand these conflicts and how they might impact a financial professional's motivation. We also believe it is useful to specifically highlight this conflict for retail investors, as it is a different type of payment and a different type of conflict than a conflict at the firm level. We further believe that by placing this discussion directly after the discussion on fees, costs and conflicts, it will mitigate potential investor confusion. This approach is also consistent with Regulation Best Interest, which treats compensation to financial professionals and the conflicts of interest that such compensation creates as material facts that must be disclosed.[558]

4. Disciplinary History

The relationship summary will include a separate section about whether a firm or its financial professionals have reportable disciplinary history and where investors can conduct further research on these events.[559] Inclusion of a separate disciplinary history section is a change from the proposed relationship summary, where this information was included in the Additional Information section.[560] Certain commenters suggested that we remove the requirement that firms disclose whether or not they have disciplinary history.[561] Similarly, some commenters suggested that any disciplinary information should simply direct retail investors to resources where they could review a firm's or a representative's disciplinary history, without any firm-specific information in the relationship summary.[562]

We have concluded, however, based on consideration of commenters and investor feedback received through surveys and studies, at roundtables and in Feedback Forms, to include the disciplinary history as a separate section of the relationship summary.[563] These comments emphasized the importance of disciplinary history information and advocated that it should be placed in a more prominent position than as part of the Additional Information section.[564] Commenters also generally supported firm-specific disclosure as to whether the firm has disciplinary history.[565] About 70% of commenters on Feedback Forms responded that they would seek

[549] *See* AARP Letter; Betterment Letter I.

[550] Item 3.C. of Form CRS.

[551] Item 3.C.(i) of Form CRS.

[552] Item 3.C.(ii) of Form CRS.

[553] *See* Proposing Release, *supra* footnote 5 (requesting comments on whether there are other considerations related to fees and compensation that we should require firms to highlight for retail investors that were not captured in the proposal); *see also* Jackson Grant Letter; Schwab Letter I; SIFMA Letter; Stifel Letter.

[554] *See, e.g.*, Schwab Letter I; SIFMA Letter; Stifel Letter; Jackson Grant Letter. One industry commenter also stated that we should focus on conflicts that result from a financial professional's financial compensation. SIFMA Letter (also stating this view is consistent with FINRA's 2013 Conflicts of Interest Report, which specifically identified financial compensation as the major source of conflicts of interest for associated persons); *see also* CCMC Letter (investor polling) *supra* footnote 21 (in connection with investor polling, noting that investors identify explaining "own compensation" as one of three "issues that matter most" to them).

[555] *See* Primerica Letter and ASA Letter (including disclosure stating that financial professional compensation is typically affected by the amount of client assets the financial professional is responsible for and the fees and commissions those assets generate); *see also* SIFMA Letter and Schwab Letter I (including disclosure on how the firm pays professionals who provide investment advice).

[556] *See* Regulation Best Interest Release, *supra* footnote 47, at Section II.C.1.b.

[557] *See, e.g.*, Primerica Letter; SIFMA Letter; Schwab Letter I.

[558] *See* Regulation Best Interest Release, *supra* footnote 47.

[559] As proposed, we used the terms "legal or disciplinary events." However, we are adopting the terms "legal or disciplinary history" for greater precision.

[560] *See* Proposing Release, *supra* footnote 5, at nn.270–71 and accompanying text.

[561] *See, e.g.*, Wells Fargo Letter (arguing that any firm-based aspect of disciplinary disclosure is not fair to representatives of the firm without any history of wrongdoing); *see also* ACLI Letter; New York Life Letter (arguing that any firm-specific disciplinary history disclosure would prejudice large firms).

[562] *See, e.g.*, LPL Financial Letter (mock-up suggested that "[f]or free tools to research our firm, our financial advisors and other firms, including our disciplinary events . . ." investors should visit BrokerCheck or IAPD).

[563] The IAC also recommended including disciplinary history in the relationship summary. *See* IAC Broker-Dealer Fiduciary Duty Recommendations, *supra* footnote 10 ("[W]e encourage the Commission to develop an approach to disclosure of disciplinary record that makes it easier for investors to assess the significance of disclosed events, particularly for firms that may have a large number of relatively insignificant technical violations.").

[564] *See, e.g.*, CFA Letter I ("The required disclosure regarding disciplinary events does not give adequate prominence to this issue."); NASAA Letter ("The descriptor 'Additional Information' is too vague to describe the important information in this section [and] should be recast as 'Disciplinary History and Customer Rights and Remedies . . . .'"); Trailhead Consulting Letter ("Legal and Disciplinary Actions are very important for an investor to consider and should not be 'hidden' in an Additional Information section. This information deserves its own separate section."); IAA Letter.

[565] *See, e.g.*, CFA Letter I ("We believe this information is important enough to be highlighted under its own separate heading, 'Do you have a disciplinary record?' ").

out additional information about a firm's disciplinary history.[566] Similarly, more than 70% of investors surveyed in the RAND 2018 report reported that they were "very likely" or "somewhat likely" to look up the disciplinary history of a financial professional.[567]

However, results from investor studies and surveys and investor comments on Feedback Forms supported the concern that the Additional Information section may not provide enough salience. For example, in the RAND 2018 survey, the Additional Information section was most often selected as one of the two least useful sections of the proposed relationship summary.[568] On Feedback Forms, commenters rated the Additional Information section as "very useful" or "useful" less often than any other section of the relationship summary.[569] One investor study suggested a reason for these mixed results, finding that participants would skip the Additional Information section, in part because they did not understand that the websites in the section would allow them to review the disciplinary history of the investment adviser or broker-dealer that they were considering.[570] Comments on Feedback Forms similarly suggest that information about how to research a firm's disciplinary information should be presented more prominently and more simply in the relationship summary.[571] After taking comments into consideration, we believe that a separate disciplinary history section is appropriate, with a requirement that firms explicitly state whether or not they have legal or disciplinary history so that investors can find the information in the summary with ease.

The section will begin with the heading: "Do you or your financial professionals have legal or disciplinary history?" Firms will answer "yes" or "no," depending upon whether they or one of their financial professionals have a triggering event enumerated in the instructions, as discussed below. The proposed relationship summary required a statement that the firm has legal and disciplinary events but did not require an affirmative statement that a firm or its financial professionals did not have disclosable events. We are requiring a "No" answer in the final instructions where applicable, given the importance of disciplinary history and to provide a complete answer to the question in the heading.

Regardless of whether firms report a "Yes" or "No" answer as to whether they or their financial professionals have legal or disciplinary history, the relationship summary will direct the retail investor to visit *Investor.gov/CRS* to research the firm and its financial professionals, as proposed.[572] This is responsive to RAND 2018 survey results, which indicated that 37% of investors did not know where to research disciplinary history.[573] Directing retail investors to the search tool is also consistent with the Commission's Office of Investor Education and Advocacy initiative to encourage retail investors to do background checks on financial professionals and is intended to increase awareness of available search tools.[574] In addition to disciplinary history, the search tools also can provide useful information regarding registration and licensing and financial professional employment history.

The triggering events for a statement that a firm does have legal or disciplinary history are the same as proposed.[575] Following the heading, firms will be required to state "Yes" in response to the heading questions if they currently disclose or are required to disclose (i) disciplinary information per Item 11 of Part 1A or Item 9 of Part 2A of Form ADV,[576] or (ii) legal or disciplinary history per Items 11A–K of Form BD ("Uniform Application for

[566] *See* Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 3(e)). Some commented that, before viewing the relationship summary, they had not known that they could ask or how to check. *See, e.g.,* Anonymous02 Feedback Form ("did not know how to do that"); Anonymous03 Feedback Form ("I looked up my advisor while reading through the summary"); Anonymous26 Feedback Form ("Now I know where to go"); Anonymous29 Feedback Form ("I didn't know if asked—they had to answer"); *see also* Philadelphia Roundtable (investor participant noting that "checking your broker's disciplinary record" is "something that people should do").

[567] *See* RAND 2018, *supra* footnote 13 ("More than 40 percent of respondents reported being very likely to look up the disciplinary history based on the information provided in the Relationship Summary, and another 35 percent reported being somewhat likely to look it up. Only 5 percent reported being not at all likely to do so."); *see also* Kleimann II, *supra* footnote 19 (study participants who viewed a redesigned form reported that they would research the company they are doing business with"); *but see* Schwab Letter I (Koski), *supra* footnote 21 (only 20% of survey participants selected "How to find disciplinary information about a firm or its representatives" when asked to select the four most important topics for a firm to communicate, from a list of 11 topics).

[568] *See* RAND 2018, *supra* footnote 14 (Additional Information section rated as one of the two "least informative" sections by 66% of respondents; only 3% selected it as one of the two "most informative"); *see also* Cetera Letter II (Woelfel), *supra* footnote 17 (84% of survey respondents strongly or somewhat agreed that the "how to find additional information about a broker/adviser" and "how to find additional information about the firm," fewer than for most other topics out of a series of nine topic options).

[569] Feedback Forms Comment Summary, *supra* footnote 11 (summary of responses to Question 2(f)) (Additional Information section rated as "not useful" or "unsure" by more commenters (20%) and "very useful" by fewer commenters (32%) relative to other sections of the relationship summary).

[570] *See* Kleimann I, *supra* footnote 19; *see also* Kleimann II, *supra* footnote 19 (noting that interview responses to links in the relationship summary "suggest that use is dependent on perceived relevance . . . Some of that relevance can be built in with more specific descriptions of what can be found at the link.").

[571] Some commenters on Feedback Forms suggested moving the Additional Information section forward in the relationship summary. *See* Anonymous14 Feedback Form ("Recommend add this to beginning of the pamphlet"); Durgin Feedback Form ("Additional info needs to be moved up"); Salkowitz Feedback Form ("Move this section to near the beginning"); Starmer2 Feedback Form ("put Key Questions and Additional Info up front to stimulate a conversation."). Others commented that the presentation should be clearer. *See, e.g.,* Anonymous28 Feedback Form ("Would be better titled 'How to find out about us' or 'Other information you need to know'"); Anonymous29 Feedback Form ("plain language"); Calderon Feedback Form ("say expressly where that information is found, with linked URL's"); Shepard Feedback Form ("the easier it is to access, the better"); Baker Feedback Form ("Please explain IAPD").

[572] Item 4.D.(i) of Form CRS. *Investor.gov* includes a search function that searches the databases Web CRD® and IARD, and this search will direct an investor to BrokerCheck and/or IAPD, as appropriate, where the investor can research disciplinary history.

[573] *See* RAND 2018, *supra* footnote 13. By contrast, 19% of surveyed investors cited the time and effort required and 10% of surveyed investors indicated that they would not look up a firm or financial professional's disciplinary history because the information was not very important to the investor. *Id.* We believe this is also consistent with the IAC's recommendation to "look at whether it might be beneficial to adopt a layered approach to [disciplinary history] disclosures, with the goal of developing a more abbreviated, user-friendly document for distribution to investors." IAC Broker-Dealer Fiduciary Duty Recommendations, *supra* footnote 10.

[574] *See https://www.investor.gov/research-before-you-invest.*

[575] *See* Proposed Item 7.B. of Form CRS. In the proposal, firms with such events would have been required to state the following: "We have legal and disciplinary events." *Id.* For reasons discussed *supra*, we believe the question-and-answer formatting will make the relationship summary more useful to investors.

[576] Item 4.B. of Form CRS. Generally, investment advisers are required to disclose on Form ADV Part 2A any legal or disciplinary event, including pending or resolved criminal, civil and regulatory actions, if it occurred in the previous 10 years, that is material to a client's (or prospective client's) evaluation of the integrity of the adviser or its management personnel, and include events of the firm and its personnel. *See* Amendments to Form ADV, Investment Advisers Act Release No. 3060 (Jul. 28, 2010) [75 FR 49233 (Aug. 12, 2010)], at 22–27 ("Brochure Adopting Release"). Items 9.A., 9.B., and 9.C. provide a list of disciplinary events that are presumptively material if they occurred in the previous 10 years. However, Item 9 requires that a disciplinary event more than 10 years old be disclosed if the event is so serious that it remains material to a client's or prospective client's evaluation of the adviser and the integrity of its management.

Broker-Dealer Registration")[577] except to the extent such information is not released to BrokerCheck pursuant to FINRA Rule 8312.[578] Regarding their financial professionals, firms will determine whether they need to include an affirmative statement based on legal and disciplinary information on Form U4,[579] Form U5,[580] or Form U6.[581] In particular, firms will be required to state "Yes" if they have financial professionals for whom disciplinary history is reported per Items 14 A through M on Form U4, Items 7A or 7C through F on Form U5,[582] or Form U6 except to the extent such information is not released to BrokerCheck pursuant to FINRA Rule 8312.[583] Firms that do not have disclosable events for themselves or their financial professionals in connection with these provisions will state "No" in answer to the heading.[584]

As noted above, several commenters opposed the approach of requiring firms to indicate in their relationship summaries whether they or their financial professionals have disciplinary history, questioning the value of the disclosure to retail investors,[585] or citing to prejudicial or competitive concerns.[586] These firms recommended that the relationship summary include only a prompt for investors to research the disciplinary history of the firm or financial professional, directing them to *Investor.gov/CRS*.[587]

We recognize that the disciplinary history of firms and their financial professionals is already publicly available, as commenters have noted. From studies and investor feedback, however, we also understand that investors view disciplinary history as significant to their decision of whether or not to engage with a firm or a financial professional, but in many cases are unaware of the need for researching or the tools available to research whether disciplinary history exists.[588] Highlighting disciplinary history in this way provides information to retail investors before they enter into a relationship with a particular firm and financial professional and a "yes" response will alert retail investors that there is disciplinary history they may want to research, review, or discuss with their financial professional.[589] As there is no required waiting period between the delivery of the relationship summary to the retail investor and the time that the retail investor may enter into a relationship with or an order placed by a firm, highlighting the disciplinary information allows the retail investor time to consider any disciplinary history before moving forward or to monitor the relationship or financial professional more closely if the retail investor decides to move forward at that time. By basing this disclosure on information that is already reported elsewhere and also requiring the relationship summary to include details about where to find more information, we give retail investors the tools to learn more about firms and financial professionals.

We are not persuaded by commenters who believed that these disclosures are unduly prejudicial or would have sufficient competitive concerns and argued that we should not require this information. Firms or financial professionals would have the opportunity to provide more information about and encourage retail investors to ask follow-up questions regarding the nature, scope, or severity of any disciplinary history, so that retail investors have the information they need to decide on a relationship. In particular, financial professionals who themselves have no disciplinary history can make clear that a "Yes" disclosure in response to the heading question relates to the firm and other personnel (if applicable) and not to them. While we recognize that larger firms might be more likely to respond affirmatively to this question than smaller firms, we have determined to require this disclosure because we believe that, on balance, the potential benefit to the retail investor of seeing at a glance whether a firm or its financial professionals have disciplinary history (which may encourage the investor to conduct further research or monitor the relationship or financial professional more closely) justifies requiring the disclosures notwithstanding the concerns raised by commenters,

[577] Item 11 of Form BD requires disclosure on the relevant Disclosure Reporting Page ("DRP") with respect to: (A) Felony convictions, guilty pleas, "no contest" pleas or charges in the past ten years; (B) investment-related misdemeanor convictions, guilty pleas, "no contest" pleas or charges in the past ten years; (C) certain SEC or the Commodity Futures Trading Commission ("CFTC") findings, orders or other regulatory actions; (D) other federal regulatory agency, state regulatory agency, or foreign financial regulatory authority findings, orders or other regulatory actions; (E) self-regulatory organization or commodity exchange findings or disciplinary actions; (F) revocation or suspension of certain authorizations; (G) current regulatory proceedings that could result in "yes" answers to items (C), (D) and (E) above; (H) domestic or foreign court investment-related injunctions, findings, settlements or related civil proceedings; (I) bankruptcy petitions or SIPC trustee appointment; (J) denial, pay out or revocation of a bond; and (K) unsatisfied judgments or liens. Some of these disclosures are only required if the relevant action occurred within the past ten years, while others must be disclosed if they occurred at any time.

[578] Under FINRA Rule 8312, FINRA limits the information that is released to BrokerCheck in certain respects. For example, pursuant to FINRA Rule 8312(d)(2), FINRA shall not release "information reported on Registration Forms relating to regulatory investigations or proceedings if the reported regulatory investigation or proceeding was vacated or withdrawn by the instituting authority." We believe it is appropriate to limit disclosure in the relationship summary to disciplinary information or history that would be released to BrokerCheck.

[579] Form U4 (Uniform Application for Securities Industry Registration or Transfer) requires disclosure of registered representatives' criminal, regulatory, and civil actions similar to those reported on Form BD as well as certain customer-initiated complaints, arbitration, and civil litigation cases.

[580] Form U5 (Uniform Termination Notice for Securities Industry Registration) requires information about representatives' termination from their employers.

[581] Form U6 (Uniform Disciplinary Action Reporting Form) is used by SROs, regulators, and jurisdictions to report disciplinary actions against broker-dealers and associated persons. This form is also used by FINRA to report final arbitration awards against broker-dealers and associated persons.

[582] Item 7(b) of Form BD (Internal Review Disclosure) is not released to BrokerCheck by FINRA, pursuant to FINRA Rule 8312(d)(3).

[583] Item 4.B.(iii) of Form CRS.

[584] Item 4.C. of Form CRS.

[585] *See* NSCP Letter ("NSCP members believe that extending the disclosure of disciplinary history to be included in Form CRS would add additional administrative burden and costs outweighing any true benefit to the customer."); Wells Fargo Letter ("such a broad statement will add no value").

[586] *See* Wells Fargo Letter (arguing that the statement will lead clients to draw unfair conclusions about both the firm and its financial professionals); New York Life Letter (arguing that the statement prejudices larger, established firms that will usually have a small number of disclosure events to report for current or former registered representatives); ACLI Letter (same).

[587] *See* Wells Fargo Letter; New York Life Letter; ACLI Letter.

[588] *See, e.g.,* Staff of the Securities and Exchange Commission, *Study Regarding Financial Literacy Among Investors as Required by Section 917 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Aug. 2012), at iv, v, xiv, 37, 73, 121–23 and 131–32, at nn.317–19 and accompanying text, *available at https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf* ("917 Financial Literacy Study") ([A]bout 76.5% of the online survey respondents reported that, in selecting their current adviser, they did not use an SEC-sponsored website to find information about the adviser. 73% of respondents stated that they would check IAPD if they were made aware of its existence. Of that subset—those who reported not using an SEC-sponsored website—approximately 85.2% indicated that they did not know that such a website was available for that purpose. Of that majority (*i.e.,* a further subset)—those who were unaware of such a website—approximately 73.5% reported that they would review information about their adviser on an SEC-sponsored website if they knew it were available); *see also* RAND 2018, *supra* footnote 13 (when investors were asked why they would not look up disciplinary history, 37 percent of all respondents indicated that they did not know where to get the information, whereas 19 percent of all respondents indicated that it would take too much time or effort).

[589] *See* Miami Roundtable (investor noting that she had gone on *Investor.gov* to learn about the disciplinary history of her financial professional and noting that she was "happy when [she] checked" the website).

particularly given the importance that commenters placed on disciplinary history.

A few commenters suggested revisions to the specific events that would trigger a disciplinary event disclosure in the proposed relationship summary.[590] We have considered these comments but have determined to adopt the triggers as proposed. As noted in the Proposing Release, those disclosable events are those that we believe may generally assist retail investors in evaluating the integrity of a firm and its financial professionals.[591] Additionally, these triggering events are already disclosed on existing systems for other regulatory purposes. As such, there will not be additional regulatory burdens for a determination of disciplinary history for the purposes of the relationship summary.

Different requirements between other aspects of Form ADV or Form BD and the relationship summary also could cause confusion and compliance uncertainty. One commenter suggested basing the relationship summary disciplinary disclosure around a standardized set of events that would trigger disclosures specific to the relationship summary.[592] This approach may have led to advisers or broker-dealers having publicly listed disclosure events on BrokerCheck or IAPD yet answering "No" to a question of whether they or their financial professionals have legal or disciplinary history. We believe that result could have been confusing or misleading to retail investors. By contrast, the approach we adopt allows for consistency across public information as to whether or not a firm or financial professional has a disciplinary event and leverages existing disclosure reporting systems. We believe that this consistency justifies not adopting a standardized set of events triggering disclosure on the relationship summary. Furthermore, the statement encouraging retail investors to visit *Investor.gov/CRS* for more information will help retail investors to more easily learn and compare additional details from the firms themselves and from their existing disclosures.[593]

Firms also will include the following conversation starter: "As a financial professional, do you have any disciplinary history? For what type of conduct?" [594] This conversation starter is intended to take the place of a similarly worded key question.[595] However, because this item's heading asks a similar question about disciplinary history with respect to the firm, we believe that the conversation starter would be most useful specifically with respect to the financial professional. This question will allow retail investors to assess that financial professional's disciplinary history as well as engage in further discussion about those events or any events applicable to the firm. In addition, this conversation starter is designed to encourage a discussion about any differences between the firm's disciplinary history and that financial professional's history, if applicable (*e.g.*, if the financial professional has no disciplinary history while his or her firm has reportable discipline necessitating a "Yes" response to the heading question).

5. Additional Information

At the end of the relationship summary, firms will state where the retail investor can find additional information about their brokerage or investment advisory services, as proposed.[596] This information should be disclosed prominently at the end of the relationship summary. However, unlike the proposed relationship summary, the adopted instructions do not prescribe the different references that a broker-dealer and investment adviser must include for such direction and do not require a heading for the section.[597] This approach is consistent with our intent to provide firms additional flexibility to provide information most useful to retail investors.[598] In addition, removing the prescribed wording from this section avoids potentially duplicative disclosure, as the Introduction now includes a statement that free and simple tools are available to research firms and financial professionals at *Investor.gov/CRS*. *Investor.gov* provides investors access to search for firms on BrokerCheck and IAPD, references to both of which would have been required in prescribed wording in the proposed relationship summary.[599] The flexibility is also responsive to observations reported in surveys and studies and comments from investors at roundtables and on the Feedback Forms indicating that investors found the proposed "Additional Information" section less helpful compared to other sections in the relationship summary.[600] Consistent with our layered disclosure approach, we encourage hyperlinks, QR codes, or other means of facilitating access for retail investors to obtain additional information.[601]

We also are not adopting the proposed requirement that firms include information on how retail investors should report complaints about their investments, investment accounts, or financial professionals in the relationship summary.[602] While some

[590] *See* CFA Institute Letter I ("For parity and comparability, we suggest requiring that the specific events that would trigger disclosure under these requirements be the same for both investment advisers and broker-dealers"); Comment Letter of the Business Law Section of the State Bar of Texas, Investment Funds Committee (Aug. 7, 2018) (advocating that an investment adviser disclose that it has a disciplinary event only based on Item 9 of Part 2A of Form ADV, rather than both Items 9 and 11).

[591] *See* Proposing Release, *supra* footnote 5, at nn.271–73 and accompanying text.

[592] *See* CFA Institute Letter I.

[593] Item 4.D. of Form CRS.

[594] Item 4.D.(ii) of Form CRS.

[595] *See* Proposed Item 8.8 of Form CRS ("Do you or your firm have a disciplinary history? For what type of conduct?"); *see also supra* Section II.A.4 (discussing removal of the "Key Questions to Ask" section).

[596] *See* Proposed Item 7.E. of Form CRS. We are also requiring a statement of where retail investors can request a copy of the relationship summary.

[597] As proposed, broker-dealers would have had to state that, to find additional information, retail investors should visit BrokerCheck, the firm's website, and the retail investor's account agreement. In addition, broker-dealers would link to a portion of their website with up-to-date information and a link to BrokerCheck. If the firm did not have a public website, the broker-dealer would have been required to include a toll-free telephone number where retail investors could request up-to-date information. *See* Proposed Item 7.E.1. of Form CRS.

Investment advisers would have had to state that, to find additional information, retail investors should see the firm's Form ADV brochure on IAPD on *Investor.gov* and any brochure supplement the firm provides. If the adviser maintains its current Form ADV on a public website, it would have had to state the website address. If the adviser had no such website, a link to *adviserinfo.sec.gov* would have had to be provided as well as a toll-free telephone number where retail investors could request up-to-date information. *See* Proposed Item 7.E.2. of Form CRS.

[598] *See supra* footnotes 76–83 and accompanying text.

[599] *See* Item 1.A. of Form CRS. As discussed above, we are requiring firms to include the reference to *Investor.gov/CRS* in the Introduction in part to highlight to retail investors the ability to research firms and financial professionals as well as the ability to review educational materials at the website. *See supra* Section II.B.1.

[600] *See supra* footnote 568–569 and accompanying text; *see also* Philadelphia Roundtable (confusion regarding the difference between FINRA and the Commission as well as a statement that there are "too many websites" in the Additional Information section).

[601] *See supra* Section II.A.3.

[602] The proposal included the following instruction in the Additional Information section: "To report a problem to the SEC, visit *Investor.gov* or call the SEC's toll-free investor assistance line at (800) 732–0330. [To report a problem to FINRA, [ ].] If you have a problem with your investments, investment account or a financial professional, contact us in writing at [insert your primary business address]." If you are a broker-dealer or *dual registrant*, include the bracketed language. It is your responsibility to review the current

Continued

commenters supported including information on how retail investors could report complaints,[603] others disagreed with this approach[604] or suggested that it may not be information that is as critical at the beginning of a relationship.[605] Commenters submitting their own mock-ups of the relationship summary likewise took different approaches as to whether or not to include this information.[606]

We are requiring a conversation starter in this part of the relationship summary, which incorporates and adapts a key question from the proposal: "Who is my primary contact person? Is he or she a representative of an investment adviser or a broker-dealer? Who can I talk to if I have concerns about how this person is treating me?" [607] With required text features to highlight this conversation starter, as well as information from the Introduction to direct retail investors to *Investor.gov/CRS,* we believe that retail investors will be able to find information on who to contact and how to report a complaint to the firm at the appropriate time, and *Investor.gov* includes links to submit questions and complaints to the Commission. In light of the mixed feedback from commenters and the changes to the form designed to enhance flexibility and usability, we are not requiring firms to include more detailed information about submitting complaints, as proposed, to enable the disclosures in the relationship summary to focus on other information about the firm and its services.

We are also requiring firms to include a telephone number where retail investors can request up-to-date information and request a copy of the relationship summary.[608] This differs from the proposal, which required only those firms that do not have a public website to include a toll-free number that retail investors may call to request documents.[609] Some of the commenter mock-ups included a telephone number even though the firms maintained a public website.[610] A commenter who recommended including a contact telephone number in the relationship summary did not specify that it must be toll-free and we received a mock-up with a placeholder for a telephone number that was not specifically toll-free.[611]

After consideration of these comments and mock-ups, we determined that all firms should include a telephone number in the relationship summary. We continue to believe it is important for retail investors to have firm contact information in the event that they would like to request disclosures and there is no public website for that firm that the investor may easily access. In addition, we anticipate that requiring all firms to include a telephone number will more readily accommodate retail investors who prefer communicating with firms over the phone and will facilitate their requests for up-to-date information and a copy of the relationship summary. If firms do not already have a toll-free telephone number, they will not be required to obtain one to comply with the requirements of the relationship summary. Firms will have the flexibility to decide whether or not the telephone number they provide in their relationship summary will be toll-free.

6. Proposed Items Omitted in Final Instructions

The proposal included two sections that we are not adopting as separate sections in the relationship summary.[612] As discussed above, the relationship summary will not include a separate section for "Key Questions to Ask;" instead, the topics covered by the proposed key questions will be integrated throughout the relationship summary as headings to items or as "conversation starters." [613]

The relationship summary will also not include the Comparisons section for investment advisers and broker-dealers, as proposed. Standalone broker-dealers would have been required to include the following information, using prescribed wording, about a generalized retail investment adviser: (i) The principal type of fees; (ii) services investment advisers generally provide; (iii) the applicable legal standard of conduct; and (iv) certain incentives based on an investment adviser's asset-based fee structure. For standalone investment advisers, this section would have required them to include parallel categories of information regarding broker-dealers.[614]

Many commenters opposed including discussions comparing investment advisers and broker-dealers. Some commenters stated that it was inappropriate for the Commission to require firms to describe products and services that they do not offer and about which they may have limited or no expertise.[615] Other commenters had concerns with the prescribed wording, which they said may increase investor confusion or be misleading with prescribed wording that would not reflect the likely relationship that an investor would have with a specific firm.[616] Some commenters believed that the wording in the comparison section

telephone numbers for the SEC and FINRA no less often than annually and update as necessary." Proposed Item 7.D. of Form CRS.

[603] *See, e.g.,* NASAA Letter (suggesting that the Additional Information section be recast as "Disciplinary History and Customer Rights and Remedies" and include, among other things, a discussion of the legal rights and the remedies available to customers in the event of breach (including whether the customer will be subject to mandatory arbitration) and contact information for regulators where investors may file complaints or ask questions about disciplinary history); *see also* Philadelphia Roundtable (investor expressing that she would like to know where to file a complaint, but not realizing that the desired information was on the proposed relationship summary).

[604] *See* Wells Fargo Letter ("We also don't agree that Form CRS needs to get into details on how an investor can report a problem. Such a disclosure is outside of the overall purpose of the summary and will detract from both the readability and length of the document.").

[605] *See* Trailhead Consulting Letter ("[T]his document is encouraged or required to be delivered prior to entering into a relationship or transaction, so hopefully problems have yet to occur. The account statements or investment adviser reports should include statements informing investors how to report a problem."). *But see* Cetera Letter II (Woelfel) (86% of survey respondents strongly or somewhat agreed that "how to report a problem with your investments" was an important topic to be discussed in the relationship summary and 84% of survey respondents strongly or somewhat agreed that "how to report a problem with a financial professional" was an important topic; within a range of 88% to 81% of ratings for 9 different topics).

[606] *Compare, e.g.,* LPL Financial Letter (including hyperlinks to BrokerCheck and IAPD in part "to report a problem" in mock-up) and IAA Letter I (no reference to problems or reporting complaints in mock-up).

[607] Item 5.C. of Form CRS. In comparison, the analogous proposed key question was "Who is the primary contact person for my account, and is he or she a representative of an investment adviser or a broker-dealer? What can you tell me about his or her legal obligations to me? If I have concerns about how this person is treating me, who can I talk to?" Proposed Item 8.10 of Form CRS.

[608] Item 5.B. of Form CRS.

[609] *See* Proposed General Instruction 8.(a) to Form CRS.

[610] *See, e.g.,* Fidelity Letter (mock-up) and Primerica Letter (mock-up).

[611] *See* IAA Letter I and Primerica Letter (mock-up).

[612] In addition to the reasons discussed below, removing these sections also may help alleviate concerns from commenters that the proposed relationship summary was trying to "do too much." *E.g.,* Schwab Letter I; SIFMA Letter; Comment Letter of UBS Global Wealth Management (Aug. 7, 2018) ("UBS Letter"); *see also* AARP Letter (suggesting that the relationship summary be shortened to avoid "information overload"); CFA Institute Letter I (the proposed relationship summary is "too wordy, lacks design elements that engage the reader, and, in many respects, is too nuanced for the average retail investor who is trying to understand the differences between broker-dealers and investment advisers").

[613] *See supra* Section II.A.4.

[614] *See* Proposed Item 5 of Form CRS.

[615] *See, e.g.,* ACLI Letter.

[616] *See* IAA Letter I (arguing that the wording of the section was "too boilerplate" and would prohibit firms from providing useful information about what the specific investor's relationship would be with a firm).

favored broker-dealers over investment advisers.[617] Others indicated that the comparisons should allow for discussions regarding insurance products.[618] As an alternative, some commenters suggested that the Commission include the information intended for the proposed Comparison section on the Commission's website as educational material,[619] and that firms could link to the educational material from their relationship summaries.[620] Given such concerns and suggestions, a number of mock-ups did not include a comparison section.[621]

Comments on Feedback Forms indicated that this section was less useful than other sections of the relationship summary; fewer commenters rated this section as either "very useful" or "useful" compared to the other sections of the relationship summary.[622] Many narrative comments on Feedback Forms relating to this section (even from those who graded the section as "useful") indicated that these commenters did not find this section informative and wanted more information to help them compare firms.[623] Feedback on this section from the RAND 2018 report and other surveys and studies was limited because the RAND 2018 report, and other surveys and studies, generally focused on the sample proposed dual registrant relationship summary. However, in a survey that focused on the standalone investment adviser relationship summary, most survey respondents indicated that this section was not useful in helping them to understand differences between firms.[624]

We have determined not to require a separate Comparisons section in the relationship summary for broker-dealers and investment advisers that are not dual registrants. In lieu of the separate section with prescribed wording, the final instructions include several requirements that will help facilitate comparisons among firms. First, each relationship summary will be required to provide answers to the same questions in a standard order.[625] Second, dual registrants will be required to provide either a combined relationship summary describing both brokerage and advisory services, presenting the information with equal prominence and in a manner that facilitates comparison of the two types of services or, alternatively, will be required to provide separate relationship summaries that clearly distinguish and facilitate comparison of the firm's brokerage and investment advisory services.[626] Similarly, a firm that has an affiliate providing brokerage or advisory services may choose to prepare a single relationship summary, or two separate relationship summaries, discussing the services provided by both firms, but only if the relationship summary or summaries are designed in a manner that facilitates comparison of the brokerage and investment advisory services.[627]

These changes enhance the relationship summary's usability and design and, we believe, will improve comparisons among firms by retail investors using the relationship summaries. The relationship summaries will have differentiated, firm-specific information in a comparable format as compared to the proposed approach of requiring prescribed and more generalized information. We believe this comparability and differentiation among firm relationship summaries will enhance usability for retail investors. In addition, removing the prescribed wording allows firms to describe their services and fees more accurately while simultaneously mitigating concerns commenters raised regarding potentially misleading or inappropriate prescribed wording. Investors seeking more general information about investment advisers and broker-dealers will know they can refer to educational materials that are available on the Commission's website, *Investor.gov,* and elsewhere for investor research and education, including *Investor.gov/CRS,* which the relationship summary's Introduction must reference.[628]

C. Filing, Delivery, and Updating Requirements

We are adopting the filing, delivery, and updating requirements with several modifications from the proposal. Firms will file copies of their relationship summaries with the Commission, will update the disclosures when the information becomes materially inaccurate, and will communicate any changes to retail investors who are existing clients or customers. The delivery requirements are designed to ensure a relationship summary is provided before or at the time a retail investor enters into a relationship with the firm and when changes are made to the services the firm provides.

We made several modifications to the proposed requirements in response to comments, in order to make it easier for retail investors to discern changes in updated relationship summaries, streamline the filing requirements, and provide greater clarity regarding several of the delivery requirements. As described further below, some of the key revisions include:

• *Broker-Dealer Initial Delivery Obligations.* Broker-dealers will be required to deliver the relationship summary before or at the earliest of: (i) A recommendation of an account type, a securities transaction, or an investment strategy involving securities; (ii) placing an order for the retail investor; or (iii) the opening of a brokerage account for the retail investor, instead of before or at the time the retail investor first engages the broker-dealer's services, as proposed. We encourage delivery of the relationship summary to new or prospective clients or customers at the first possible opportunity, including the initial point of contact.

• *Other Delivery Obligations.* Firms will deliver the relationship summary to existing retail investor clients and customers before or at the time firms open a new account that is different

[617] *See* CFA Letter I (arguing that "there are a number of statements . . . that many, if not most, advisers would likely object to" in the prescribed wording); IAA Letter I.

[618] *See* New York Life Letter; Northwestern Mutual Letter.

[619] *See* IAA Letter I; Schnase Letter; Pickard Djinis and Pisarri Letter.

[620] *See, e.g.,* SIFMA Letter; Schwab Letter I.

[621] *See, e.g.,* IAA Letter I; SIFMA Letter; Schwab Letter I. Other mock-ups included a "first level" disclosure that involved generalized comparisons between investment advisers and broker-dealers, with the relationship summary including firm-specific information. *See* LPL Financial Letter; Primerica Letter.

[622] Twenty-nine commenters (about 30%) on Feedback Forms rated the comparison section as "Very Useful"; 39 (about 40%) rated it as "Useful"; 17 (almost 20%) responded that they did not find this section useful or were unsure. *See* Feedback Forms Comment Summary (responses to Question 2(d), *supra* footnote 11).

[623] *See, e.g.,* Anonymous07 Feedback Form ("Any example of how you use either or both for achieving goals"); Anonymous13 Feedback Form (". . . list what is the same for both, as much is, then only list differences in separate columns. What I really want is what's the differences"); Brantley Feedback Form ("when is it best to use each type of account—maybe some examples"); Coleman Feedback Form (". . . a word that suggests when one type of relationship would be more beneficial"); Hawkins Feedback Form ("There are so many different account types and investment options. More information needed"); Murphy Feedback Form ("Too complicated to follow"); Schreiner Feedback Form ("highlight differences").

[624] *See* Betterment Letter I (Hotspex), *supra* footnote 18 (only 23% of survey respondents indicated that the disclosure on a version of the sample proposed standalone adviser relationship summary helped them to understand how other investment firms differed from Betterment).

[625] *See supra* Section II.A.2.

[626] *See supra* Section II.A.5. Additionally, and as noted above, firms that prepare two separate relationship summaries must deliver both relationship summaries to each retail investor with equal prominence and at the same time, without regard to whether the particular retail investor qualifies for those retail services or accounts. *See id.; see also* General Instruction 5.A. to Form CRS.

[627] *See* General Instruction 5.B.(i) to Form CRS.

[628] *See* Item 1.B. of Form CRS.

from the retail investor's existing account, as was proposed. In addition, firms will deliver the relationship summary when they recommend that the retail investor roll over assets from a retirement account, or when they recommend or provide a new service or investment outside of a formal account (*e.g.*, variable annuities or a first-time purchase of a direct-sold mutual fund through a "check and application" process). In response to commenters' concerns, these changes are intended to replace the proposed instruction that firms deliver the relationship summary when making changes to an existing account that would "materially change the nature and scope" of the firm's relationship with the retail investor with more concrete delivery triggers.

• *Highlighting Changes.* In a change from the proposal, we are adding a requirement that firms delivering updated relationship summaries to existing clients or customers also highlight the most recent changes by, for example, marking the revised text or including a summary of material changes. This additional disclosure must be filed as an exhibit to the unmarked amended relationship summary (but would not be counted toward the two-page or four-page limit, as applicable).

• *New Filing Requirements.* As proposed, we are requiring that firms file the relationship summary using a text-searchable format. However, in response to comments received, we are also requiring that the filings contain machine-readable headings to enhance the ability to compare information submitted by different firms. Also in response to comments, which we solicited on this topic, we are changing the system that broker-dealers will use to file Form CRS from EDGAR, as proposed, to Web CRD®. Dual registrants will be required to file their relationship summaries using both IARD and Web CRD®.

Finally, we are revising the definition of retail investor to align more closely with the definition of "retail customer" in Regulation Best Interest. As discussed, below, we do not believe that this results in substantive changes in the definition as proposed.

1. Definition of Retail Investor

For purposes of Form CRS, "retail investor" is defined as "a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes." [629] The proposal defined the term retail investor as "a prospective or existing client or customer who is a natural person (an individual), including trusts or other similar entities that represent natural persons, even if another person is a trustee or managing agent." This definition was different from the definition of "retail customer" in proposed Regulation Best Interest [630] because the relationship summary was intended for an earlier stage of the relationship between an investor and a financial professional, and we thought it would be beneficial for all natural persons to receive information to facilitate their account choices.[631]

Many commenters recommended that we use a single definition for both "retail investor" and "retail customer" because consistent definitions would facilitate compliance and administrative efficiency.[632] Commenters were concerned that differences between the definitions could result in a requirement to deliver the relationship summary to broker-dealer customers who may not be "retail customers" for purposes of Regulation Best Interest.[633] Many commenters further recommended that the definitions of "retail investor" and "retail customer" should both be conformed to rules issued by FINRA, which use a net worth test to distinguish institutional and "retail" customers.[634] Commenters also asked us to clarify that the relationship summary need not be delivered to certain professionals retained to represent a natural person [635] and address whether participants in workplace retirement plans will be retail investors who should receive the relationship summary.[636]

In response to comments, the final instructions adopt a definition of retail investor that is consistent with the definition of retail customer in Regulation Best Interest, but differs to reflect differences between the relationship summary delivery requirement and the obligations of broker-dealers under Regulation Best Interest, including that the relationship summary is required whether or not there is a recommendation and covers any prospective and existing clients and customers (*i.e.*, a person who "seeks to receive or receives services") of investment advisers as well as broker-dealers.[637] Specifically, under Regulation Best Interest, retail customer will be defined as "a natural person, or the legal representative of such natural 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." [638] Like the definition of retail customer in Regulation Best Interest, the definition of retail investor in the final instructions includes natural persons [639] who seek to receive or receive services "primarily for personal, family or household purposes" and the "legal representatives of such natural persons." In addition, we provide an interpretation on who would be considered to be a "legal representative" for purposes of this definition.

The proposed definition of retail investor did not include the phrase "personal, family or household purposes." No commenters addressed whether or not to include this phrase in the Form CRS definition of retail investor, other than commenting

[629] General Instruction 11.E. to Form CRS.

[630] *Compare* Proposed Exchange Act rule 15*l*–1(b)(1) (defining retail customer to mean "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.").

[631] Proposing Release, *supra* footnote 5, at Section II, at n.29.

[632] *See* Committee of Annuity Insurers Letter ("a standardized definition . . . would be more efficient and enable firms to more easily comply"); ICI Letter ("a single definition . . . would provide important administrative efficiencies, facilitate compliance, and avoid confusion"); *see also* Bank of America Letter; CFA Letter I; Cetera Letter I; Fidelity Letter; Comment Letter of Franklin Resources, Inc. (Aug. 6, 2018); Invesco Letter; Comment Letter of Morgan Stanley Smith Barney, LLC (Aug. 7, 2018) ("Morgan Stanley Letter"); Oppenheimer Letter; Comment Letter of Raymond James Financial (Aug. 7, 2018) ("Raymond James Letter"); SIFMA Letter; TIAA Letter; Transamerica Letter.

[633] *See, e.g.*, SIFMA Letter; TIAA Letter.

[634] *See, e.g.*, SIFMA Letter (referring to FINRA Rule 2210); Cetera Letter I; Investacorp Letter; Morgan Stanley Letter; TIAA Letter; UBS Letter; Wells Fargo Letter.

[635] *E.g.*, Comment Letter of the American Bankers Association (Aug. 7, 2018) ("American Bankers Association Letter"); IAA Letter I; ICI Letter; Oppenheimer Letter; Prudential Letter; T. Rowe Letter; Wells Fargo Letter.

[636] *E.g.*, Comment Letter of Empower Retirement (Aug. 2, 2018) ("Empower Retirement Letter"); Fidelity Letter; Comment Letter of Groom Law Group (Aug. 7, 2018) ("Groom Law Letter"); IAA Letter I; ICI Letter; IRI Letter; Invesco Letter; Comment Letter of the National Association of Government Defined Contribution Plans (Aug. 7, 2018) ("NAGDA Letter"); Oppenheimer Letter; Comment Letter of SPARK Institute, Inc. (Aug. 7, 2018) ("SPARK Letter"); T. Rowe Letter.

[637] *See* Regulation Best Interest Release, *supra* footnote 47, at Section II.B.3.c.

[638] Exchange Act Rule 15*l*–1(b)(1).

[639] The proposed definition used the language "a natural person (an individual)." While the final definition excludes the parenthetical reference to "an individual," we do not intend any substantive change because a reference to a natural person typically includes any individual.

generally that they supported conforming both definitions. Commenters did comment and request clarification of this aspect of the definition of "retail customer" in Regulation Best Interest.[640]

We believe the final definition of retail investor remains consistent with our objective to provide all natural persons with information to facilitate their understanding of their choices among firms and types of accounts. Firms will be required to deliver the relationship summary to individuals seeking brokerage and investment advisory services in connection with any of the many different reasons that an individual may seek these services, including, for example, retirement, education and other personal, family or household saving and investing objectives. The final definition of retail investor will exclude natural persons seeking these services for commercial or business purposes, such as, for example, where an employee seeks services for an employer or an individual seeks services for a small business or on behalf of another non-natural person entity such as a charitable trust. However, firms must deliver the relationship summary to natural persons who might be seeking services for a mix of personal and commercial or other non-personal purposes, such as a sole proprietor or small business owner who may engage a firm or financial professional for multiple accounts and for personal as well as business purposes. Where firms do not know whether a natural person is seeking services for something other than personal, family, or household purposes at the beginning of a relationship, they may treat that natural person as a retail investor for purposes of delivery of the relationship summary.[641]

As in the proposal, the final retail investor definition will capture natural persons without any distinction based on net worth. While a number of commenters argued that firms should not be required to deliver a relationship summary to investors that meet certain asset or net worth thresholds,[642] others opposed narrowing the definition based on a net worth test or other test.[643] We continue to believe that the retail investor definition should not distinguish based on a net worth or other asset threshold test and that all individual investors would benefit from clear and succinct disclosure regarding key aspects of available brokerage and advisory relationships. As noted in the proposal, section 913 of the Dodd-Frank Act defines "retail customer" to include natural persons and legal representatives of natural persons without distinction based on assets or net worth.[644] Further, we believe that it also may be impractical to include a net worth or other test based on asset thresholds in the definition because it could be difficult for firms to determine a retail investor's net worth at the outset of the relationship when the relationship summary must be provided.

To conform definitions, the final definition of retail investor substitutes the language "the legal representative of such natural person" for language in the proposal referring to "a trust or other similar entity that represents natural persons, even if another person is a trustee or managing agent of the trust."[645] We believe this is a clarification and not a substantive change from the proposal because it retains coverage of trusts and other similar legal entities that represent natural persons, and the proposal contemplated that certain legal representatives, *e.g.*, a trustee or managing agent, would receive a relationship summary on behalf of a trust or other similar legal entity. Further, we clarify that we interpret a "legal representative" of a natural person to cover only non-professional legal representatives (*e.g.*, a non-professional trustee that represents the assets of a natural person and similar representatives such as executors, conservators, and persons holding a power of attorney for a natural person).[646] In referring to non-professional legal representatives, we intend to capture persons who are acting on behalf of natural persons and are not regulated financial services professionals retained by natural persons to exercise independent professional judgment. This responds to those commenters who argued that it should not be necessary to provide a relationship summary to regulated professionals in the financial services industry, such as registered investment advisers and broker-dealers, corporate fiduciaries (*e.g.*, banks, trust companies and similar financial institutions) and insurance companies, and the employees or other representatives of such advisers, broker-dealers, corporate fiduciaries and insurance companies.[647] Accordingly, non-professional legal representatives would not include such regulated financial services professionals. We agree with these commenters that delivery of the relationship summary to such regulated financial services professionals retained by natural persons to exercise independent judgment will not further our objective of facilitating retail investors' understanding of their account choices.[648] Importantly, however, this will not relieve firms or financial professionals retained to represent the assets of natural persons from their own obligations to deliver the relationship summary to clients or customers who are retail investors.

Commenters offered varying points of view about whether participants of workplace retirement plans should be treated as retail investors who receive the relationship summary. Some recommended that the definition of retail investor should include plan participants.[649] Others argued against

[640] *See* Regulation Best Interest Release, *supra* footnote 47, at Section II.B.3a (describing comments).

[641] As explained in Regulation Best Interest Release, *supra* footnote 47, at Section II.B.3a, we interpret "personal, family or household purposes" as used in the definition of retail customer to mean *any* recommendation to a natural person for his or her account, and we believe that, pursuant to the Care Obligation of Regulation Best Interest, broker-dealers are able to obtain sufficient facts to determine the purpose for which a recommendation will be used.

[642] For example, SIFMA's comments refer to FINRA Rule 2210, which treats accounts of natural persons with $50 million or more in assets as institutional investors; SIFMA explains that these investors are "among the wealthiest and most sophisticated customers and often have multiple professional fiduciaries and advisers, apart from their broker-dealer relationships" and "do not function as 'retail customers' "; *see also* Cetera Letter I; Investacorp Letter; Morgan Stanley Letter; TIAA Letter; UBS Letter; Wells Fargo Letter. Other commenters suggested different tests of financial sophistication, *e.g.*, Advisers Act Rule 205–3 definition of "qualified clients" (a $2 million net worth test), *see* Comment Letter of American Investment Council (Aug. 7, 2018) ("American Investment Council Letter"); Comment Letter of Loan Syndications and Trading Association (Aug. 7, 2018); Comment Letter of the Managed Funds Association Alternative Investment Management Association (Aug. 7, 2018); or the section 2(a)(51) of the Investment Company Act definition of "qualified purchaser" ($5 million net worth test). *See* Fidelity Letter; Pickard Djinis and Pisarri Letter.

[643] *See, e.g.*, Morningstar Letter ("any unequal distribution of this information would be arbitrary"); *see also* AARP Letter; CFA Letter I; Trailhead Consulting Letter.

[644] Proposing Release, *supra* footnote 5, at Section II, at text accompanying nn.31–32.

[645] General Instruction 11.E. to Form CRS.

[646] *See* ICI Letter (recommending that the Commission "make explicit in the definition of 'retail investor' that a 'legal representative' of a natural person "means an executor, conservator, or a person holding a durable power of attorney for a natural person").

[647] *See, e.g.*, American Bankers Association Letter; Bank of America Letter; IAA Letter I; Invesco Letter; ICI Letter; Oppenheimer Letter; Prudential Letter; T. Rowe Letter.

[648] *See, e.g.*, American Bankers Association Letter; Bank of America Letter; IAA Letter I; Invesco Letter; ICI Letter; Oppenheimer Letter; Prudential Letter; T. Rowe Letter.

[649] *See* ICI Letter; Invesco Letter; Oppenheimer Letter; Trailhead Consulting Letter; *see also* IRI

Continued

delivering a relationship summary to plan participants, explaining that a relationship summary would confuse participants and would duplicate other required disclosures.[650] Several commenters suggested that only plan participants that choose to retain a firm or financial professional in connection with assets in his or her plan account should receive a relationship summary.[651] Commenters also asked us to clarify whether the definition of retail investor would include participants in plans not subject to ERISA, such as governmental or other non-ERISA workplace retirement plans meeting requirements under section 403(b) or 457 of the Internal Revenue Code of 1986, as amended ("Internal Revenue Code" or "Code"), and individual retirement accounts ("IRAs") (including SEPs and SIMPLE IRAs).[652]

In response to comments, we are clarifying that the relationship summary applies when retail investors seek services for their retirement accounts as well as non-retirement accounts because retirement savings is a personal, household or family purpose. Accordingly, the definition of retail investor will include a natural person seeking to select and retain a firm to provide brokerage or advisory services for his or her own retirement account, including but not limited to IRAs and individual accounts in workplace retirement plans, such as 401(k) plans and other tax-favored retirement plans.[653] For example, firms will be required to deliver a relationship summary to plan participants seeking advice about whether to take a distribution from a 401(k) plan or other workplace retirement plan and how to invest that distribution. Similarly, a firm will be required to deliver a relationship summary to a plan participant seeking to retain the firm to provide brokerage or advisory services for the participant's individual account held in a 401(k) plan or other workplace retirement plan.[654]

However, participants in 401(k) plans and other workplace retirement plans will not be retail investors for purposes of the Form CRS delivery obligation when making certain ordinary plan elections that do not involve selecting or retaining a firm to provide brokerage or advisory services. We understand, for example, that participants in workplace retirement plans generally do not choose the firm that provides brokerage or advisory services in connection with certain ordinary plan elections, such as whether to enroll in the plan, make or increase plan contributions, or how to allocate contributions and plan account balances among a designated menu of plan investment options. We designed the relationship summary to assist investors in understanding their choices when they seek to engage a firm to provide brokerage and advisory services. Even if a financial professional or other firm representative assists a participant directly, *e.g.,* at an enrollment meeting or through a call center interaction, the participant generally would not be making the type of account or firm choice contemplated by a relationship summary because the plan's sponsor or another representative designated by the terms of the plan (*e.g.,* a trustee or other fiduciary or other responsible party) (a "plan representative") already has selected the firm, has negotiated the terms of service, and remains responsible for supervising the firm.[655] We agree with commenters that delivering a relationship summary under these circumstances could be confusing to participants and duplicative of already required disclosures. Accordingly, plan participants should not be viewed as "seeking or receiving services" for purposes of the Form CRS definition of retail investor when they are merely electing among plan features offered by firms and financial professionals retained and supervised by a plan representative. This includes a participant's decision to invest his or her account balance through an in-plan self-directed brokerage account option or to select an in-plan managed account service option, where a plan representative retains and supervises the broker-dealer or investment advisory firm providing such services to the plan.

Finally, commenters asked us to address whether workplace retirement plans and their representatives (*e.g.,* plan sponsors, trustees, and other fiduciaries) and service providers will be retail investors entitled to receive Form CRS. In the proposal, we excluded workplace retirement plans and their representatives from the definition of retail investor.[656] Most commenters agreed with this approach; some noting that workplace retirement plans and their representatives would not benefit from receiving a Form CRS.[657] Two

Letter (permit delivery of Form CRS using media approved by the plan sponsor).

[650] *See* Empower Retirement Letter (noting that plans covered by ERISA "have named fiduciaries responsible for ensuring each plan is operated in the best interest of plan participants . . . [and who] are already obligated pursuant to ERISA § 404a–5 to provide participants with detailed disclosures related to those investment choices."); Groom Law Letter (noting that "the decision to engage a broker-dealer for purposes of providing services to the plan is made at the plan sponsor level and not at the participant level); Comment Letter of Principal Financial Group (Aug. 7, 2018) ("Principal Letter").

[651] *See* T. Rowe Letter (noting that Form CRS should apply "if an individual chooses to retain a broker-dealer or advisor to provide recommendations or management regarding his or her retirement plan accounts . . . [but] "if a plan fiduciary selects a broker-dealer or adviser to provide such services to its plan participants . . . we do not think Form CRS should apply); Prudential Letter; SPARK Letter.

[652] *See* ICI Letter; Invesco Letter; Oppenheimer Letter; T. Rowe Letter.

[653] Such IRAs include, for example, individual retirement accounts and individual retirement annuities described by section 408(a) and (b) of the Internal Revenue Code, "simplified employee pensions" (or (SEPs) described by section 408(k) of the Code, and simple retirement accounts described by section 408(p) of the Code (SIMPLE IRAs). In response to commenters, we also clarify that workplace retirement plans include any arrangement available at a workplace that provides retirement benefits or allows saving for retirement, including, for example, any 401(k) plan or other plan that meets requirements for qualification under Code section 401(a), deferred compensation plans of state and local governments and tax-exempt organizations described by Code section 457, and annuity contracts and custodial accounts described by Code section 403(b). Likewise, the definition of retail investor includes natural persons seeking brokerage or advisory services for other tax-favored savings arrangements such as an Archer Medical Savings Account described by Code section 220(d), a Health Savings Accounts described by Internal Revenue Code section 223(d) and any similar tax-favored health plan saving arrangement, a Coverdell education savings account described by Code section 530 and a qualified tuition program or "529 plan" established pursuant to Code section 529.

[654] For example, we understand that, although not common, some 401(k) plans and other individual account plans provide participants total discretion to choose an investment adviser or broker-dealer to provide services for their individual plan account. *See, e.g.,* 29 CFR 2550.404c–1(f), Example 9.

[655] This approach differs from our approach to defining retail customer for purposes of Regulation Best Interest to recognize differences between the relationship summary requirement and the obligations of broker-dealers under Regulation Best Interest. As discussed in the Regulation Best Interest Release, *supra* footnote 47, at Section II.B.3.a, a participant receiving recommendations for the participant's individual account held in a 401(k) or other workplace retirement plan would be a retail customer for purposes of Regulation Best Interest.

[656] Proposing Release, *supra* footnote 5, at Section II.

[657] *See* IAA Letter I ("Institutional trusts such as employee benefit or pension plans . . . would not benefit from a Form CRS"); T. Rowe Letter (". . . where a plan fiduciary selects a broker-dealer or adviser to provide such services to its plan participants . . . we do not think Form CRS should apply. ERISA and governmental plans are already subject to extensive disclosures to participants and rules related to conflicts. Consequently, a Form CRS in this context would be duplicative of existing disclosures and cause potential confusion, without providing any additional benefits"); *see also* Comment Letter of the American Retirement Association (Aug. 3, 2018) (professional investment experts retained by a plan to perform investment advisory services in a fiduciary capacity should not be included); Fidelity Letter ("establish a uniform definition . . . [that] excludes ERISA and non-ERISA employer sponsored retirement plans regardless of size, as well as their sponsors, trustees and advisers . . ."); ICI Letter (a retail investor should not include retirement plans, their sponsors or trustees or plan fiduciaries); NAGDA Letter

commenters argued that workplace retirement plans and their representatives should receive Form CRS.[658]

We understand that plan representatives of workplace retirement plans typically are not seeking or receiving services primarily for personal, family or household purposes when they consider whether to engage a broker-dealer or investment adviser to provide services to a retirement plan established, maintained and operated by an employer to provide pension or retirement savings benefits to employees. Further, the relationship summary—designed to provide succinct information relevant to individual retail investors—is not designed to facilitate account and firm choices by the representatives of these workplace retirement plans. In this regard, we understand that plan representatives typically seek brokerage and advisory services bundled together with, or that will be complimentary with, other services supporting the plan's establishment, maintenance and operation, such as plan design, recordkeeping and other administrative services, and compliance services to meet applicable requirements under the Internal Revenue Code and ERISA (or applicable state law for non-ERISA governmental plans).[659]

Accordingly, the final definition of retail investor does not include most workplace retirement plans or their plan representatives seeking services for a plan established, maintained and operated by an employer to provide pension or retirement savings benefits to employees, because such plans and their representatives are not seeking services primarily for personal, family or household purposes. We note, however, that some plan representatives may participate under their employer's workplace plan, *e.g.*, in the case of a workplace IRA or other workplace retirement plan is established and maintained by a sole proprietor or other self-employed individual that includes one or more employees in addition to the plan representative. If a plan representative who decides the services arrangements for a workplace retirement plan is a sole proprietor or other self-employed individual who will participate in the plan, the plan representative also would be a retail investor seeking services for personal, family or household purposes and must receive a copy of the firm's relationship summary.[660]

2. Filing Requirements

As proposed, all broker-dealers and investment advisers will file their relationship summaries with the Commission, and the relationship summaries will be accessible via the Commission's public website, *Investor.gov*,[661] in addition to each firm's website. There are several reasons we are requiring the relationship summaries to be filed with the Commission. First, the public will benefit by being able to access any firm's relationship summary by using one website, *Investor.gov*. This should make it easier to make comparisons across firms. Second, some firms may not maintain a website, and therefore their relationship summaries will not otherwise be accessible to the public. Third, by having firms file their relationship summaries with the Commission, Commission staff can more easily monitor the filings for compliance. Commenters generally supported requiring broker-dealers and investment advisers to file their relationship summaries with the Commission.[662]

We are requiring that the filing be in a text-searchable format, as proposed, and in addition, the final instructions will require that the filing be structured with machine-readable headings. Two commenters advocated that the relationship summary should be filed not only in a text-searchable, but also machine-readable, format,[663] in response to our solicitation for comment on filing formats. Both commenters stated that this would allow third parties to develop online comparison tools, making it easier for retail investors to compare firms with one another, including across key categories, such as fees.[664] We agree that requiring this formatting will enable investors and other data users, industry participants, and the Commission and Commission staff to better collect and analyze reported information and facilitate the development of tools to aggregate and compare the information. We are requiring that only the headings be machine-readable, given that firms will use their own wording in the narrative responses for each of the relationship summary items, and the responses will not be uniform. The machine-readable, structured headings could, for example, be implemented in PDF by creating a bookmark for each of the headings of the relationship summary that matches the text of the heading and that has the heading as its destination. We believe this promotes aggregation and comparison of responses to specific items across different relationship summaries but also limits the costs of preparing the relationship summary. This is consistent with the Commission's ongoing efforts to modernize our forms by taking advantage of technological advances both in the manner in which information is reported to the Commission and how it is provided to investors and other users.[665] These

(requesting clarification); Prudential Letter ("'retail investor' for purposes of Form CRS should not include retirement plan representatives"); Transamerica Letter (same).

[658] *See* Comment Letter of Fisher Investments (Dec. 13, 2018) ("many individuals overseeing retirement plans . . . would benefit from a better understanding of concepts in proposed Form CRS"); Trailhead Consulting Letter.

[659] *See, e.g.*, Groom Law Letter (describing business models of firms offering brokerage and advice services to plans together with other services); SPARK Letter (same).

[660] This is consistent with the final definition of retail customer for purposes of Regulation Best Interest, which to the extent that the plan representative who decides services arrangements is a sole proprietor or other self-employed individual who will participate in the plan, the plan representative will be a retail customer for purposes of Regulation Best Interest to the extent that the plan representative receives recommendations directly from a broker-dealer primarily for personal, family or household purposes. *See* Regulation Best Interest Release, *supra* footnote 47, at Section II.B.3a.

[661] For broker-dealers, relationship summaries will be filed through Web CRD®, and for investment advisers, relationship summaries will be filed through IARD. Investors will be able to access relationship summaries using BrokerCheck and IAPD, the public interfaces of Web CRD® and IARD, respectively, and through the Commission's *Investor.gov* website, which has a search tool that links to both BrokerCheck and IAPD.

[662] *See, e.g.*, CFA Letter I; Schnase Letter; Trailhead Consulting Letter; Institute for Portfolio Alternatives Letter.

[663] *See* CFA Letter I ("[P]ast experience regarding investors' limited use of existing databases, such as IARD and BrokerCheck, cautions against placing too much reliance on investors' accessing the documents directly. We therefore urge the Commission to require that the documents be filed, not just in a text-searchable format, but in a machine-readable format."); Schnase Letter ("[T]he data contained in the Relationship Summary should be required to be filed in a structured data format, so the document can be utilized as a stand-alone human-readable document and serve as the source for a machine-readable data set.").

[664] CFA Letter I ("We can envision a time when third parties could develop online tools to help investors search for a firm or account that meets their preferred parameters, much like the tools Kelly Blue Book or Edmunds provide to help car buyers narrow their selections."); Schnase Letter ("Retail investors may not be able or inclined to build their own algorithms and spreadsheets to manipulate machine-readable data themselves, but third-party providers will likely step in when demand exists to provide investors publicly accessible comparison tools fueled by the machine-readable data made available by the SEC.").

[665] *See, e.g.*, Inline XBRL Filing of Tagged Data, Advisers Act Release No. 10514 (Jun. 28, 2018) [83 FR 40846] (Aug. 16, 2018); Optional internet Availability of Investment Company Shareholder Reports, Investment Company Act Release No. 33115 (Jun. 5, 2018) [83 FR 29158] (Jun. 22, 2018)

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instructions are not intended to require firms to prepare a relationship summary in paper format. A firm that prepares and delivers a relationship summary only in an electronic format could, for example, file a rendering of the electronic disclosures with the Commission.

In a change from the proposal, broker-dealers will file through Web CRD® instead of EDGAR. Investment advisers will file their relationship summaries through IARD in the same manner as they currently file Form ADV Parts 1A and 2A, as proposed.[666] Whether dual registrants prepare a single relationship summary or two, they will file their relationship summaries using both IARD and Web CRD®.[667] We are requiring filing of the relationship summary through Web CRD® and IARD because they are currently used by and familiar to broker-dealers and investment advisers, respectively. This should minimize the systems changes firms would need to make, because they would not need to establish new systems in order to file their relationship summaries with the Commission. One commenter supported using EDGAR for analyzing and comparing fee information.[668] Several commenters, however, generally preferred Web CRD®, arguing that Web CRD® is more accessible for broker-dealers, which already make filings through Web CRD®, and that Web CRD® data provided on BrokerCheck is more familiar to retail investors.[669] In light of comments, we have determined that requiring broker-dealers to file their relationship summaries through Web CRD® should streamline broker-dealer filing requirements relative to requiring broker-dealers to file on EDGAR. Broker-dealers already use Web CRD® for filing their own registration records and those of their associated persons, and retail investors already can find broker-dealers' disciplinary history and other information on BrokerCheck. In addition, *Investor.gov* already has a prominent search tool on its main landing page that links to BrokerCheck and IAPD, which investors can use to search for information about firms and financial professionals. This minimizes the implementation changes needed to make relationship summaries easily accessible through *Investor.gov* because new search tools would not need to be created and existing search tools could be linked to the *Investor.gov/CRS* web page referenced in the relationship summary.

We also received comment that dual registrants should file only on one system, instead of on both EDGAR and IARD as proposed.[670] One commenter, however, implicitly supported the requirement that dual registrants file on two systems.[671] The final instructions require dual registrants to file their relationship summaries using both systems—Web CRD® and IARD.[672] This approach ensures a complete and consistent filing record for each firm and facilitates the Commission's data analysis, examinations, and other regulatory efforts. Firms offering brokerage or investment advisory services through affiliates will follow the same filing requirements as standalone firms.

For investment advisers, we are also adopting clarifications in the General Instructions to Form ADV that relate to the amending and filing of the relationship summary.[673] First, investment advisers may file an amended relationship summary as an other-than-annual amendment or by including the relationship summary as part of an annual updating amendment, within the 30 days in which they are required to file the amendment.[674] Second, the instructions provide that advisers may, but are not required to, submit amended versions of their relationship summary as part of their annual updating amendment and include additional technical references to implement this instruction.[675] Third, we added provisions to mirror the requirements of the General Instructions to Form CRS as to when amendments and exhibits showing changes to Part 3 must be made and filed.[676] We believe that investment advisers will benefit from these clarifications. Finally, we are adopting certain amendments to the General Instructions to Form ADV to add conforming technical changes and references to the Form ADV, Part 3.[677]

3. Delivery Requirements

a. Form of Delivery

The final instructions provide, as proposed, that firms will be able to deliver the relationship summary (including updates) within the framework of the Commission's existing guidance regarding electronic delivery.[678] This framework consists of

("Shareholder Reports Release"); Investment Company Reporting Modernization, Investment Company Act Release No. 32314 (Dec. 8, 2017) [82 FR 58731 (Dec. 14, 2017)].

[666] General Instruction 7.A.(i) to Form CRS. Several commenters supported using IARD as the filing system for investment advisers. *See, e.g.*, Trailhead Consulting Letter; Schnase Letter. Investment advisers may instead file a paper copy of the Form ADV with the Commission if they apply for a hardship exemption by filing Form ADV–H.

[667] General Instruction 7.A.(i) to Form CRS. Information for investment advisers on how to file with IARD is available on the SEC's website at *www.sec.gov/iard*. Information for broker-dealers on how to file through Web CRD® is available on FINRA's website at *http://www.finra.org/industry/web-crd/web-crd-system-links*. *See* General Instruction 7.A.(ii) to Form CRS.

[668] *See* Morningstar Letter (advocating for fee information to be filed in a standard table with brief examples "in the EDGAR system in a standardized data format facilitating analysis and comparison").

[669] *See* Schnase Letter ("[I]t is not clear why BDs should be filing their Relationship Summary through a different filing system than IAs (IARD, which is operated by FINRA) and through a different filing system than BDs already use for Form BD (CRD, also operated by FINRA)."); NASAA Letter ("[B]roker-dealers should file Form CRS on the WebCRD platform maintained by FINRA for its BrokerCheck reports (and which is related to IARD)."); Institute for Portfolio Alternatives Letter ("CRD and its public-facing BrokerCheck is a system familiar to both the brokerage industry as well as investors. We believe that CRD/BrokerCheck will address potential investor confusion and streamline broker requirements.").

[670] *See, e.g.*, Prudential Letter ("The Commission should clarify that a single filing [for dual registrants], in either IARD or EDGAR, would constitute compliance with the filing requirement.").

[671] *See* Schwab Letter III (providing sample Form CRS instructions for dual registrants to file on IARD and EDGAR).

[672] General Instruction 7.A.(i) to Form CRS.

[673] *See infra* Section II.C.4 generally for a discussion of amendments to the relationship summary.

[674] *See* amended General Instruction 4 to Form ADV (revised to add the following language: "If you are registered with the SEC, you must amend Part 3 of your Form ADV within 30 days whenever any information in your relationship summary becomes materially inaccurate by filing with the SEC an additional other-than-annual amendment or by including the relationship summary as part of an annual updating amendment."). *Compare* Proposed General Instruction 4 to Form ADV ("You must amend your relationship summary and file your relationship summary amendments in accordance with the Form ADV, Part 3 (Form CRS), General Instructions, 6.").

[675] *See* amended General Instruction 4 to Form ADV (revised with language that investment advisers must update responses to all items "in Part 1A, 1B, 2A and 2B (as applicable)," and "You may, but are not required, to submit amended versions of the *relationship summary* required by Part 3 as part of your *annual updating amendment*.").

[676] *See infra* footnotes 769–774, 781–783, and accompanying text.

[677] *See* amended General Instruction 3 to Form ADV (indicating that Form ADV, as amended to add Part 3, now contains five instead of four parts); amended General Instruction 4 to Form ADV ("Part 3 requires advisers to create a relationship summary (Form CRS) containing information for retail investors. The requirements in Part 3 apply to all investment advisers registered or applying for registration with the SEC, but do not apply to exempt reporting advisers. Every adviser that has retail investors to whom it must deliver a relationship summary must include in the application for registration a relationship summary prepared in accordance with the requirements of Part 3 of Form ADV. See Advisers Act Rule 203–1."); amended General Instruction SEC's Collection of Information section (removing "promptly" to reflect filing requirements for relationship summary changes).

[678] *See* Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples

the following elements: (i) Notice to the investor that information is available electronically; (ii) access to information comparable to that which would have been provided in paper form and that is not so burdensome that the intended recipients cannot effectively access it; and (iii) evidence to show delivery, *i.e.*, reason to believe that electronically delivered information will result in the satisfaction of the delivery requirements under the federal securities laws.[679] In the Proposing Release, we also provided proposed guidance that a firm would be able to deliver the relationship summary to new or prospective clients or customers in a manner that is consistent with how the retail investor requested information about the firm or financial professional, and that this method of initial delivery for the relationship summary would be consistent with the Commission's electronic delivery guidance.[680] We have included this provision in the final instructions to provide additional clarity and certainty on what is permissible for initial delivery of the relationship summary.[681] This approach applies only to the initial delivery of the relationship summary to new or prospective clients or customers, and not to any other delivery obligation of any other required disclosure. With respect to existing clients or customers, as proposed, firms should deliver the relationship summary in a manner consistent with the firm's existing arrangement with that client or customer and with the Commission's electronic delivery guidance. The above delivery instructions are based on the assumption that retail investors are able to access and prefer to receive communications and disclosures through the same medium in which they request information from the firm or financial professional. If this assumption is not correct, retail investors can request a copy of the relationship summary in a format they prefer, as discussed below, and can establish their delivery preferences with the firm once they have entered into a relationship.

Numerous commenters expressed support for electronic delivery, including for modifications to the instructions to make electronic delivery a more accessible option for the relationship summary as well as other disclosures.[682] A number of commenters further advocated for the "notice plus access" model, in which posting the relationship summary to the firm's website, in combination with a notice to the retail investor that the relationship summary is available there, would constitute delivery.[683] Some of these commenters argued that this approach should suffice for delivery, even if the retail investor had not previously consented to electronic delivery in an affirmative way.[684] A few commenters cited to the Commission's recently adopted rule 30e–3 under the Investment Company Act[685] as a possible model for delivering the relationship summary.[686] Some of these commenters also advocated for a more comprehensive updating of the Commission's guidance concerning electronic delivery, not just for the relationship summary but for other disclosures as well.[687] Commenters advocating for more widespread use of electronic delivery cited to arguments including the potential cost savings and improved security of delivery to investors.[688]

On the other hand, some commenters expressed reservations about a notice plus access equals delivery approach and supported the Commission's proposed approach.[689] The RAND 2018 survey and another investor survey also showed mixed results relating to electronic delivery, with many participants indicating that they would prefer to receive the disclosures in paper.[690] Similarly, the IAC has stated that nearly half of investors (49%) still prefer to receive paper disclosures through the mail, compared with only 33% who prefer to receive disclosures electronically, either through email (27%) or by accessing them online (6%).[691] Additionally, we are aware,

Under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940, Exchange Act Release No. 37182 (May 9, 1996) [61 FR 24644 (May 15, 1996)] ("96 Guidance"); *see also* Use of Electronic Media, Exchange Act Release No. 42728 (Apr. 28, 2000) [65 FR 25843 (May 4, 2000)] ("2000 Guidance"); and Use of Electronic Media for Delivery Purposes, Exchange Act Release No. 36345 (Oct. 6, 1995) [60 FR 53458 (Oct. 13, 1995)] ("95 Guidance"). Recognizing the growth of different forms of electronic media, other technological developments, and the passage of time since these releases were issued, the Commission plans to revisit its existing guidance regarding electronic delivery.

[679] 96 Guidance, *supra* footnote 678.

[680] *See* Proposing Release, *supra* footnote 5, at nn.344–45 and accompanying text; *see also* 2000 Guidance, *supra* footnote 678, at 65 FR 25845–46; 96 Guidance, *supra* footnote 678, at 61 FR 24647; and 95 Guidance, *supra* footnote 678, at 60 FR 53461.

[681] General Instruction 9.B. to Form CRS ("You may deliver the relationship summary to new or prospective clients or customers in a manner that is consistent with how the *retail investor* requested information about you or your financial professional.").

[682] *See, e.g.*, CFA Institute Letter I ("Whatever design is finalized for CRS, it should accommodate electronic delivery to investors. We also believe a design with interactive components is needed in today's electronically savvy investor base."); TIAA Letter ("the SEC could make the disclosure requirements in . . . Form CRS more flexible, such that broker-dealers have more options with respect to the method of delivery of required disclosures. . . ."); MassMutual Letter; SIFMA Letter; SPARK Letter; Morgan Stanley Letter; Cetera Letter II; Fidelity Letter.

[683] *See, e.g.*, Primerica Letter; Cetera Letter II; Schwab Letter (advocating a notice plus access model for annual or more frequent updates to the relationship summary); Pickard Djinis and Pisarri Letter; IAA Letter I; SIFMA Letter; MassMutual Letter; Comment Letter of the Money Management Institute (Aug. 7, 2018) ("MMI Letter"); Wells Fargo Letter.

[684] *See, e.g.*, LPL Financial Letter (supporting an implicit consent model on the basis that, among other things "It simply is not feasible to obtain an investor's affirmative consent to electronic delivery before the investor makes a final decision about the [investment relationship]"); FSI Letter I (supporting a negative consent model, rather than an opt-in approach); IAA Letter I (supporting an implied consent model).

[685] 17 CFR 270.30e–3 (internet availability of reports to shareholders); Shareholder Reports Release, *supra* footnote 665.

[686] *See, e.g.*, T. Rowe Letter ("In cases where no email address is on file with the firm, we think a notice and access protocol akin to Rule 30e–3 is appropriate."); SPARK Letter ("The SEC has recently demonstrated a willingness to embrace electronic disclosure as the default delivery method for other disclosures and we encourage the SEC to consider whether the disclosures added by the SEC's Proposal, including Form CRS, should be able to tap into the benefits of electronic delivery.").

[687] *See, e.g.*, LPL Financial Letter ("Modern communication practices underscore the need for the Commission to provide more flexibility to broker-dealers and investment advisers to satisfy their document delivery obligations by delivering materials to customers and clients who have *implicitly* consented to electronic delivery as well as to current customers and clients who have *affirmatively* consented to electronic delivery in a manner contemplated by the existing guidance."); SPARK Letter ("strongly urges the SEC to permit . . . electronic delivery as the default delivery method for satisfying the disclosure requirements under [Regulation Best Interest, as well as Form CRS]."); Cetera Letter II ("We believe that adoption of Reg. BI and the Form CRS represents something of a watershed moment. . . ."); Pickard Djinis and Pisarri Letter; IAA Letter I; MMI Letter.

[688] *See, e.g.*, Cetera Letter II (asserting that electronic delivery is safer and more environmentally friendly); IRI Letter; SPARK Letter; Primerica Letter.

[689] CFA Letter I ("We greatly appreciate that, in discussing this issue, the Release specifically references the obligation to provide 'evidence to show delivery.' This should help to clarify that firms could not meet the disclosure requirement simply by making the disclosures accessible on a public website and providing notice of their availability, under an 'access equals delivery' model. . . ."); AARP Letter ("The SEC should prohibit advisers from simply providing an electronic address for disclosures. . . . A paper copy should be provided to the retail investor.").

[690] *See supra* footnote 699.

[691] IAC Electronic Delivery Recommendation, *supra* footnote 153 (citing FINRA Investor Education Foundation, *Investors in the United States 2016* (Dec. 2016), *available at http://www.usfinancialcapability.org/downloads/NFCS_2015_Inv_Survey_Full_Report.pdf*). While the FINRA 2016 Investors Study was conducted prior to the Form CRS proposal (and does not specify what disclosure materials are contemplated in the survey, *e.g.*, shareholder reports, summary prospectuses, statutory prospectuses, account

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based on our filing data, that a number of firms do not host public websites and would not be able to make available an updated, electronic version of their relationship summary for their retail investors at all times.[692] Some commenters noted that some retail investors may lack readily available internet access.[693]

The relationship summary is designed to be delivered when a retail investor selects a firm or financial professional and which services to receive, including updated versions upon certain events when retail investors are again making decisions about whether to invest through an advisory account or a brokerage account. These selections affect all of the retail investor's subsequent investments under that relationship. In comparison, documents such as shareholder reports and prospectuses typically relate to investment decisions on single products; once the product is purchased, reporting is most commonly delivered at regular intervals, unlike the relationship summary. We are preserving an investor's ability to receive the relationship summary in paper, by maintaining the protections provided by the Commission's electronic delivery guidance.[694]

We recognize the benefits to retail investors of receiving the relationship summary as early as possible when considering a firm or financial professional and that electronic communication can facilitate earlier delivery, provided that retail investors can readily access the form of communication used. As noted above, we have adopted the instruction that delivery of the relationship summary to new or prospective clients or customers in a manner that is consistent with how that retail investor requested information about the firm or financial professional would be consistent with the Commission's electronic delivery guidance.[695] This approach applies only to the initial delivery of the relationship summary to new or prospective clients or customers, and not to any other delivery obligation of any other required disclosure. Moreover, to ensure that a relationship summary delivered electronically is noticeable for retail investors and not hidden among other disclosures, we are adopting a new instruction that a relationship summary delivered electronically must be presented prominently in the electronic medium and must be easily accessible for retail investors.[696] For example, a firm can use a direct link or provide the relationship summary in the body of an email or message.[697] We are also requiring firms to post the current version of the relationship summary prominently on their public website, if they have one, as proposed.[698]

We understand that, while many investors prefer receiving disclosures about investment advice in electronic format, many also value the option to receive them in paper.[699] We are adopting several additional requirements relating to relationship summaries in paper format. First, in a relationship summary that is delivered in paper format, firms may link to additional information by including URL addresses, QR codes, or other means of facilitating access to such information.[700] Second, if a relationship summary is delivered in paper format as part of a package of documents, the firm must ensure that the relationship summary is the first among any documents that are delivered at that time, substantially as proposed.[701] All firms will be required to make a copy of the relationship summary available upon request without charge.[702] However, we are not requiring that firms make the relationship summary available in paper format. We understand that some firms' business models—for example, those of advisers providing automated investment advisory services and broker-dealers that provide services only online—are based on delivering substantially all disclosures and conducting substantially all correspondence with clients and customers electronically. We do not intend to change these practices and believe that retail investors that prefer paper communications will have the opportunity to establish relationships with firms that accommodate paper delivery.

b. Initial Delivery

The final instructions require an investment adviser registered with the SEC to deliver a relationship summary to each retail investor before or at the time the firm enters into an investment advisory contract, even if the agreement is oral, as proposed.[703] The timing for standalone investment advisers to deliver the relationship summary to new or prospective retail clients generally tracks the initial delivery requirement for Form ADV Part 2A.[704] As described further below, we are changing the instruction for broker-dealers to require delivery before or at earliest of one of three triggers.[705] In

statements, etc.), it presents general investor survey data regarding investor disclosure preferences.

[692] Based on IARD system data, 8.4% of investment advisers with individual clients do not report at least one public website.

[693] *See, e.g.,* Comment Letter of C. Frederick Reish (Sept. 12, 2018); SIFMA Letter (acknowledging that firms would need to provide linked disclosures to customers and prospective customers who do not have internet access); LPL Financial Letter (citing Investment Company Institute, 2015 Investment Company Fact Book, (55th ed. 2015), at 129, *available at https://www.ici.org/pdf/2015_factbook.pdf.* The study found the following with respect to internet access in mutual fund owning households: (i) Head of household age 65 or older, 14% lack access; (ii) education level of high school diploma or less, 16% lack access; and (iii) household income of less than $50,000, 16% lack access.).

[694] *See supra* footnote 678.

[695] *See* Proposing Release, *supra* footnote 5, at nn.344–45 and accompanying text; *see also* 2000 Guidance, *supra* footnote 678, at 65 FR 25845–46; 96 Guidance, *supra* footnote 678, at 61 FR 24647; and 95 Guidance, *supra* footnote 678, at 60 FR 53461.

[696] General Instruction 10.C. to Form CRS.

[697] General Instruction 10.C. to Form CRS.

[698] Advisers Act rule 204–5(b)(3) and Exchange Act rule 17a–14(c)(3); General Instruction 10.A. to Form CRS. The most recent versions of firms' relationship summaries will be accessible through *Investor.gov.* Firms will be required to include in their relationship summaries a phone number where investors can request up-to-date information and (if applicable) request a copy of the relationship summary. *See* Item 5.B. of Form CRS. Firms also could include their relationship summaries on other electronic media, such as mobile apps and other similar technologies.

[699] *See* RAND 2018, *supra* footnote 13 (when surveyed about how and when they would prefer to receive the relationship summary, "two-fifths reported that they would be most likely to view a paper document"); Schwab Letter I (Koski) *supra* footnote 21 (26% of survey participants preferred to receive disclosures about investment advice on paper; 46% preferred online or digital disclosures with the option for paper).

[700] General Instruction 3.B. to Form CRS.

[701] General Instruction 10.D. to Form CRS. *Cf.* Proposed General Instruction 8.(c) to Form CRS ("If the relationship summary is delivered on paper and not as a standalone document, you must ensure that the relationship summary is the first among any documents that are delivered at that time.").

[702] General Instructions 1.C. to Form CRS.

[703] General Instruction 7.B.(i) to Form CRS. The final instructions for investment advisers are streamlined from the proposal, but remain substantively the same. Compare to Proposed Advisers Act rule 204–5(b)(1) and Proposed General Instruction 5.(b) to Form CRS ("You must give a relationship summary to each retail investor, if you are an investment adviser, before or at the time you enter into an investment advisory agreement with the retail investor, or if you are a broker-dealer, before or at the time the retail investor first engages your services. *See* Advisers Act rule 204–5(b)(1) and Exchange Act rule 17a–14(c)(1). You must deliver the relationship summary even if your agreement with the retail investor is oral."). We replaced the word "agreement" with "contract" to mirror the wording in the current Advisers Act rules and Form ADV instructions. *See, e.g.,* Item 5.D of Part 2.A. of Form ADV. We also clarified that the delivery requirements apply to investment advisers registered with the SEC.

[704] *See* General Instruction 1 to Part 2A of Form ADV.

[705] General Instruction 7.B.(ii) to Form CRS ("If you are a broker-dealer, you must deliver a relationship summary to each retail investor, before or at the earliest of: (i) A recommendation of an account type, a securities transaction, or an investment strategy involving securities; (ii) placing an order for the retail investor; or (iii) the opening

comparison, under the proposal, broker-dealers would have delivered the relationship summary before or at the time the retail investor first engages their services.[706] Under the final rules, dual registrants, and affiliated broker-dealers and investment advisers that jointly offer their services to retail investors, must deliver at the earlier of the initial delivery triggers for an investment adviser or a broker-dealer, including a recommendation of account type.[707] This applies whether the dual registrant or affiliated firms prepare one single relationship summary describing both brokerage and investment advisory services, or two separate relationship summaries describing each type of service.

Some commenters supported keeping the initial delivery requirements as proposed.[708] Other commenters expressed concern that under the proposal, the relationship summary would be delivered only after the investor has already made a decision about which firm to engage and which type of account to open, and recommended variations on the proposed initial delivery requirements, including mandating even earlier delivery.[709] The variations include, for example, delivery at the point of first contact or inquiry between the retail investor and firm, whenever possible;[710] at the earlier of when a customer contacts the firm or enters into an advisory agreement or engagement of services;[711] and upon the first interaction with a prospective retail investor.[712] For dual registrants, one commenter recommended requiring delivery no later than the point at which a recommendation is made regarding which type of account to open.[713] One commenter asserted that the Commission should not permit delivery "at" the time of service but rather should always require delivery "before" the provision of service.[714] The IAC recommended providing "a uniform, plain English disclosure document . . . to customers and potential customers of broker-dealers and investment advisers at the start of the engagement, and periodically thereafter."[715]

A few commenters supported requiring a period of time between delivery of the relationship summary and the beginning of the relationship.[716] One commenter suggested allowing time for retail investors to review the relationship summary, subsequent to delivery when the firm first interacts with a retail investor.[717] A number of investors at Commission-held roundtables also supported a waiting period.[718] Other commenters, however, opposed a mandated delay between delivery of the relationship summary and engaging in services.[719]

Various commenters explained logistical and recordkeeping issues if firms were required to deliver the relationship summary at first contact or prior to engaging a firm's services.[720] For example, one commenter stated that it would not be feasible to obtain an investor's affirmative consent to electronic delivery before the investor decides to engage the firm.[721] Tracking whether or not prospective customers had consented to electronic delivery of the relationship summary would be difficult because prospective customers who do not open accounts would not have account numbers or other unique identifiers for the firm's recordkeeping purposes.[722] Other commenters argued that keeping records of when a relationship summary was given to a prospective retail investor would be unnecessarily burdensome for firms and would likely provide *de minimis* benefits.[723] Still other commenters discussed the difficulty of defining when a customer first engages the firm's services, the terminology used in the proposal.[724]

We encourage investment advisers and broker-dealers to deliver the relationship summary far enough in advance of a prospective retail investor's final decision to engage the firm to allow for meaningful discussion between the financial professional and retail investor, including by using the conversation starters, so that the retail investor has time to understand the relationship summary and to weigh available options. We believe that prospective clients or customers would benefit from receiving the relationship summary as early as possible when deciding whether to engage the services of a firm or financial professional. In response to comments on initial delivery, including those relating specifically to broker-dealers, we are modifying the broker-dealer initial delivery requirements, as discussed below. However, we are declining to mandate a delivery requirement based on first contact or inquiry, or to impose a waiting period. First, "first contact or inquiry" may include circumstances that are not limited to the seeking of investment services, such as business

of a brokerage account for the retail investor."). As described below, dual registrants will continue to deliver the relationship summary at the earlier of the requirements for investment advisers or broker-dealers. General Instruction 7.B.(iii) to Form CRS ("A dual registrant must deliver the relationship summary at the earlier of the timing requirements in General Instruction 7.B.(i) or (ii).").

[706] *See* Proposed Exchange Act rule 17a–14(c)(1); Proposed General Instruction 5.(b) to Form CRS.

[707] General Instruction 7.B.(iii) to Form CRS ("A dual registrant must deliver the relationship summary at the earlier of the timing requirements in General Instruction 7.B.(i) or (ii).").

[708] *See, e.g.*, Trailhead Consulting Letter; Schnase Letter (agreeing that the relationship summary should be required to be delivered along the lines proposed in the Proposing Release); SIFMA Letter ("For the initial delivery most brokerage firms likely will include [the relationship summary] with account applications or other account opening materials, while investment advisers will include it with their Form ADV.").

[709] *See, e.g.*, CFA Letter I; CFA Institute Letter I; AARP Letter; NASAA Letter; Consumers Union Letter; Consumer Reports Letter. In the RAND 2018 survey, *supra* footnote 13, 70% of respondents reported that they would prefer to receive the relationship summary at the outset of the relationship, *i.e.*, "before or at the time you first engage the investment professional" and slightly more than 30% of respondents would prefer to receive the relationship summary "before the investment professional first recommends a transaction or investment strategy"; *see also* Schwab Letter I (Koski), *supra* footnote 21 (when asked "[w]hich of the following best describes your preference for when you would like to receive information about how a Brokerage Firm or a Registered Investment Adviser (RIA) does business with you?", 41% preferred "[a]t or before I open my account, plus any updates on an annual basis," 22% preferred "[a]vailable on an ongoing basis, such as on a firm's website," 19% preferred at "[a]t or before I open my account only," and 17% preferred "[e]very single time I receive investment advice.").

[710] *See* CFA Letter I.

[711] *See* CFA Institute Letter I.

[712] *See* AARP Letter.

[713] *See* CFA Letter I.

[714] *See* NASAA Letter.

[715] *See* IAC Broker-Dealer Fiduciary Duty Recommendations, *supra* footnote 10.

[716] *See, e.g.*, AARP Letter; CFA Institute Letter I; NASAA Letter.

[717] *See* AARP Letter.

[718] *See, e.g.*, Houston Roundtable, at 51 (one investor suggesting a "cool-off period"); Washington, DC Roundtable, at 58 (at least two investors supporting a "lapse" of time between receipt of a relationship summary and having to sign it).

[719] Comment Letter of John Neil Conkle (Aug. 7, 2018) (arguing that a waiting period is not necessary for the relationship summary to fulfill its purpose); Edward Jones Letter (arguing that a waiting period could harm investors by preventing them from meeting IRA contribution or rollover deadlines, for example, or at a minimum cause frustration); SIFMA Letter (arguing that the relationship summary is designed to be contemporaneously read and understood).

[720] *See, e.g.*, Edward Jones Letter (asserting that requiring firms to record the delivery of the relationship summary to prospective clients that subsequently become clients would impose a significant burden without providing meaningful benefits to investors); SIFMA Letter ("[I]t would be very burdensome and not practical in many instances to keep track of Forms CRS that are provided to retail investors who never seek to establish a relationship with a firm."); Primerica Letter; LPL Financial Letter.

[721] *See* LPL Financial Letter.

[722] *See* LPL Financial Letter.

[723] *See infra* footnote 803; *see also infra* footnotes 798–816 and accompanying text regarding recordkeeping requirements.

[724] *See, e.g.*, Fidelity Letter; SIFMA Letter; Primerica Letter; TIAA Letter.

interactions for other purposes or social interactions, and therefore could create compliance uncertainty. Second, we believe the availability of each firm's relationship summary through *Investor.gov* and on its own website, if the firm has one, helps to address the concern that investors will not have the opportunity to review and compare relationship summaries before entering into an investment advisory contract or receiving services from a broker-dealer.[725] Third, some investors may not want to wait to begin services,[726] and those who do can always take as much time as needed to review the relationship summary and wait to sign an advisory agreement or begin receiving brokerage services at a later time. Fourth, firms will be permitted to deliver the relationship summary well before they enter into an advisory agreement or provide brokerage services, and as noted, we encourage firms to deliver the relationship summary early in the process. Finally, dual registrants, and affiliated broker-dealers and investment advisers that jointly offer their services to retail investors, must deliver their relationship summaries at the earlier of the delivery triggers for broker-dealers or investment advisers. To the extent the initial delivery requirements for a broker-dealer are earlier than the delivery requirements would be for an investment adviser, the earlier requirements will apply to an investment adviser that is a dual registrant or that offers services jointly with a broker-dealer affiliate. We believe this will provide a significant benefit to retail investors, given the substantial percentage of regulatory assets under management ("RAUM") managed by dual registrants and investment advisers with broker-dealer affiliates, relative to the total RAUM managed by investment advisers overall.[727]

To facilitate earlier delivery, as discussed above, the final instructions allow firms to deliver the relationship summary to a new or prospective client or customer in a manner that is consistent with how the retail investor requested information about the firm or financial professional, clarifying that this approach would be consistent with the SEC's electronic delivery guidance.[728] We believe this approach alleviates concerns expressed by commenters that obtaining the consent of prospective clients or customers to receive electronic delivery and maintaining records of that consent would be challenging.[729] While we recognize recordkeeping burdens relating to the delivery of the relationship summary to prospective clients—for example, we are not imposing a delivery requirement upon first contact or inquiry by a retail investor, as discussed above—we disagree that they are insurmountable and would outweigh the benefits to retail investors. As discussed further in Section II.E. below, investment advisers and broker-dealers have experience with similar recordkeeping requirements.[730] Moreover, we believe there is considerable benefit to retail investors in receiving the relationship summary before deciding to engage a firm, to allow time for questions and discussion with the financial professional, to understand the relationship summary, and to weigh available options.

Commenters suggested modifications to the proposed initial delivery requirements specifically for broker-dealers. Several commenters requested that we require broker-dealers to deliver the relationship summary at the point of first contact, inquiry, or interaction with a retail investor.[731] A number of commenters also raised questions about the meaning of "engaging the services" of a broker-dealer, noting that it was unclear when that may ultimately occur and that it is a new and undefined concept in the context of a customer relationship with a broker-dealer.[732] Other commenters suggested that we exclude or exempt certain types of broker-dealers that provide limited services to retail investors from the requirement to deliver the relationship summary or from the requirements of Form CRS more generally.[733]

In response to these concerns, we are modifying the initial delivery requirements for broker-dealers. Instead of "at the time the retail investor first engages a broker-dealer's services," broker-dealers will be required to deliver the relationship summary to each retail investor before or at the earliest of: (i) A recommendation of an account type, a securities transaction, or an investment strategy involving securities; (ii) placing an order for the retail investor; or (iii) the opening of a brokerage account for the retail investor.[734] We believe that these more concrete initial delivery triggers for broker-dealers avoid the uncertainty of when a retail investor first engages a broker-dealer's services and include scenarios that encompass earlier delivery, in response to commenters' concerns.

As noted, the proposal would have required broker-dealers to deliver the relationship summary before or at the time the retail investor first engages the firm's services. This proposed requirement was intended to capture the earliest point in time at which a retail investor engages the services of a broker-dealer, including instances when a customer opens an account with the broker-dealer, or effects a transaction through the broker-dealer in the absence of an account, for example, by purchasing a mutual fund through the broker-dealer via "check and application". The proposed rule would not have required delivery to a retail investor to whom a broker-dealer makes a recommendation, if that retail investor did not open or have an account with

[725] *See* CFA Institute Letter I ("We strongly support the requirement that firms with public websites must post their CRSs on their sites in an easily accessible location and format. . . . Investors can review the disclosures provided there before deciding on a service provider and showing up for a meeting. Then when presented with the CRS 'before or at the time' of entering into an agreement or engaging a firm's services, an investor will have already had an opportunity to review the disclosures and come armed with questions.").

[726] *See, e.g.*, Edward Jones Letter (stating that some investors have a very specific timeframe for opening a new account, such as meeting an IRA contribution or rollover deadline); SIFMA Letter (stating that requiring a waiting period would frustrate a retail customer's efforts to begin his or her relationship with a financial services provider).

[727] As of December 31, 2018, 1,878 SEC-registered investment advisers report in their Form ADV an affiliate that is a broker-dealer also registered with the SEC. These 1,878 SEC-registered investment advisers manage approximately $58.48 trillion, or approximately 70% of total RAUM managed by SEC-registered investment advisers. Furthermore, 359 SEC-registered investment advisers that are also dually-registered as broker-dealers manage approximately $5.18 trillion, or 6.12% of total RAUM. Thus, SEC-registered investment advisers that report registered broker-dealer affiliates and dual registrants together manage over 75% of RAUM. *See also infra* footnotes 855, 888–889, and accompanying text.

[728] General Instruction 10.B. to Form CRS.

[729] *See supra* footnotes 720–722 and accompanying text.

[730] *See infra* footnotes 809–810 and accompanying text.

[731] *See* CFA Institute Letter I; AARP Letter; and NASAA Letter.

[732] *See* Primerica Letter; SIFMA Letter; and Fidelity Letter.

[733] *See, e.g.*, Fidelity Letter (recommending "that the SEC exclude limited-purpose broker-dealers acting solely as mutual fund general distributors from the obligation to deliver Form CRS to direct mutual fund investors that invest on an unsolicited basis, and shareholders investing through an intermediary (such as a full service broker-dealer or bank) that has an independent obligation to deliver such information to its client" and suggesting "that the SEC explicitly exempt from the Form CRS requirement certain categories of broker-dealers, including clearing firms, principal underwriters, and distributors of mutual funds, as these firms do not have a direct relationship with the end investor based on their business models"); ICI Letter; Wells Fargo Letter; Invesco Letter; ACLI Letter; Comment Letter of Great-West Financial (Aug. 6, 2018); T. Rowe Letter and Oppenheimer Letter.

[734] *See* Exchange Act rule 17a–14(c)(1); General Instruction 6.B.(ii) to Form CRS.

the broker-dealer, or that recommendation did not lead to a transaction with that broker-dealer.[735] If the recommendation led to a transaction with the broker-dealer who made the recommendation, the retail investor would have been considered to be "engaging the services" of that broker-dealer at the time the customer places the order or an account is opened, whichever occurred first. Instead, in response to comments advocating for earlier delivery, the final requirement expands on the proposed initial delivery requirement and potentially pushes it earlier, to require delivery (even where a brokerage account has not been established) before or at the time a broker-dealer recommends an account type, a securities transaction, or an investment strategy involving securities without regard to whether the retail investor acts on the recommendation. We believe that revising the delivery requirement in this way will give retail investors the opportunity to consider the information included in the relationship summary earlier in the process of determining whether to establish a brokerage relationship with the broker-dealer, as well as in evaluating the recommendation.

Compared to the proposal, the final requirement also pushes earlier the time at which broker-dealers must deliver the relationship summary in instances in which the retail investor does not open an account but still engages in a securities transaction such as the "check and application" example described above. Under these circumstances, broker-dealers must deliver the relationship summary before or at the time an order is placed for the retail investor, instead of before or at the time the transaction is effected, as proposed. This delivery obligation would be triggered to the extent this type of transaction were unsolicited, because, as described above, if a recommendation preceded this type of transaction, delivery would have been triggered before or at the time of the recommendation.

To the extent the broker-dealer had not already made a recommendation of an account type, a securities transaction or an investment strategy involving securities, or placed an order for the retail investor, delivery would be triggered before or at the time the retail investor opens a brokerage account with the broker-dealer. As revised, we believe that the initial delivery triggers for broker-dealers avoid the uncertainty of the proposed initial delivery standard and include scenarios that encompass earlier delivery, in response to commenters' concerns.

In response to the comments requesting exemptions or exclusions from the relationship summary obligations generally and the delivery obligations for certain broker-dealers that engage in limited activities, we are clarifying that we do not intend for the Form CRS requirements to apply to certain types of relationships between a broker-dealer and a retail investor. Pursuant to Exchange Act Rule 17a–14, the scope of the Form CRS requirement applies "to every broker or dealer registered with the Commission pursuant to section 15 of the Act that *offers services to a retail investor*" (emphasis added). Solely for purposes of Form CRS, we are describing here the types of relationships between a broker-dealer and a retail customer that we would not consider to be "offer[s] [of] services to a retail investor".

Specifically, clearing and carrying broker-dealers that are solely providing services to third party or affiliated introducing broker-dealers would not be considered to be offering services to a retail investor for purposes of Exchange Act Rule 17a–14, and would not be subject to the Form CRS requirements when acting in such capacity. As described above, the relationship summary is designed to make it easier for *retail investors* to get the facts they need when deciding among investment firms or financial professionals and the accounts and services available to them. When a retail investor is establishing or has a relationship with an introducing broker-dealer, we believe that the retail investor would benefit most from focusing on that broker-dealer's services, fees, standard of conduct, conflicts of interest and disciplinary history. In these circumstances, we believe that receiving an additional relationship summary from a clearing or carrying broker-dealer could create confusion and detract from the goals of this disclosure.

Additionally, we would not consider a broker-dealer that is serving solely as a principal underwriter to a mutual fund or variable annuity or variable life insurance contract issuer to be offering services to a retail investor for purposes of Exchange Act Rule 17a–14, when acting in such capacity. As with clearing and carrying broker-dealers, broker-dealers serving solely as principal underwriters do not typically establish the kind of relationship with retail investors that Form CRS has been designed to address. To the extent such broker-dealers interact with a retail customer in a different capacity (beyond serving as a principal underwriter to the mutual fund or variable contract that the retail investor owns), we believe the nature of their relationship could become one where delivery of the Relationship Summary would be useful. Accordingly, Form CRS's obligations would apply in those instances.[736]

We are adopting as proposed the approach to delivery for dual registrants, whereby they must deliver the relationship summary to a new or prospective retail investor at the earlier of the delivery triggers applicable to investment advisers and broker-dealers.[737] One commenter argued that a dual registrant should be required to deliver the relationship summary at the earlier of providing an investment recommendation or the time a retail investor opens an account with the firm.[738] We believe that the broker-dealer initial delivery requirements, as adopted, accommodate this comment. Another commenter asserted that dual registrants should be required to deliver the relationship summary no later than when a recommendation is made as to the type of account to open.[739] We believe that the final initial delivery requirements accommodate this comment also. Broker-dealers will be required to deliver the relationship summary before or at the earliest of (i) a recommendation of an account type, a securities transaction, or an investment strategy involving securities, (ii) placing an order for the retail investor, or (iii) the opening of a brokerage account for the retail investor.[740] Investment advisers will be required to deliver the relationship summary before or at the time of entering into an investment advisory contract with the retail investor.[741] Dual registrants will be required to deliver the relationship summary when recommending an account type to the retail investor if it is the earliest occurrence among the initial delivery triggers for broker-dealers and investment advisers, which we believe will typically precede the opening of a brokerage account or

[735] Proposing Release, *supra* footnote 5.

[736] For example, we would expect the requirements of Form CRS to apply in the event the broker-dealer makes a recommendation of an account type, securities transaction or investment strategy involving securities, the retail investor places an order for the purchase of different securities, or the retail investor opens a new brokerage account with the broker-dealer.

[737] Advisers Act rule 204–5(b)(1) and Exchange Act rule 17a–14(c)(1); *see also* General Instruction 7.B.(iii) to Form CRS.

[738] *See* State Farm Letter.

[739] *See* CFA Letter I.

[740] *See* Exchange Act rule 17a–14(c)(1); General Instruction 7.B.(ii) to Form CRS.

[741] *See* Advisers Act rule 204–5(b)(1); General Instruction 7.B.(i) to Form CRS.

entering into an investment advisory contract.[742]

c. Additional Delivery Requirements to Existing Clients and Customers

We are adopting requirements for firms to re-deliver the relationship summary to existing clients and customers under certain circumstances, with some modifications from the proposal. We continue to believe that these investors will benefit from being reminded of the information contained in the relationship summary, including about the different services and fees that the firm offers, when they are again making decisions about whether to invest through an advisory account or a brokerage account. Specifically, after an initial delivery of the relationship summary to existing clients and customers who are retail investors, firms will be required to deliver the most recent version of the relationship summary to a retail investor if they (i) open a new account that is different from the retail investor's existing account(s); (ii) recommend that the retail investor roll over assets from a retirement account into a new or existing account or investment; or (iii) recommend or provide a new brokerage or investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in an existing account, for example, the first time purchase of a direct-sold mutual fund or insurance product that is a security through a "check and application" process, *i.e.,* not held directly within an account.

In comparison, as proposed, the instructions would have required a firm to deliver a relationship summary to existing clients or customers when: (i) A new account is opened that is different from the retail investor's existing account, or (ii) changes are made to the existing account that would materially change the nature and scope of the relationship. The proposed instructions provided that whether a change was material for these purposes would depend on the specific facts and circumstances and gave as examples transfers from an investment advisory account to a brokerage account, transfers from a brokerage account to an investment advisory account, and moves of assets from one type of account to another in a transaction not in the normal, customary or already agreed course of dealing.

In the RAND 2018 survey, 50% of respondents reported that they would like to receive an updated relationship summary "whenever there is a material change in the Relationship Summary, such as a change in fees or commission structure," about 30% would prefer to receive the relationship summary periodically and almost 40% preferred to receive the summary on request.[743] One commenter supported the additional delivery requirements to existing clients and customers as proposed, agreeing that investors are again making decisions about relationships and account types under these circumstances and would benefit from the information the relationship summary provides.[744] Another commenter recognized the value of delivering the relationship summary to existing clients and customers but recommended specific limitations to the requirements.[745] One commenter supported once a year or periodic updates and continued availability of a current version on a firm's website,[746] while another commenter opposed any requirement to provide periodic updates.[747] Several commenters argued that some or all of the additional delivery requirements are not necessary, given the prior initial delivery and online availability of relationship summaries.[748] A few commenters argued that the additional delivery requirements could confuse investors because of either an apparent duplication or difference from delivery requirements of existing disclosures.[749] One commenter also stated that the proposed additional delivery requirements could overwhelm investors in a counterproductive way.[750] Furthermore, commenters requested additional guidance or examples for what would "materially change" the relationship.[751]

In addition, some commenters expressed concerns about administrative and operational burdens relating to the proposed additional delivery requirements.[752] For example, one commenter asserted that firms would be required to build entirely new operational and supervisory processes to identify asset movements divorced from any account opening process that could trigger an additional delivery requirement.[753] This commenter also argued that the review that would be required prior to effecting potentially triggering asset movements could cause delays that are detrimental to the retail

[742] *See* General Instruction 7.B.(iii) to Form CRS.

[743] RAND 2018, *supra* footnote 13.

[744] *See* CFA Letter I ("We support this proposal and agree with the Commission that, in these instances, 'retail investors are again making decisions about whether to invest through an advisory account or a brokerage account and would benefit from information about the different services and fees that the firm offers to make an informed choice.' ").

[745] *See* SIFMA Letter (arguing that a "material change" should be defined as changes from an advisory account to a brokerage account or vice versa, and not include asset movements from one type of account to another or "other material changes").

[746] *See* Schwab Letter I; Schwab Letter III.

[747] *See* CFN Letter.

[748] *See, e.g.,* LPL Financial Letter ("It is not clear what additional benefits obtain from delivering an identical copy of a document an investor has already received."); SIFMA Letter ("[W]e do not believe these additional trigger points [other than changing from one type of account to another] are necessary because customers will receive Form CRS at periodic intervals throughout the relationship, and customers will have continual online access to a firm's Form CRS via a website posting, making the need to "push out" the Form CRS at additional points unnecessary."); Institute for Portfolio Alternatives Letter ("We suggest that delivery of a new or updated Form CRS with every transaction would be excessive, impractical and without commensurate investor benefit"); UBS Letter ("If a client already has both a brokerage account and an advisory account and is transferring assets from one to another . . . the client already would have the critical disclosures applicable to both account types . . . .").

[749] *See, e.g.,* Comment Letter of AXA (Aug. 7, 2019) ("[E]xisting customers have already decided which firm to work with, so requiring firms to send the Relationship Summary to those customers is likely to cause customer confusion."); Pickard Djinis and Pisarri Letter ("The disharmony between the existing ADV brochure delivery requirements and the proposed requirements under Rule 204–5 are likely to confuse clients. . . ."); UBS Letter ("[R]eceiving the Form CRS again in such circumstances would likely lead to confusion rather than an improved understanding.").

[750] *See* SIFMA Letter ("Providing Form CRS to investors beyond [changes from one type of account to another] could overwhelm them with duplicative or redundant information," making it "less likely they will digest the information.").

[751] *See, e.g.,* Prudential Letter ("[M]ore guidance is needed on this point; additional examples of triggering events would provide clarity."); TIAA Letter ("SEC should identify additional instances beyond account changes that would trigger re-delivery."); Cambridge Letter (requesting further guidance on a material change to the nature and scope of the relationship and encouraging SEC to provide a broad set of examples); SIFMA Letter ("[I]t is not clear what 'other material' changes or assets movements 'not in the normal, customary, or already agreed course of dealing' would be"); Institute for Portfolio Alternatives Letter (requesting guidance on what facts and circumstances would trigger a "material" change and require delivery of a new, or updated, Form CRS); Comment Letter of Sorrento Pacific Financial, LLC (Aug. 7, 2018).

[752] *See* SIFMA Letter; LPL Financial Letter; Institute for Portfolio Alternatives Letter; Pickard Djinis and Pisarri Letter (additional delivery requirements "would impose unjustifiable administrative burdens on advisers, the majority of whom are small businesses.").

[753] *See* SIFMA Letter (explaining that, because additional delivery triggers could be divorced from any account opening process, entirely new operational and supervisory processes would need to be designed (i) to identify potentially triggering asset movements; (ii) to review for whether a proposed asset movement is not in the normal, customary, or already agreed course of dealing; and (iii) depending on whether delivery were required, create and preserve either a record of the delivery or of the conclusion that no such delivery was required).

investor.[754] Similarly, another commenter explained that most of the proposed additional delivery triggers would be relatively easy to identify and address through existing processes, such as new account openings and when a brokerage account is converted to an investment advisory account and vice versa.[755] Other potential delivery triggers, however, such as investments of inheritances or proceeds of a property sale, or a significant migration from savings to investment, would present operational challenges and compliance costs.[756] These commenters recommended limiting additional delivery requirements to circumstances in which a brokerage account is converted to an investment advisory account and vice versa.[757]

We disagree that delivery of the relationship summary to existing clients and customers is unnecessary if the investor has already received one. As noted above, when investors are again making decisions about whether to choose an investment advisory or brokerage account, we believe they will benefit from being reminded that different options are available and where they can get more information to inform their choice. We are not requiring that the relationship summary be delivered at periodic intervals or at every transaction; thus we disagree with comments that the additional delivery obligations will not provide commensurate benefit to investors, or will confuse or overwhelm investors. We are therefore adopting additional delivery requirements that apply to a firm's existing clients and customers, with some modifications from those proposed.

First, as proposed (and supported by two commenters as noted above), we are adopting the requirement that a firm deliver the relationship summary when opening any new account that is different from the retail investor's existing account(s).[758] Second, in response to comments we are replacing the proposed standard of "materially change the nature and scope of the relationship" with two, more specific and easily identifiable, triggers that we believe would not implicate the same operational or supervisory burdens described by commenters to meet the proposed requirement.[759] Instead, firms will be required to deliver a relationship summary to existing clients and customers when recommending that the retail investor roll over assets from a retirement account, or recommending or providing a new brokerage or investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in an existing account, for example, the first-time purchase of a direct-sold mutual fund or insurance product (*e.g.,* variable annuities) that is a security through a "check and application" process, *i.e.,* not held directly within an account.[760] While these requirements will still impose operational and supervisory burdens, we believe they are more easily identified and monitored, such that firms will not need to create new systems or processes to the extent that commenters said would be necessary to comply with the proposed "material change" standard. These more specific triggers are intended to provide investor protection under these circumstances in a more cost-effective manner, while still addressing the objectives that the "material changes" language sought to address, that is, to ensure that a firm does not switch existing customers or clients into accounts or services without explaining or giving them the opportunity to consider other available options.[761] Also, as proposed, we are adopting the instruction that firms must deliver the relationship summary to a retail investor within 30 days upon the retail investor's request.[762] While some commenters requested changes to the proposed delivery requirements, they nonetheless supported requiring delivery upon request.[763]

Finally, delivery of the relationship summary will not necessarily satisfy any other disclosure obligations the firm has under the federal securities laws or other laws or regulations, as proposed. The relationship summary requirement will be in addition to, and not in lieu of, other disclosure and reporting requirements or other obligations for broker-dealers and investment advisers.[764] One commenter suggested that we require that the relationship summary include a prominent statement that it does not replace, but rather should be read in conjunction with, Form ADV or Form BD.[765] This commenter also suggested that the relationship summary should include a hyperlink to the appropriate Form ADV or Form BD, as applicable.[766] We believe that the required links in the Additional Information section, discussed in Section II.B.5. above, addresses these comments.

Some commenters argued that investment advisers should not be required to deliver a relationship summary to retail clients because they already deliver a Form ADV Part 2A brochure.[767] We disagree. By requiring both investment advisers and broker-dealers to deliver a relationship summary that discusses at a high level both types of services and their differences in a comparable format, the relationship summary would help all retail investors compare not only among investment advisory services, but also between investment advisory and brokerage services. We do not believe that existing disclosures provide this level of transparency and comparability across investment advisers, broker-dealers, and dual registrants. Form CRS is a summary disclosure designed to provide a high-level overview of services, fees, costs, conflicts of interest, standard of conduct, and disciplinary history, to retail investors in order to help them decide whether to engage a particular firm or financial professional, including deciding whether to seek investment advisory or brokerage services. Form ADV Part 2A, in contrast, requires more detailed disclosures specific to advisory services. If a firm does not have retail investor clients or customers and is not required to deliver a relationship summary to any clients or customers, the firm will not be required to prepare or file a relationship summary, as proposed.[768]

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[754] *See* SIFMA Letter.

[755] *See* LPL Financial Letter.

[756] *See* LPL Financial Letter (explaining that its existing systems are not designed to monitor and record dates of non-ordinary course events or to distinguish those events from routine account changes).

[757] *See* SIFMA Letter; LPL Financial Letter.

[758] General Instruction 9.A. to Form CRS.

[759] *See supra* footnotes 752–757 and accompanying text.

[760] General Instruction 9.A. to Form CRS.

[761] Recommendations of account types to existing customers and clients also are addressed in the Regulation Best Interest Release and Fiduciary Release, *supra footnote* 47.

[762] General Instruction 9.B. to Form CRS.

[763] *See* Fidelity Letter; SIFMA Letter.

[764] For example, the relationship summary would not necessarily satisfy the disclosure requirements under Regulation Best Interest. *See* Regulation Best Interest Release, *supra* footnote 47.

[765] *See* Financial Engines Letter.

[766] *See* Financial Engines Letter.

[767] Comment Letter of Registered Advisor Services (Apr. 20, 2018); Comment Letter of Franklin Templeton Investments (Aug. 6, 2018); IAA Letter I; Triad Letter; Pickard Djinis and Pisarri Letter; Prudential Letter; *see also* State Farm Letter (arguing that investment advisers should be required to include in their relationship summaries only those disclosures that are not otherwise available, provided that a representative heading or introductory statement and a hyperlink to such disclosures are provided in the Relationship Summary).

[768] *See* amended Advisers Act rule 203–1, note to paragraph (a)(1); Exchange Act rule 17a–14(a), (b). *See* introduction of General Instructions to Form CRS.

4. Updating Requirements

We are adopting substantially as proposed a requirement for firms to update the relationship summary within 30 days whenever the relationship summary becomes materially inaccurate.[769] Firms also must post the latest version on their website (if they have one), and electronically file the relationship summary with the Commission.[770] Although some commenters expressed different views on the requirement to communicate updated information to retail investors, as discussed below, most commenters did not object to the proposed requirements to update the relationship summary within 30 days of a material change and the associated posting and filing obligations.[771] On the other hand, one commenter advocated that firms be allowed 60 days to update the relationship summary to address operational issues, but did not describe the specific operational challenges.[772] Based on our experience with other similar filings, we believe the proposed approach is consistent with the current requirements for investment advisers to update the Form ADV Part 2A brochure,[773] and with broker-dealers' current obligations, including to update Form BD if its information is or becomes inaccurate for any reason.[774] We continue to believe that allowing 30 days for firms to make updates provides sufficient time for firms to make the necessary revisions. Therefore, we are adopting these requirements as proposed.

The proposed instructions also would have required firms, without charge to the retail investor, to communicate updated information by delivering the amended relationship summary or by communicating the information another way.[775] As noted above, commenters expressed different views regarding this approach. Some commenters advocated for posting the relationship summary on a firm's website in order to meet the communication requirement.[776] On the other hand, one commenter advocated for requiring firms to deliver updated relationship summaries whenever a change is made, rather than permitting firms to communicate the information in another way.[777] We are adopting slightly revised final instructions to eliminate the proposed wording "another way" in order to clarify that a firm may communicate the information through another disclosure, and that disclosure must be delivered to the retail investor.[778] In other words, merely providing notice of or access to another disclosure or the relationship summary would not satisfy this final instruction. For example, if an investment adviser communicated a material change to information contained in its relationship summary to a retail investor by delivering an amended Form ADV brochure or Form ADV summary of material changes that also contained the updated information, this would support a reasonable belief that the information had been communicated to the retail investor, and the investment adviser will not be required to deliver an updated relationship summary to that retail investor. This requirement provides firms the flexibility to disclose changes to the relationship summary without requiring them to incur additional delivery costs.

In another modification from the proposal, the rules as adopted will allow firms to communicate the information in an amended relationship summary to retail investors who are existing clients or customers within 60 days after the updates are required to be made, instead of 30 days as proposed.[779] Two commenters advocated that allowing 60 days for the communication would increase the likelihood that firms could deliver an updated relationship summary along with other disclosures that firms commonly deliver on a quarterly basis, rather than in a separate delivery.[780] Delivery with other disclosures is consistent with the instructions regarding the way in which relationship summary updates may be communicated. We are clarifying this, as noted above, and adopting the requirement that firms must communicate updates to the relationship summary within 60 days after the updates are required to be made.

In a further change from the proposal, firms must highlight the changes in an amended relationship summary by, for example, marking the revised text or including a summary of material changes and attaching the changes as an exhibit to the unmarked amended relationship summary.[781] The unmarked amended relationship summary and exhibit must be filed with the Commission.[782] We believe that including this exhibit is important in assisting retail investors to assess changes that may impact their accounts or their relationships with their firm or financial professional. A retail investor will be able to find the latest version of the relationship summary through Investor.gov and on the firm's website, if it has one, and firms will be required to deliver a relationship summary within 30 days upon the retail investor's request, as proposed.[783]

As discussed in the proposal, for purposes of the requirement to communicate updates to the

[769] Advisers Act rule 204–1(a)(2) and Exchange Act rule 17a–14(b)(3); General Instruction 8.A. to Form CRS. For investment advisers, we are also adopting amendments to the General Instructions to Form ADV to mirror this requirement and to clarify the filing type. *See* amended General Instruction 4 to Form ADV (revised to add the following language: "If you are registered with the SEC, you must amend Part 3 of your Form ADV within 30 days whenever any information in your *relationship summary* becomes materially inaccurate by filing with the SEC an additional other-than-annual amendment or by including the relationship summary as part of an *annual updating amendment*."); *see also supra* footnotes 673–677 and accompanying text.

[770] Advisers Act rules 203–1(a)(1), 204–5(b)(3) and Exchange rules 17a–14(b)(2), 17a–14(c)(3); General Instructions 8.A., 8.C., and 10.A. to Form CRS.

[771] *See, e.g.*, Trailhead Consulting Letter ("If the form is kept to a more generalized and educational nature, material changes shouldn't occur too often."); NASAA Letter; LPL Financial Letter; Prudential Letter; Primerica Letter.

[772] *See* Morgan Stanley Letter (30 days "may not be sufficient to address the related operational issues").

[773] *See, e.g.*, Advisers Act rule 204–5(b)(4); General Instruction 8 to Form CRS. Generally, an investment adviser registered with the SEC is required to amend its Form ADV promptly if information provided in its brochure becomes materially inaccurate. *See* Advisers Act rule 204–1(a)(2); General Instruction 4 to Form ADV.

[774] *See, e.g.*, Exchange Act rule 15b3–1.

[775] *See* Proposed General Instruction 6.(b) to Form CRS.

[776] *See, e.g.*, Fidelity Letter ("We also support the SEC's position that with respect to material changes of information provided in a Form CRS, firms must either provide an updated Form CRS to retail investors or communicate the changes in another way such as posting on the firm's website."); Morgan Stanley Letter; Primerica Letter.

[777] *See* NASAA Letter.

[778] General Instruction 8.B. to Form CRS ("You can make the communication by delivering the amended *relationship summary* or by communicating the information through another disclosure that is delivered to the *retail investor*.").

[779] Advisers Act rule 204–5(b)(4) and Exchange Act rule 17a–14(c)(4); Proposed General Instruction 6.(b) to Form CRS.

[780] *See* LPL Financial Letter; Morgan Stanley Letter. For example, NASD Rule 2340 requires broker-dealers to deliver account statements generally on a quarterly basis.

[781] General Instruction 8.C. to Form CRS ("Each amended *relationship summary* that is delivered to a *retail investor* who is an existing client or customer must highlight the most recent changes by, for example, marking the revised text or including a summary of material changes. The additional disclosure showing revised text or summarizing the material changes must be attached as an exhibit to the unmarked amended *relationship summary*."). As an addition to the proposal, we are also amending General Instruction 4 to Form ADV to mirror this requirement ("You must include an exhibit highlighting the most recent changes required by Form ADV, Part 3 (Form CRS), General Instruction 8.C."); *see also supra* footnotes 673–677 and accompanying text.

[782] General Instruction 8.A. to Form CRS; *see also* General Instruction 4 to Form ADV.

[783] Advisers Act rules 204–5(b)(3) and 204–5(b)(5) and Exchange Act rules 17a–14(c)(3) and 17a–14(c)(5); General Instruction 9.B. to Form CRS.

relationship summary, it is important that broker-dealers identify their existing customers who are retail investors and recognize that a customer relationship may take many forms. For example, a broker-dealer will be required to provide the relationship summary to customers who have so-called "check and application" arrangements with the broker-dealer, under which a broker-dealer directs the customer to send the application and check directly to the issuer. We continue to believe this approach will facilitate broker-dealers building upon their current compliance infrastructure in identifying existing customers [784] and will enhance investor protections to retail investors engaging the financial services of broker-dealers.

D. Transition Provisions

To provide adequate notice and opportunity to comply with the adopted relationship summary filing requirements, firms that are registered, or investment advisers who have an application for registration pending, with the Commission prior to June 30, 2020 will have a period of time beginning on May 1, 2020 until June 30, 2020 to file their initial relationship summaries with the Commission.[785] On and after June 30, 2020, newly registered broker-dealers will be required to file their relationship summary with the Commission by the date on which their registration with the Commission becomes effective, and the Commission will not accept any initial application for registration as an investment adviser that does not include a relationship summary that satisfies the requirements of Form ADV, Part 3: Form CRS.[786] The adopted transition period is longer than we proposed. The proposal would have required broker-dealers to comply with their relationship summary obligations beginning six months after the effective date of the new rules and rule amendments.[787] Similarly, in the proposal, investment advisers or dual registrants would have been required to comply with the new filing requirements as part of the firm's next annual updating amendment to Form ADV that would have been required after six months after the rule's effective date.[788] The extended time to comply with the relationship summary requirements reflects our consideration of comments we received from firms and the modifications to the proposed requirements of the relationship summary.

In the proposal, we asked for comment on the proposed implementation requirements and whether the six-month period was enough time for newly registered broker-dealers and investment advisers to prepare an initial relationship summary.[789] A number of commenters requested a longer implementation period, ranging from 12 to 24 months from the effective date.[790] One commenter suggested a phased-in approach, such that requirements may be effected at different points in time.[791] Commenters cited a number of reasons for a longer implementation period, including the time needed to hire additional staff and create and deploy new disclosures, procedures, training, and technology,[792] as well as to have the opportunity to apply innovative technology and designs.[793]

We are mindful of the time needed to create the relationship summary, as well as to update a firm's policies, procedures, and systems in order to provide these new disclosures. We are, however, lengthening the time that firms will have to comply relative to the proposal after considering commenters' suggestions for a longer implementation period. We expect that approximately twelve months will be adequate for firms to conduct the requisite operational changes to their systems and to establish internal processes to satisfy their relationship summary obligations.

Some commenters expressed the view that the proposed one-time, initial delivery to existing clients and customers is not necessary.[794] One survey reported, on the other hand, that over 90% of survey respondents with an existing financial professional relationship stated that they knew more about their relationship with the adviser after reading the proposed relationship summary.[795] We believe the information contained in the relationship summary could improve existing investors' ability to monitor and make more informed decisions related to their existing relationships with firms during their duration, including whether to terminate a relationship. For example, as discussed above in Section II.A., retail investors that may learn of account types whose minimum requirements they did not meet when they first opened their existing account, through a one-time, initial delivery to existing clients and customers. Upon seeing this range of options, existing clients and customers could seek to take advantage of cost savings or additional services offered through these other account types. We believe that existing clients and customers would benefit from this one-time delivery of the relationship summary and therefore are adopting the requirement as proposed. Firms will be required to deliver their relationship summary to new and prospective clients and customers who are retail investors as of the date by which they are first required to electronically file their relationship summary with the Commission.[796] In addition, as proposed, firms will be required, as part of the transition, to

[784] For example, broker-dealers may already have compliance infrastructure to identify customers pursuant to FINRA's suitability rule, which applies to dealings with a person (other than a broker or dealer) who opens a brokerage account at a broker-dealer or who purchases a security for which the broker-dealer receives or will receive, directly or indirectly, compensation even though the security is held at an issuer, the issuer's affiliate or custodial agent, or using another similar arrangement. *See* Guidance on FINRA's Suitability Rule, FINRA Regulatory Notice 12–55 (Dec. 2012), at Q6(a).

[785] *See* Exchange Act rule 17a–14(f), Advisers Act rules 203–1(a)(2) and 204–1(e); Instruction 7.C. to Form CRS.

[786] *See* Exchange Act rule 17a–14(f) and Advisers Act rule 203–1(a)(2); Instruction 7.C. to Form CRS.

[787] *See* Proposed Instruction 5.c. to Form CRS. *See* Advisers Act proposed rule 203–1(a)(2) and Exchange Act proposed rule 17a–14 (f)(1).

[788] *See id.*

[789] *See* Proposing Release.

[790] *See, e.g.,* IAA Letter I (requesting a 12 month implementation period from the effective date); CCMC Letter (requesting 18 months); IRI Letter (requesting 18–24 months); Comment Letter of HD Vest Financial Services (Aug. 7, 2018) ("HDVest Letter") (requesting 18 months); Cetera Letter I; SIFMA Letter (requesting at least 24 months from the date the final rules are approved).

[791] *See* SIFMA Letter.

[792] *See* HDVest Letter.

[793] *See* IAA Letter I.

[794] *See, e.g.,* Fidelity Letter (existing customers are already familiar with the services offered to them by their broker-dealer or investment adviser. . . but can of course access a copy posted on the firm's website); AXA Letter (delivering the relationship summary to existing customers is likely to be confusing); Cetera Letter I (firms should not be required to deliver a new or amended Form CRS to [existing] clients except in limited circumstances, such as when the client establishes a different type of account than they already have).

[795] *See* Cetera Letter II (Woelfel), *supra* footnote 17 (84% of respondents stated that they knew a lot or a little more about their financial adviser after reviewing the Form CRS than they did before; among respondents with current relationships with a broker or adviser, over 90% said they knew more); *see also* CCMC Letter (investor polling), *supra* footnote 21 (in a survey of investors with investments outside of a work sponsored 401(k), pension or personal real estate, 72% of participants responding to a question describing that new rules could require financial professionals to deliver " a standardized four page document that explains the relationship between the financial professional and clients" agreed that the new disclosure document "will boost transparency and help build stronger relationships between me and my financial professional" and 62% indicated that they were "very interested" in reading the document).

[796] *See* Advisers rule 204–5(e)(2) and Exchange Act rule 17a–14(f)(4); Instruction 7.C.iii. to Form CRS.

deliver their relationship summaries to all existing clients and customers who are retail investors on an initial one-time basis within 30 days after the date the firm is first required to file its relationship summary with the Commission.[797]

E. Recordkeeping Amendments

We are adopting amendments to the recordkeeping and record retention requirements under Advisers Act rule 204–2 and Exchange Act rules 17a–3 and 17a–4, as proposed. These rules set forth requirements for firms to make, maintain, and preserve specified books and records. Pursuant to paragraph (a)(14)(i) of Advisers Act Rule 204–2 as amended, investment advisers will be required to make and preserve a record of the dates that each relationship summary was given to any client or prospective client who subsequently becomes a client.[798] New paragraph (a)(24) of Exchange Act Rule 17a–3 as adopted will require broker-dealers to create a record of the date on which each relationship summary was provided to each retail investor, including any relationship summary provided before such retail investor opens an account.[799] In addition, paragraph (a)(14)(i) of Advisers Act rule 204–2, as amended, will require investment advisers to retain copies of each relationship summary and each amendment or revision thereto while paragraph (e)(10) of Exchange Act rule 17a–4, as amended, will require broker-dealers to maintain and preserve a copy of each version of the relationship summary as well as the records required to be made pursuant to new paragraph (a)(24) of Exchange Act rule 17a–3 as adopted by the Commission.[800] The amended rules set forth the manner in which and the period of time for which these record must be retained.[801] These records will facilitate the Commission's ability to inspect for and enforce compliance with the relationship summary requirements.

We received no comments on the proposed manner and time period for records preservation or the requirement to maintain a copy of each version of the relationship summary and each amendment or revision to the relationship summary.[802] We are adopting these requirements as proposed. Some commenters expressed concern with the potential costs and feasibility of complying with the proposed recordkeeping requirements for broker-dealers.[803] Several commenters argued that keeping records of when a relationship summary was given to a prospective retail investor would be unnecessarily burdensome for firms and would likely provide *de minimis* benefits.[804] Some investment adviser and broker-dealer commenters stated that most firms' recordkeeping systems and procedures are not designed to maintain records relating to prospective clients and that conforming such systems and procedures to the proposed rule requirements would be burdensome and costly and would not result in an offsetting benefit.[805] Others noted they may have to retain records for an indefinite length of time because their interactions with prospective clients about engaging services often span weeks, months or years and may include numerous phone calls, meetings or other forms of contact.[806]

As an alternative, commenters suggested that firms only be required to maintain a record of the most recent date they delivered the relationship summary to a prospective client that becomes an actual client preceding the opening of an account.[807] Commenters suggested only requiring a record that the relationship summary was delivered at account opening or when a retail investor becomes an investment advisory client.[808]

Based on our experience with similar recordkeeping requirements for the Form ADV Part 2A brochure, requiring firms to create and maintain records of the dates they provide or give a relationship summary to an existing, new, or potential retail investor will facilitate examiners' ability to inspect and examine for compliance with the relationship summary delivery and content requirements. Specifically, the dates will help examiners to identify the relationship summary disclosures that retail investors may have relied on to decide whether to engage a firm's services. Absent having these dates to examine, we believe that it would be exceedingly difficult for examiners to evaluate firms' compliance with the relationship summary delivery and content requirement. These records also may assist firms in monitoring their compliance with the relationship summary delivery requirements.

Recordkeeping obligations for the relationship summary may be less burdensome if firms' recordkeeping and compliance systems are already capable of creating and maintaining records related to communications with prospective clients. For example, investment advisers are required to keep similar records for the delivery of the Form ADV Part 2A brochure[809] and broker-dealers, especially those registered with FINRA, are subject to comparable recordkeeping requirements with respect to communications and correspondence with prospective retail investors.[810]

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[797] *See* Advisers rule 204–5(e)(1) and Exchange Act rule 17a–14(c) and (f)(3); adopted Instruction 7.C.iv. to Form CRS.

[798] *See* amended Advisers Act rule 204–2(a)(14)(i).

[799] *See* Exchange Act rule 17a–3(a)(24).

[800] The effect of the amended and adopted rules will require both investment advisers and broker-dealers to maintain copies of all versions of the relationship summary and the dates they are provided or given to existing or prospective retail customers; *see also* General Instruction 6.A. to Form CRS (requiring firms to maintain a copy of each version of the relationship summary and make it available to the SEC staff upon request). The Commission notes that pursuant to Exchange Act rule 17a–3(e), for purposes of transactions in municipal securities by municipal securities broker-dealers, compliance with Rule G–8 of the Municipal Securities Rulemaking Board ("MSRB") will be deemed to be in compliance with the recordkeeping requirements for broker-dealers. Accordingly, for purposes of transactions in municipal securities, a broker-dealer may satisfy its recordkeeping obligations under Exchange Act rule 17a–3(a)(24), as adopted, by complying with Rule G–8 of the MSRB. *See* Exchange Act rule 17a–3(e).

[801] Investment advisers will be required to maintain and preserve these records in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser. *See* Advisers Act rule 204–2(e)(1). Broker-dealers will be required to maintain these records in an easily accessible place until six years after such record or relationship summary is created. *See* Exchange Act rules 17a–3(a)(24) and 17a–4(e)(10) as amended.

[802] *See* Exchange Act rule 17a–4(e)(10) as proposed to be amended and Advisers Act rule 204–2(e)(1) (which would apply to amended rule 204–2(a)(14)(i) as proposed to be amended). The recordkeeping requirements for investment advisers will mirror the current recordkeeping requirements for Form ADV Part 2. *See* Advisers Act amended rule 204–2(a)(14)(i) as proposed to be amended and rule 204–2(e)(1).

[803] *See, e.g.*, CCMC Letter; Committee of Annuity Insurers Letter; Edward Jones Letter; Morgan Stanley Letter; Primerica Letter; SIFMA Letter; IPA Letter.

[804] *See id.*

[805] *See, e.g.*, Committee of Annuity Insurers Letter; Edward Jones Letter; Morgan Stanley Letter; Primerica Letter; SIFMA Letter.

[806] *See, e.g.*, Edward Jones Letter; Primerica Letter; SIFMA Letter.

[807] *See, e.g.*, CCMC Letter; SIFMA Letter.

[808] *See, e.g.*, SIFMA Letter; Morgan Stanley; Edward Jones Letter.

[809] *See, e.g.*, Advisers Act rule 204–2.

[810] *See, e.g.*, Exchange Act rule 17a–4(b)(4) requiring broker-dealers to maintain a record of all communications sent relating to its business as such; *see also*, *e.g.*, FINRA Rule 2210(a)(5) (defining "retail communication" to mean "any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period."); FINRA Rule 2210(b)(4) (requiring all FINRA members to "maintain all retail communications and institutional communications for the retention period required by SEA Rule 17a–4(b) and in a format and media that comply with SEA Rule 17a–4 . . . [and] . . . all correspondence in accordance with the record-keeping requirements of [FINRA] Rules 3110.09 [on supervision, requiring FINRA members to retain the internal communications and

Several firms also requested clarification and expressed concern regarding the potential recordkeeping implications related to the "Key Questions to Ask" provision of the proposal.[811] Some commenters stated that requiring firms to make and maintain records of their answers to the "Key Questions to Ask" and of supplemental information cross-referenced in or linked from the relationship summary would result in substantial and unnecessary burdens and/or might stifle potentially beneficial discussions between firms, clients and/or prospective clients.[812] Commenters requested clarification that "Key Questions to Ask" are intended to promote dialog between firms and clients rather than creating any sort of recordkeeping requirement, which commenters believed could lead to less robust discussions between firms and clients.[813]

As discussed above, the "Key Questions to Ask" section of the relationship summary has been eliminated, but firms will be required to include "conversation starters" in their relationship summary.[814] We are not establishing new or separate recordkeeping obligations related to the conversation starters or the answers provided by firms in response to the conversation starters. We are also not adding separate or new recordkeeping obligations related to the use of layered disclosure in the relationship summary. Current recordkeeping rules for investment advisers and broker-dealers already impose recordkeeping and retention requirements related to a firm's disclosures and other communications with retail investors, which will include responses to conversation starters or information cross-referenced in the relationships summary.[815] Responses to conversation starters or hyperlinked material may trigger recordkeeping requirements under other federal securities statutes and rules or the rules of self-regulatory organizations of which firms are members or registrants.[816] Further, firms may wish to develop scripts for their financial professionals in responding to conversation starters to ensure the quality and consistency of responses and then preserve the scripts for compliance purposes.

III. Disclosures About a Firm's Regulatory Status and a Financial Professional's Association

In connection with Form CRS, we recognized that the education and information that Form CRS provides to retail investors could potentially be overwhelmed by the way in which financial professionals present themselves to potential or current retail investors, including through advertising and other communications.[817] This concern was particularly acute where such communications could be misleading in nature, or where advertising and communications precede the delivery of Form CRS and may have a disproportionate impact on shaping or influencing retail investor perceptions.[818] To mitigate these concerns, we proposed additional rules as part of the Proposing Release. One of our proposed rules required disclosure of a firm's regulatory status and a financial professional's association with a firm. Specifically, we proposed rules under the Exchange Act and the Advisers Act that would have required a broker-dealer and an investment adviser to prominently disclose that it is registered as a broker-dealer or investment adviser, as applicable, with the Commission in print or electronic retail investor communications.[819] The proposed Exchange Act rule also would have required an associated natural person of a broker or dealer to prominently disclose that he or she is an associated person of a broker-dealer registered with the Commission in print or electronic retail investor communications.[820] Similarly, the proposed Advisers Act rule would have required a supervised person of an investment adviser registered under section 203 to prominently disclose that he or she is a supervised person of an investment adviser registered with the Commission in print or electronic retail investor communications.[821] As we discussed in the Proposing Release, we believed that requiring a firm to disclose whether it is a broker-dealer or an investment adviser in print or electronic retail investor communications would assist retail investors in determining which type of firm is more appropriate for their specific investment needs.[822] For similar reasons, we noted that because retail investors interact with a firm primarily through financial professionals, it is important that financial professionals disclose the firm type with which they are associated.[823]

Several commenters expressed general support for the proposed Affirmative Disclosures.[824] Some of these commenters believed that the rules could be beneficial in helping investors to understand the legal distinctions between broker-dealers and investment advisers.[825] Another commenter in support of the Affirmative Disclosures stated that investors would benefit more if they were also provided with readily accessible regulatory and disciplinary histories of the financial professional.[826] However, one commenter noted that while "the required disclosure could have some modest benefit, . . . it is important not to overstate [its] likely value." [827]

Several commenters also opposed the Affirmative Disclosures.[828] Some commenters believed that the proposed rules were duplicative, noting that

correspondence of associated persons relating to the member's investment banking or securities business for the period of time and accessibility specified in SEA Rule 17a–4(b)] and 4511 [establishing general requirements for members to "preserve books and records as required under the FINRA rules, the Exchange Act and the applicable Exchange Act rules"]).

[811] *See, e.g.*, CCMC Letter; TIAA Letter; LPL Financial Letter; IPA Letter; NSCP Letter.

[812] *See, e.g.*, Edward Jones Letter; CCMC Letter; NSCP Letter; SIFMA Letter; Morgan Stanley Letter; TIAA Letter; LPL Financial Letter.

[813] *See, e.g.*, Edward Jones Letter; CCMC Letter; TIAA Letter; LPL Financial Letter.

[814] *See supra* Section II.A.4.

[815] For example, with respect to investment advisers, if a conversation starter prompts a written communication that includes a recommendation made or proposed to be made or any advice given or proposed to be given by the investment adviser, such a communication may be subject to the recordkeeping requirements of Advisers Act rule 204–(2)(a)(7). Also, for example, broker-dealers, under Exchange Act Rule 17a–4(b)(4), are required to maintain records of the "[o]riginals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such. . ."; *see also* the recordkeeping requirements of FINRA Rule 2210.

[816] *See id.*

[817] *See* Proposing Release, *supra* footnote 5, at footnotes 374–375 and accompanying text.

[818] *See id.*

[819] *See id.*, at footnotes 437–439 and accompanying text.

[820] *See id.*

[821] *See id.*

[822] *See* Proposing Release, *supra* footnote 5, at footnotes 440–441 and accompanying text.

[823] *See id.* We also proposed rules that would have restricted broker-dealers and their associated persons from using the terms "adviser" or "advisor" as part of a name or title when communicating with retail investors in certain circumstances. We are not adopting those rules, as further discussed in the Regulation Best Interest Release. *See* Regulation Best Interest Release, *supra* footnote 47.

[824] *See* CFA Letter I; CFA Institute Letter I (stating that "[r]equiring them to call themselves what they legally are will enable investors to better understand the distinction"); Better Markets Letter.

[825] *See* CFA Institute Letter I; CFA Letter I; LPL Financial Letter.

[826] *See* Better Markets Letter.

[827] *See* CFA Letter I.

[828] Some commenters also opposed the proposed Affirmative Disclosures because investors do not understand what it means to be registered or what the legal terms mean. *See* Altruist Letter; IRI Letter. *See also* LPL Financial Letter (noting that regulatory status is not important to an investor when being casually introduced for the first time to a financial professional and receiving a business card); Bank of America Letter; SIFMA Letter.

Regulation Best Interest, Form CRS, and/or other required disclosure obligations (*e.g.*, Form ADV, FINRA Rule 2210) would inform retail investors of the capacity of a firm and its financial professionals, obviating the need for the additional rules.[829] Some of these commenters stated that Form CRS alone or in combination with FINRA Rule 2210(d)(3) (providing specific requirements for disclosure of the broker-dealer's name in retail communications and correspondence) would provide retail investors with a firm's capacity and its name, making the Affirmative Disclosures duplicative.[830]

Several commenters also opposed the Affirmative Disclosures because they believed the costs to implement and comply with the proposed rules did not justify the benefits.[831] In particular, these commenters noted a range of cost-related impacts, such as replacing new and existing business cards[832] and amending numerous electronic and print marketing materials.[833] Several commenters also noted the difficultly in implementing and supervising specific types of communication including business cards, oral communications, and voice overlay and on-screen text in televised or video presentations.[834]

After considering the comments received and the obligations we are adopting under Regulation Best Interest and Form CRS, we have concluded that the capacity disclosure requirement in Regulation Best Interest and Form CRS are sufficient to achieve the objectives of the proposed Affirmative Disclosures. These rules enhance retail investor awareness of the firm and professional type that they are engaging or seeking to engage and would therefore assist a retail investor in choosing the type that best suits his or her financial goals.

As discussed in the Regulation Best Interest Release, as part of its disclosure obligations, a broker-dealer and its associated natural persons must disclose when they are acting as a broker-dealer when making a recommendation. This type of disclosure is designed to improve awareness among retail customers such that a retail customer can more readily identify and understand their relationship.[835] This capacity disclosure requires a broker-dealer and its financial professionals to disclose that the firm or the financial professional is acting as a broker-dealer, as a material fact relating to the scope and terms of the relationship subject to its disclosure obligation.[836] As noted in the Regulation Best Interest Release, a broker-dealer and its financial professionals must disclose the required information prior to or at the time of a recommendation but Regulation Best Interest does not mandate the form, specific time, or method of delivering disclosures pursuant to its disclosure obligation.[837] In fulfilling this obligation, a broker-dealer that is not a dual registrant generally will be able to satisfy the requirement to disclose the broker-dealer's capacity by delivering the Relationship Summary to the retail customer. For broker-dealers who are dually registered, and for associated persons who are either dually licensed or are not dually licensed and only offer broker-dealer services through a firm that is dually registered, the information contained in the Relationship Summary will not be sufficient to disclose their capacity in making a recommendation.[838] As discussed in the Regulation Best Interest Release, although some commenters expressed concerns about potential investor confusion caused by "additional" disclosure regarding a dual registrant's capacity, the disclosure obligations of Regulation Best Interest will not duplicate or confuse, but instead will provide clarifying detail on capacity to supplement the information contained in the Relationship Summary.[839]

Additionally, as discussed above, Form CRS includes a requirement for firms to state their name and whether they are "registered with the Securities and Exchange Commission as a broker-dealer, investment adviser, or both."[840] Form CRS is required to be delivered before or at the time the financial professional enters into an investment advisory relationship or, for a broker-dealer, before or at the earliest of a certain recommendation, the execution of a securities transaction, or the opening of a brokerage account.[841] Additionally, Form CRS will need to be prominently posted on the firm's public website, if it maintains one, in a location and format that is easily accessible to retail investors[842] and must be provided to retail investors 60 days after a material change is made.[843] These requirements highlight for an investor's attention, and promote access to, the capacity information at times that we believe are crucial to a retail investor when seeking to make a choice of financial firms.

We recognize that the proposed Affirmative Disclosures would have included capacity requirements on more communications than what is required by Form CRS and capacity disclosure requirement in Regulation Best Interest. Specifically, under the Affirmative Disclosures, all forms of communications used by broker-dealers, investment advisers and their financial professionals, such as business cards, letterheads, social media profiles, and signature blocks would have included these required capacity disclosures. However, several commenters questioned whether the benefit provided by covering more communications justified the costs of implementing the requirements.[844]

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[829] *See, e.g.*, LPL Financial Letter (stating that Form ADV, Form CRS, and Regulation Best Interest already "communicate to investors the capacity in which they are acting on behalf of the investor and the material facts related to the investor's relationship with the firm and its financial professionals."); SIFMA Letter (stating that "information regarding regulatory status is contained in Proposed Form CRS, and Proposed Form CRS is available at all times on a firm's website, in addition to periodic distribution to clients."); IRI Letter; Committee of Annuity Insurers Letter; Letter from Mari-Anne Pisarri, Pickard Djinis and Pisarri LLP ("Pickard Letter") (stating "the Commission should determine whether the existing Form ADV brochure supplement adequately informs retail investors of the registration status of the advisory representatives they deal with . . . .")

[830] *See, e.g.*, IRI Letter; Bank of America Letter; Committee of Annuity Insurers Letter. *See also* SIFMA Letter (noting that Form CRS resolves any confusion that may exist regarding whether a financial professional or firm is a broker-dealer or an investment adviser and would be available on a firm website and given periodically to investors).

[831] *See, e.g.*, LPL Financial Letter; Bank of America Letter; IRI Letter; SIFMA Letter.

[832] *See* IRI Letter. *See also* SIFMA Letter (noting also that firms would need to reprint all business cards and modify "firm technologies and electronic communications").

[833] *See* LPL Financial Letter (noting "significant financial costs").

[834] *See* Bank of America Letter; IRI Letter; SIFMA Letter; Altruist Letter. *See also* Committee of Annuity Insurers Letter (noting also that there are operational challenges in situations where marketing materials or account statements are used or distributed by a product sponsor rather than the firm itself).

[835] *See* Regulation Best Interest Release, *supra* footnote 47, at Section II.C.1.a.

[836] *See id.*

[837] *See id.*

[838] *See id.*

[839] *See id.*

[840] *See* Item 1.A. of Form CRS. *See also supra* Section II.B.1.

[841] *See* General Instruction 7.B to Form CRS. *See also supra* Section II.C.

[842] *See* General Instruction 10.A. to Form CRS. *See also supra* Section II.C.3.a.

[843] *See* General Instruction 8.B. to Form CRS. *See also supra* Section II.C.4. In addition, the most recent versions of firms' relationship summaries will be accessible through *Investor.gov*. *See supra* footnote 698 and accompanying text.

[844] *See, e.g.*, IRI Letter (stating that the costs to amend "tens of thousands of business cards to add the new required disclosure outweighs any intended benefit, particularly since the Form CRS already accomplishes the same objective . . ."); Committee of Annuity Insurers Letter (stating that the Affirmative Disclosure rules provide little benefit to investors and present operational challenges with respect to marketing materials created by product sponsors or issuers); LPL Financial Letter (noting that the benefits of these rules are outweighed by the "significant financial

While commenters did not provide quantitative data that would demonstrate the cost impact on firms, certain commenters did describe the scope of the impact along with the operational challenges in implementing the rule.[845] One commenter stated that "the costs of such requirement would be significant" as firms would need to reprint all business cards to include this disclosure and make changes to firm technology and electronic communications to make the disclosure.[846] Additionally, another commenter stated that adding a voice overlay and on-screen text for video presentations would be difficult to implement, costly, and challenging to supervise.[847]

After considering the comments received and the obligations we are adopting under Regulation Best Interest and Form CRS, we have concluded that the policy concerns underlying the Affirmative Disclosures are addressed by the rulemaking package we are adopting, particularly the disclosure obligations in Regulation Best Interest and Form CRS, as discussed above.[848] We therefore believe that the costs of the Affirmative Disclosures do not justify any incremental benefit of requiring registration status on all communications and as a result, we are not adopting the Affirmative Disclosures.

IV. Economic Analysis

A. Introduction

The Commission is sensitive to the economic effects, including the benefits and costs and the effects on efficiency, competition, and capital formation that will result from the new rules and amendments to existing rules. Whenever the Commission engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, section 3(f) of the Exchange Act requires the Commission to consider whether the action would promote efficiency, competition, and capital formation, in addition to the protection of investors.[849] Further, when making rules under the Exchange Act, section 23(a)(2) of the Exchange Act requires the Commission to consider the impact such rules would have on competition.[850] Section 23(a)(2) of the Exchange Act also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[851]

Section 202(c) of the Advisers Act requires the Commission, when engaging in rulemaking and required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation, in addition to the protection of investors.[852] The Commission provides both a qualitative assessment of the potential effects and where feasible, quantitative estimates of the potential aggregate initial and aggregate ongoing costs. In some cases, however, quantification is not feasible due to lack of relevant data, or the difficulty of predicting how market participants would act under the conditions of the proposed rules. For example, to the extent that the relationship summary will increase retail investors' understanding of the services provided to them, investors are likely to respond differently to the increased understanding. Such responses could be transferring to a different financial firm or professional, hiring a financial professional for the first time, not taking any action, deciding to invest on their own without advice, or entirely abandoning the brokerage or investment advisory market while moving their assets to other products or markets (*e.g.*, bank deposits or insurance products). Given the number and complexity of assumptions that would be required to be able to estimate how the relationship summary will affect investors' understanding and their decision-making, the Commission is not able to estimate the propensity of investors to respond in one way or another.

In the economic analysis that follows, we first examine the current regulatory and economic landscape to form a baseline for our analysis. The economic effects of the adopted changes are discussed below.

B. Baseline

This section discusses, as it relates to this rulemaking, the current state of the broker-dealer and investment adviser markets, the current regulatory environment, and the current state of retail investor perceptions in the market.

cost" to amend "numerous electronic and print marketing materials, business cards, and other retail customer communications.")

[845] *See* IRI Letter (noting that a voice overlay and on-screen text may be difficult to implement and to effectively supervise. Additionally, firms will incur "significant costs and resources to monitor such presentations" for the required disclosures "even though that same client already received the Form CRS disclosure."); LPL Financial Letter. *See also* Bank of America Letter ("the [Affirmative Disclosure rules] will impose significant costs to implement since tens of thousands of business cards will need to be amended in order to add the new required disclosures.")

[846] *See* SIFMA Letter (noting that "we do not believe the regulatory status disclosure would have an obvious benefit to investors. At the same time, the costs of such a requirement would be significant.")

[847] *See* Bank of America Letter (stating further that "it would be virtually impossible to supervise whether [the required] disclosure was made in oral communications."); *see also* Altruist Letter (stating that including the disclosure in oral communications would be "awkward for a practitioner to implement."); Committee of Annuity Insurers Letter (stating that "it may not be feasible for a broker-dealer to include this information on marketing materials for investment products created and provided by a product sponsor.")

[848] *See* Regulation Best Interest Release, *supra* footnote 47.

[849] *See* 15 U.S.C. 77b(b) and 15 U.S.C. 78c(f).

[850] *See* 15 U.S.C. 78w(a)(2).

[851] *Id.*

[852] 15 U.S.C. 80b–2(c).

1. Providers of Financial Services[853]

a. Broker-Dealers

This rule will affect registrants in the market for broker-dealer services, including dual registrants[854] and broker-dealers offering services to retail investors that are affiliated with an investment adviser.[855] The market for broker-dealer services encompasses a small set of large and medium sized broker-dealers and thousands of smaller broker-dealers competing for niche or regional segments of the market.[856] The market for broker-dealer services includes many different markets for a variety of services, including, but not limited to, managing orders for customers and routing them to various trading venues; providing advice to customers that is in connection with and reasonably related to their primary business of effecting securities transactions; holding retail customers' funds and securities; handling clearance and settlement of trades; intermediating between retail customers and carrying/clearing brokers; dealing in corporate debt and equities, government bonds, and municipal bonds, among others; privately placing securities; and effecting transactions in mutual funds that involve transferring funds directly to the issuer. Some broker-dealers may specialize in just one narrowly defined service, while others may provide a wide variety of services.

As of December 2018, there were approximately 3,764 registered broker-dealers with over 140 million customer accounts. In total, these broker-dealers have over $4.3 trillion in total assets, which are total broker-dealer assets as reported on Form X–17a–5.[857] More than two-thirds of all brokerage assets and close to one-third of all customer accounts are held by the 17 largest broker-dealers, as shown in Table 1, Panel A.[858] Of the broker-dealers registered with the Commission as of December 2018, 359 broker-dealers are dually registered as investment advisers.[859] These firms hold over 90 million (63%) customer accounts. Approximately 539 broker-dealers (14%) report at least one type of non-securities business, including insurance, retirement planning, mergers and acquisitions, and real estate, among others.[860] Approximately 73.5% of registered broker-dealers report retail customer activity.[861]

Panel B of Table 1 is limited to the broker-dealers that report some retail investor activity. As of December 2018, there are approximately 2,766 broker-dealers that served retail investors, with over $3.8 trillion in total assets (89% of total broker-dealer assets) and almost 139 million (97%) customer accounts.[862] Of those broker-dealers serving retail investors, 318 are dually registered as investment advisers.[863]

[853] In addition to broker-dealers and Commission-registered investment advisers discussed below in the baseline, there are a number of other entities, such as state registered investment advisers, commercial banks and bank holding companies, and insurance companies, which also provide financial advice services to retail customers; however, because of unavailability of data, the Commission is unable to estimate the number of some of those other entities that are likely to provide financial advice to retail customers. A number of broker-dealers (*see infra* footnote 862) have non-securities businesses, such as insurance or tax services. As of December 2018, there are approximately 17,300 state-registered investment advisers. The Department of Labor in its Regulatory Impact Analysis identifies approximately 398 life insurance companies that could provide advice to retirement investors. *See* U.S. Department of Labor, *Regulating Advice Markets: Definition of the Term 'Fiduciary,' Conflicts of Interest, Retirement Investment Advice: Regulatory Impact Analysis for Final Rule and Exemptions* (Apr. 2016), *available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf* ("Regulatory Impact Analysis")

[854] Not all firms that are dually registered as an investment adviser and a broker-dealer offer both brokerage and advisory accounts to retail investors. For example, some dually registered firms offer advisory accounts to retail investors but offer only brokerage services, such as underwriting services, to institutional clients. For the purposes of the relationship summary, we define a dual registrant as a firm that is dually registered as a broker-dealer and an investment adviser and offers services to retail investors as both a broker-dealer and investment adviser. General Instruction 11.C to Form CRS.

[855] Some broker-dealers may be affiliated with investment advisers but are not dually registered. From Question 10 on Form BD, 2,098 (55.7%) broker-dealers report that directly or indirectly, they control, are controlled by, or are under common control with an entity that is engaged in the securities or investment advisory business. Comparatively, 2,421 (18.2%) SEC-registered investment advisers report an affiliate that is a broker-dealer in Section 7A of Schedule D of Form ADV, including 1,878 SEC-registered investment advisers that report an affiliate that is a registered broker-dealer. Approximately 77% of total regulatory assets under management of investment advisers are managed by these 2,421 SEC-registered investment advisers.

[856] *See* Risk Management Controls for Brokers or Dealers with Market Access, Securities Exchange Act Release No. 63241 (Nov. 3, 2010) [75 FR 69791 (Nov. 15, 2010)]. For simplification, we present our analysis as if the market for broker-dealer services encompasses one broad market with multiple segments, even though, in terms of competition, it could also be discussed in terms of numerous interrelated markets.

[857] Assets are estimated by Total Assets (allowable and non-allowable) from Part II of the FOCUS filings (Form X–17A–5 Part II, *available at https://www.sec.gov/files/formx-17a-5_2.pdf*) and correspond to balance sheet total assets for the broker-dealer. The Commission does not have an estimate of the total amount of customer assets for broker-dealers. We estimate broker-dealer size from the total balance sheet assets as described above.

[858] Approximately $4.27 trillion of total assets of broker-dealers (99%) are at firms with total assets in excess of $1 billion. Of the 39 dually registered broker-dealers with total assets in excess of $1 billion, total assets for these dually registered broker-dealers are $2.32 trillion (54%) of aggregate broker-dealer assets. Of the remaining 99 broker-dealers with total assets in excess of $1 billion that are not dually registered, 91 have affiliated investment advisers.

[859] Because this number does not include the number of broker-dealers who are also registered as state investment advisers, the number undercounts the full number of broker-dealers that operate in both capacities.

[860] We examined Form BD filings to identify broker-dealers reporting non-securities business. For the 539 broker-dealers reporting such business, staff analyzed the narrative descriptions of these businesses on Form BD, and identified the most common types of businesses: Insurance (202), management/financial/other consulting (99), advisory/retirement planning (71), mergers and acquisitions (70), foreign exchange/swaps/other derivatives (28), real estate/property management (30), tax services (15), and other (146). Note that a broker-dealer may have more than one line of non-securities business.

[861] The value of customer accounts is not available from FOCUS data for broker-dealers. Therefore, to obtain estimates of firm size for broker-dealers, we rely on the value of broker-dealers' total assets as obtained from FOCUS reports. Retail sales activity is identified from Form BR, which categorizes retail activity broadly (by marking the "sales" box) or narrowly (by marking the "retail" or "institutional" boxes as types of sales activity). We use the broad definition of sales as we preliminarily believe that many firms will just mark "sales" if they have both retail and institutional activity. However, this may capture some broker-dealers that do not have retail activity, although we are unable to estimate that frequency.

[862] Total assets and customer accounts for broker-dealers that serve retail customers also include institutional accounts. Data available from Form BD and FOCUS data is not sufficiently granular to identify the percentage of retail and institutional accounts at firms.

[863] Of the 31 dually registered firms in the group of retail broker-dealers with total assets in excess of $500 million, total assets for these dually registered firms are nearly $2.32 trillion (60%) of aggregate retail broker-dealer assets (Table 1, Panel B). Of the remaining 81 retail broker-dealers with total assets in excess of $500 million that are not dually registered, 69 have affiliated investment advisers.

TABLE 1—PANEL A: REGISTERED BROKER-DEALERS AS OF DECEMBER 2018

[Cumulative broker-dealer total assets and customer accounts]

Size of broker-dealer (total assets)	Total number of broker-dealers	Number of dually registered broker-dealers	Cumulative total assets (billion)	Cumulative number of customer accounts [864]
>$50 billion	17	10	$2,879	40,550,200
$1 billion to $50 billion	114	22	1,363	96,037,591
$500 million to $1 billion	35	7	23	397,814
$100 million to $500 million	105	19	23	1,603,818
$10 million to $100 million	490	101	17	4,277,432
$1 million to $10 million	1,021	130	3.6	460,748
<$1 million	1,982	70	0.5	5,675
Total [865] [866]	3,764	359	4,309	143,333,278

TABLE 1—PANEL B: REGISTERED RETAIL BROKER-DEALERS AS OF DECEMBER 2018

[Cumulative broker-dealer total assets and customer accounts]

Size of broker-dealer (total assets)	Total number of retail-facing broker-dealers	Number of dually registered retail-facing broker-dealers	Cumulative total assets (billion)	Cumulative number of customer accounts
>$50 billion	16	8	$2,806	40,545,792
$1 billion to $50 billion	75	18	990	91,991,118
$500 million to $1 billion	21	5	13	365,632
$100 million to $500 million	84	16	18	1,603,818
$10 million to $100 million	378	91	14	3,762,620
$1 million to $10 million	783	120	2.8	450,132
<$1 million	1,409	60	0.4	5,672
Total BDs [867]	2,766	318	3,844	138,724,784

Table [868] 2 reports information on brokerage commissions,[869] fees, and selling concessions from the fourth quarter of 2018 for all broker-dealers, including dually-registered firms.[870] We observe significant variation in sources of revenues for broker-dealers, with large broker-dealers, on average, generating substantially higher levels of commission and fee revenues than smaller broker-dealers. On average, broker-dealers, including those that are dually registered as investment advisers, earn about $5.1 million per quarter in revenue from commissions and nearly four times that amount in fees, although the Commission notes that fees encompass a variety of fees.[871] The level of revenues earned from broker-dealers for commissions and fees increases with broker-dealer size, but also tends to be more heavily weighted toward commissions for broker-dealers with less than $10 million in assets and is weighted more heavily toward fees for broker-dealers with assets in excess of $10 million. For example, for the 114

[864] Customer Accounts includes both broker-dealer and investment adviser accounts for dually-registered firms.

[865] The data is obtained from FOCUS filings as of December 2018. Note that there may be a double-counting of customer accounts among, in particular, the larger broker-dealers, as they may report introducing broker-dealer accounts as well accounts in their role as clearing broker-dealers.

[866] In addition to the approximately 143 million individual accounts at broker-dealers, there are approximately 302,000 omnibus accounts (0.2% of total accounts at broker-dealers), with total assets of $32.1 billion, across all 3,764 broker-dealers, of which approximately 99% are held at broker-dealers with greater than $1 billion in total assets. *See also infra* footnote 872. Omnibus accounts reported in FOCUS data are the accounts of non-carrying broker-dealers with carrying broker-dealers. These accounts may have securities of multiple customers (of the non-carrying firm), or securities that are proprietary assets of the non-carrying broker-dealer. We are unable to determine from the data available how many customer accounts non-carrying broker-dealers may have. The data does not allow the Commission to parse the total assets in those accounts to determine to whom such assets belong. Therefore, our estimate may be under inclusive of all customer accounts held at broker-dealers.

[867] Total Broker-dealers includes all retail-facing broker-dealers, including those dual registrants that have both retail-facing broker-dealers and retail-facing investment advisers.

[868] *See infra* footnote 1397 for how broker-dealers who engage in retail sales activity are identified. In addition to the 318 retail-facing dually registered broker-dealers, we estimate 30 broker-dealers that are registered as investment advisers but do not have a retail-facing investment advisory business.

[869] Mark-ups or mark-downs are not included as part of the brokerage commission revenue in FOCUS data; instead, they are included in Net Gains or Losses on Principal Trades, but are not uniquely identified as a separate revenue category.

[870] Source: FOCUS data.

[871] Fees, as detailed in the FOCUS data, include fees for account supervision, investment advisory services, and administrative services. Beyond the broad classifications of fee types included in fee revenue, we are unable to determine whether fees such as 12b–1 fees, sub-accounting, or other such service fees (*e.g.*, payments by an investment company for personal services and/or maintenance of shareholder accounts) are included. The data covers both broker-dealers and dually registered firms. FINRA's Supplemental Statement of Income, Line 13975 (Account Supervision and Investment Advisory Services) denotes that fees earned for account supervision are those fees charged by the firm for providing investment advisory services where there is no fee charged for trade execution. Investment Advisory Services generally encompass investment advisory work and execution of client transactions, such as wrap arrangements. These fees also include fees charged by broker-dealers that are also registered with the Commodity Futures Trading Commission ("CFTC"), but do not include fees earned from affiliated entities (Item A of question 9 under Revenue in the Supplemental Statement of Income).

broker-dealers with assets between $1 billion and $50 billion, average revenues from commissions are approximately $45 million, while average revenues from fees are approximately $225 million.[872]

In addition to revenue generated from commissions and fees, broker-dealers may also receive revenues from other sources, including margin interest, underwriting, research services, and third-party selling concessions, such as from sales of investment company ("IC") shares. As shown in Table 2, Panel A, these selling concessions are generally a smaller fraction of broker-dealer revenues than either commissions or fees, except for broker-dealers with total assets between $10 million and $100 million. For these broker-dealers, revenue from third-party selling concessions is the largest category of revenues and constitutes approximately 42% of total revenues earned by these firms.

Table 2, Panel B below provides aggregate revenues by revenue type (commissions, fees, or selling concessions from sales of IC shares) for broker-dealers delineated by whether the broker-dealer is also a dually-registered firm. Broker-dealers dually registered as investment advisers have a significantly larger fraction of their revenues from fees other than commissions or selling concessions, whereas commissions are approximately 42% of the revenues of broker-dealers that are not dually registered.

TABLE 2—PANEL A: AVERAGE BROKER-DEALER REVENUES FROM REVENUE GENERATING ACTIVITIES

Size of broker-dealer in total assets	Number of broker-dealers	Commissions	Fees[873][874]	Sales of IC shares
>$50 billion	17	$170,336,258	$414,300,268	$23,386,192
$1 billion–$50 billion	114	45,203,225	225,063,257	53,671,602
500 million–1 billion	35	8,768,547	30,141,270	5,481,248
100 million–500 million	105	12,801,889	33,726,336	16,610,013
10 million–100 million	490	3,428,843	8,950,892	9,092,971
1 million–10 million	1,021	996,130	1,037,825	652,905
<1 million	1,982	197,907	269,459	85,219
Average of All Broker-Dealers	3,764	5,092,808	21,948,551	4,368,823

TABLE 2—PANEL B: AGGREGATE TOTAL REVENUES FROM REVENUE GENERATING ACTIVITIES FOR BROKER-DEALERS BASED ON DUALLY-REGISTERED STATUS

Broker-dealer type	Number of broker-dealers	Commissions (billion)	Fees[875] (billion)	Sales of IC shares (billion)
Dually Registered as IAs	359	$4.52	$17.54	$2.63
Broker-Dealers	3,405	4.16	3.25	2.57
All	3,764	8.68	20.79	5.20

As shown in Table 3, based on responses to Form BD, broker-dealers most commonly provided business lines include private placements of securities (62.7% of broker-dealers); retail sales of mutual funds (55.4%); acting as a broker or dealer retailing corporate equity securities over the counter (52.0%); acting as a broker or dealer retailing corporate debt securities (47.2%); acting as a broker or dealer selling variable contracts, such as life insurance or annuities (41.0%); acting as a broker of municipal debt/bonds or U.S. government securities (39.8% and 37.4%, respectively); acting as an underwriter or selling group participant of corporate securities (31.2%); and investment advisory services (26.4%); among others.[876]

TABLE 3—LINES OF BUSINESS AT RETAIL BROKER-DEALERS AS OF DECEMBER 2018

Line of business	Number of broker-dealers (total)	Percent of broker-dealers (total)
Private Placements of Securities	1,735	62.7
Mutual Fund Retailer	1,533	55.4
Broker or Dealer Retailing:		
Corporate Equity Securities OTC	1,438	52.0
Corporate Debt Securities	1,306	47.2

[872] A rough estimate of total fees in this size category would be 114 broker-dealers with assets between $1 billion and $50 billion multiplied by the average fee revenue of $225 million, or $25.65 billion in total fees. Divided by the number of customer accounts, not all of which may pay fees, in this size category (96,037,591), each account would be charged on average approximately $267 in fees per quarter, or $1,068 per year.

[873] Fees, as detailed in the FOCUS data, include fees for account supervision, investment advisory services, and administrative services. The data covers both broker-dealers and dually registered firms.

[874] The data is obtained from December 2018 FOCUS reports and averaged across size groups.

[875] *See id.*

[876] Form BD requires applicants to identify the types of business engaged in (or to be engaged in) that accounts for 1% or more of the applicant's annual revenue from the securities or investment advisory business. Table 3 provides an overview of the types of businesses listed on Form BD, as well as the frequency of participation in those businesses by registered broker-dealers as of December 2018.

TABLE 3—LINES OF BUSINESS AT RETAIL BROKER-DEALERS AS OF DECEMBER 2018—Continued

Line of business	Number of broker-dealers (total)	Percent of broker-dealers (total)
Variable Contracts	1,132	40.9
Municipal Debt/Bonds—Broker	1,101	39.8
U.S. Government Securities Broker	1,035	37.4
Put and Call Broker or Dealer or Options Writer	993	35.9
Underwriter or Selling Group Participant—Corporate Securities	862	31.2
Non-Exchange Member Arranging for Transactions in Listed Securities by Exchange Member	785	28.4
Investment Advisory Services	730	26.4
Broker or Dealer Selling Tax Shelters or Limited Partnerships—Primary Market	619	22.4
Trading Securities for Own Account	614	22.2
Municipal Debt/Bonds—Dealer	475	17.2
U.S. Government Securities—Dealer	339	12.3
Solicitor of Time Deposits in a Financial Institution	308	11.1
Underwriter—Mutual Funds	237	8.6
Broker or Dealer Selling Interests in Mortgages or Other Receivables	216	7.8
Broker or Dealer Selling Oil and Gas Interests	207	7.5
Broker or Dealer Making Inter-Dealer Markets in Corporate Securities OTC	207	7.5
Broker or Dealer Involved in Networking, Kiosk, or Similar Arrangements (Banks, Savings Banks, Credit Unions)	197	7.1
Internet and Online Trading Accounts	192	6.9
Exchange Member Engaged in Exchange Commission Business Other than Floor Activities	171	6.2
Broker or Dealer Selling Tax Shelters or Limited Partnerships—Secondary Market	164	5.9
Commodities	162	5.9
Executing Broker	107	3.9
Day Trading Accounts	89	3.2
Broker or Dealer Involved in Networking, Kiosk, or Similar Arrangements (Insurance Company or Agency)	88	3.2
Real Estate Syndicator	94	3.4
Broker or Dealer Selling Securities of Non-Profit Organizations	71	26
Exchange Member Engaged in Floor Activities	61	2.2
Broker or Dealer Selling Securities of Only One Issuer or Associate Issuers	43	1.6
Prime Broker	21	0.8
Crowdfunding FINRA Rule 4518(a)	21	0.8
Clearing Broker in a Prime Broker	14	0.5
Funding Portal	8	0.3
Crowdfunding FINRA Rule 4518(b)	5	0.2
Number of Retail-Facing Broker-Dealers	2,766	

(1) Disclosures for Broker-Dealers

As discussed above, broker-dealers register with and report information, including about their business, affiliates, and disciplinary history, to the Commission, Self-Regulatory Organizations ("SROs"), and other jurisdictions through Form BD.[877] Form BD requires information about the background of the applicant, its principals, controlling persons, and employees, as well as information about the type of business the broker-dealer proposes to engage in and all control affiliates engaged in the securities or investment advisory business.[878] Broker-dealers report whether a broker-dealer or any of its control affiliates have been subject to criminal prosecutions, regulatory actions, or civil actions in connection with any investment-related activity, as well as certain financial matters.[879] Once a broker-dealer is registered, it must keep its Form BD current by amending it promptly when the information is or becomes inaccurate for any reason.[880] In addition, firms report similar information and additional information to FINRA pursuant to FINRA Rule 4530.[881]

A significant amount of information concerning broker-dealers and their associated natural persons, including information from Form BD, Form BDW, and Forms U4, U5, and U6, is publicly available through FINRA's BrokerCheck system.[882] This information includes violations of and claims of violations of the securities and other financial laws by broker-dealers and their financial professionals; criminal or civil litigation, regulatory actions, arbitration, or customer complaints against broker-dealers and their financial professionals; and the employment history and licensing information of financial professionals associated with broker-dealers, among other things.[883]

[877] *See* Proposing Release, *supra* footnote 5, at Section IV.A.1.i.; *see also generally* Form BD.

[878] *See generally* Form BD.

[879] *See* Item 11 and Disclosure Reporting Pages of Form BD.

[880] *See* Exchange Act rule 15b3–1(a).

[881] *See* Proposing Release, *supra* footnote 5, at Section II.B.7. Pursuant to FINRA Rule 4530, broker-dealers are required to disclose certain information to FINRA that is not reported on Form BD (*e.g.*, customer complaints and arbitrations).

[882] FINRA Rule 8312 governs the information FINRA releases to the public via BrokerCheck. *See* Proposing Release, *supra* footnote 5, at n.280.

[883] *See* Proposing Release, *supra* footnote 5, at Section II.B.7.

Broker-dealers are subject to other disclosure obligations under the federal securities laws and SRO rules. For instance, under existing antifraud provisions of the Exchange Act, a broker-dealer has a duty to disclose material information to its customers conditional on the scope of the relationship with the customer.[884] Disclosure has also been a feature of other regulatory efforts related to financial services, including certain FINRA rules.[885]

b. Investment Advisers

As discussed above, SEC-registered investment advisers that offer services to retail investors will be subject to the final rule. In addition, although not required to comply with the final rule, state-registered investment advisers will also be affected, because the final rule will impact the competitive landscape in the market for the provision of financial advice.[886] This section first discusses SEC-registered investment advisers, followed by a discussion of state-registered investment advisers.

As of December 2018, there are approximately 13,300 investment advisers registered with the Commission. The majority of SEC-registered investment advisers report that they provide portfolio management services for individuals and small businesses.[887]

Of all SEC-registered investment advisers, 359 identify themselves as dually registered broker-dealers.[888] Further, 2,421 investment advisers (18%) report an affiliate that is a broker-dealer, including 1,878 investment advisers (14%) that report an SEC-registered broker-dealer affiliate.[889] As shown in Panel A of Table 4 below, in aggregate, investment advisers have over $84 trillion in assets under management ("AUM"). A substantial percentage of AUM at investment advisers is held by institutional clients, such as investment companies, pooled investment vehicles, and pension or profit sharing plans; therefore, the total number of accounts for investment advisers is only 29% of the number of customer accounts for broker-dealers.

Based on staff analysis of Form ADV data as of December 2018, approximately 62% of registered investment advisers (8,235) have some portion of their business dedicated to retail investors, including both high net worth and non-high net worth individual clients,[890] as shown in Panel B of Table 4.[891] In total, these firms have approximately $41.4 trillion of assets under management.[892] Approximately 8,200 registered investment advisers (61%) serve over 32 million non-high net worth individual clients and have approximately $4.8 trillion in assets under management, while approximately 8,000 registered investment advisers (60%) serve approximately 4.8 million high net worth individual clients with $6.15 trillion in assets under management.[893]

TABLE 4—PANEL A: REGISTERED INVESTMENT ADVISERS (RIAS) AS OF DECEMBER 2018

[Cumulative RIA Assets Under Management (AUM) and Accounts]

Size of investment adviser (AUM)	Number of RIAs	Number of dually registered RIAs	Cumulative AUM (billion)	Cumulative number of accounts
>$50 billion	270	15	$59,264	20,655,756
$1 billion to $50 billion	3,453	121	22,749	13,304,154
$500 million to $1 billion	1,635	47	1,151	1,413,099
$100 million to $500 million	5,927	119	1,397	5,135,070
$10 million to $100 million	1,070	24	59	310,031
$1 million to $10 million	162	3	0.8	69,664
<$1 million	782	30	0.02	13,976
Total	13,299	359	84,621	41,081,750

[884] A broker-dealer also may be liable if it does not disclose "material adverse facts of which it is aware." *See, e.g., Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167, 1172 (1970); *SEC* v. *Hasho*, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992); In the Matter of RichMark Capital Corp., Exchange Act Release No. 48758 (Nov. 7, 2003) ("When a securities dealer recommends stock to a customer, it is not only obligated to avoid affirmative misstatements, but also must disclose material adverse facts of which it is aware. That includes disclosure of "adverse interests" such as "economic self-interest" that could have influenced its recommendation.") (citations omitted).

[885] *See* FINRA Requests Comment on Concept Proposal to Require a Disclosure Statement for Retail Investors at or Before Commencing a Business Relationship, FINRA Regulatory Notice 10–54 (Oct. 2010). Generally, all registered broker-dealers that deal with the public must become members of FINRA, a registered national securities association, and may choose to become exchange members. *See* section 15(b)(8) of the Exchange Act and Exchange Act rule 15b9–1. FINRA is the sole national securities association registered with the SEC under section 15A of the Exchange Act. Accordingly, for purposes of discussing a broker-dealer's regulatory requirements when providing advice, we focus on FINRA's regulation, examination, and enforcement with respect to member broker-dealers. FINRA disclosure rules include, but are not limited to, FINRA Rules 2210(d)(2) (communications with the public), 2260 (disclosures), 2230 (customer account statements and confirmations), and 2270 (day-trading risk disclosure statement).

[886] In addition to SEC-registered investment advisers, which are the focus of this section, this rule could also affect banks, trust companies, insurance companies, and other providers of financial advice.

[887] Of the approximately 13,300 SEC-registered investment advisers, 8,410 (63.24%) report in Item 5.G.(2) of Form ADV that they provide portfolio management services for individuals and/or small businesses. In addition, there are approximately 17,300 state-registered investment advisers, of which 125 are also registered with the Commission. Approximately 13,900 state-registered investment advisers are retail facing (*see* Item 5.D. of Form ADV).

[888] *See supra* footnote 861 and accompanying text.

[889] Item 7.A.1. of Form ADV.

[890] Data on individual clients obtained from Form ADV may not necessarily correspond to data on "retail customers" as defined in this rule because the data in Form ADV regarding individual clients does not involve any test of use for personal, family, or household purposes.

[891] We use the responses to Items 5.D.(a)(1), 5.D.(a)(3), 5.D.(b)(1), and 5.D.(b)(3) of Part 1A of Form ADV. If at least one of these responses was filled out as greater than 0, the firm is considered as providing business to retail investors. Part 1A of Form ADV.

[892] The aggregate AUM reported for these investment advisers that have retail investors includes both retail AUM as well as any institutional AUM also held at these advisers.

[893] Estimates are based on IARD system data as of December 31, 2018. The AUM reported here is specifically that of those non-high net worth clients. Of the 8,235 investment advisers serving retail investors, 318 are also dually registered as broker-dealers.

TABLE 4—PANEL B: RETAIL REGISTERED INVESTMENT ADVISERS (RIAS) AS OF DECEMBER 2018

[Cumulative RIA Assets Under Management (AUM) and accounts]

Size of investment adviser (AUM)	Number of RIAs	Number of dually registered RIAs	Cumulative AUM (billion)	Cumulative number of accounts
>$50 billion	119	14	$30,291	20,592,326
$1 billion to $50 billion	1,614	111	9,570	13,224,188
$500 million to $1 billion	1,007	44	700	1,392,842
$100 million to $500 million	4,548	113	1,026	5,287,584
$10 million to $100 million	706	23	40	308,285
$1 million to $10 million	102	3	0.5	69,534
<$1 million	169	10	0.02	13,946
Total RIAs [894]	8,235	318	41,434	40,887,325

In addition to SEC-registered investment advisers, other investment advisers are registered with state regulators.[895] As of December 2018, there are 17,268 state-registered investment advisers,[896] of which 125 are also registered with the Commission. Of the state-registered investment advisers, 204 are dually registered as broker-dealers, while approximately 4.6% (786) report a broker-dealer affiliate. In aggregate, state-registered investment advisers have approximately $334 billion in AUM. Eighty-two percent of state-registered investment advisers report that they provide portfolio management services for individuals and small businesses, compared to just 63% for Commission-registered investment advisers.

Approximately 81% of state-registered investment advisers (13,927) have some portion of their business dedicated to retail investors,[897] and in aggregate, these firms have approximately $324 billion in AUM.[898] Approximately 13,910 (81%) state-registered advisers serve 14 million non-high net worth retail clients and have approximately $137 billion in AUM, while 11,497 (67%) state-registered advisers serve approximately 170,000 high net worth retail clients with approximately $169 billion in AUM.[899]

Table 5 details the compensation structures employed by approximately 13,000 SEC-registered investment advisers. Approximately 96% are compensated through a fee-based arrangement, where a percentage of assets under management are remitted to the investment adviser from the investor for advisory services. As shown in the table below, most investment advisers rely on a combination of different compensation types, in addition to fee-based compensation, including fixed fees, hourly charges, and performance based fees. Less than 4% of investment advisers charge commissions [900] to their investors.

TABLE 5—REGISTERED INVESTMENT ADVISERS COMPENSATION BY TYPE

Compensation type	Yes	No
A Percentage of Assets Under Management	12,678	614
Hourly Charges	3,914	9,378
Subscription Fees (For a Newsletter or Periodical)	122	13,170
Fixed Fees (Other Than Subscription Fees)	5,800	7,492
Commissions	454	12,838
Performance-Based Fees	4,938	8,354
Other	1,899	11,393

As discussed above, many investment advisers participate in wrap fee programs. As of December 31, 2018, more than 8.5% of the SEC-registered investment advisers sponsor a wrap fee program and more than 13.1% act as a portfolio manager for one or more wrap

[894] Total RIAs (1) includes all retail-facing investment advisers, including those dual registrants that have retail-facing investment advisers and retail-facing broker-dealers.

[895] Item 2.A. of Part 1A of Form ADV and the Advisers Act rules 203A–1 and 203A–2 require an investment adviser to register with the SEC if it: (i) Is a large adviser that has $100 million or more of regulatory assets under management (or $90 million or more if an adviser is filing its most recent annual updating amendment and is already registered with the SEC); (ii) is a mid-sized adviser that does not meet the criteria for state registration or is not subject to examination; (iii) meets the requirements for one or more of the revised exemptive rules under section 203A; (iv) is an adviser (or subadviser) to a registered investment company; (v) is an adviser to a business development company and has at least $25 million of regulatory assets under management; or (vi) receives an order permitting the adviser to register with the Commission. Although the statutory threshold is $100 million, the SEC raised the threshold to $110 million to provide a buffer for mid-sized advisers with assets under management close to $100 million to determine whether and when to switch between state and Commission registration. Advisers Act rule 203A–1(a).

[896] There are 70 investment advisers with latest reported regulatory assets under management in excess of $110 million but that are not listed as registered with the SEC. None of these 70 investment advisers has exempted status with the Commission. For the purposes of this rulemaking, these are considered potentially erroneous submissions

[897] We use the responses to Items 5.D.(a)(1), 5.D.(a)(3), 5.D.(b)(1), and 5.D.(b)(3) of Part 1A. If at least one of these responses was filled out as greater than 0, the firm is considered as providing business to retail investors. Part 1A of Form ADV.

[898] The aggregate AUM reported for these investment advisers that have retail investors includes both retail AUM as well as any institutional AUM also held at these advisers.

[899] Estimates are based on IARD system data as of February 10, 2018. The AUM reported here is specifically that of those non-high net worth investors. Of the 13,927 state-registered investment advisers serving retail investors, 134 may also be dually registered as broker-dealers.

[900] Some investment advisers report on Item 5.E. of Form ADV that they receive "commissions." As a form of deferred sales load, all payments of ongoing sales charges to intermediaries would constitute transaction-related compensation. Intermediaries receiving those payments should consider whether they need to register as broker-dealers under section 15 of the Exchange Act.

fee programs.[901] From the data available, we are unable to determine how many advisers provide advice about investing in wrap fee programs, because advisers providing such advice may be neither sponsors nor portfolio managers.

(1) Disclosures for Investment Advisers

As discussed more fully in the Fiduciary Release, investment advisers have a duty to provide full and fair disclosure of all material facts about the advisory relationship to their clients as well as to obtain informed consent from their clients. [902] SEC- and state-registered investment advisers are also subject to express disclosure requirements in Form ADV. Consistent with this duty and those requirements, investment advisers file Form ADV to register with the Commission or state securities authorities, as applicable, and provide an annual update to the form.[903] Part 1 of Form ADV provides information to regulators about the registrants' ownership, investors, and business, and it is made available to clients, prospective clients, and the public. Advisers also prepare a Form ADV Part 2A narrative brochure that contains information about the investment adviser's business practices, fees, conflicts of interest, and disciplinary information,[904] in addition to a Part 2B brochure supplement that includes information about the specific individuals, acting on behalf of the investment adviser, who actually provide investment advice and interact with the client.[905] The Part 2A brochure is the primary client-facing disclosure document,[906] however, Parts 1 and 2A are both made publicly available by the Commission through IAPD,[907] and advisers are generally required to deliver Part 2A and Part 2B to their clients.

c. Trends in the Relative Numbers of Providers of Financial Services

Over time, the relative number of broker-dealers and investment advisers has changed. Figure 1 presented below shows the time series trend of growth in broker-dealers and SEC-registered investment advisers between 2005 and 2018. Over the last 14 years, the number of broker-dealers has declined from over 6,000 in 2005 to less than 4,000 in 2018, while the number of investment advisers has increased from approximately 9,000 in 2005 to over 13,000 in 2018. This change in the relative numbers of broker-dealers and investment advisers over time likely affects the competition for advice, and potentially alters the choices available to retail investors regarding how to receive or pay for such advice, the nature of the advice, and the attendant conflicts of interest.

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[901] A wrap fee program sponsor is as a firm that sponsors, organizes, or administers the program or selects, or provides advice to clients regarding the selection of, other investment advisers in the program. *See* General Instructions to Form ADV.

[902] *See* Fiduciary Release *supra* footnote 47.

[903] *See* Advisers Act rules 203–1 and 204–1. Part 1 of Form ADV is the registration application for the Commission (and state securities authorities). Part 2 of Form ADV consists of a narrative "brochure" about the adviser and "brochure supplements" about certain advisory personnel on whom clients may rely for investment advice. *See* Brochure Adopting Release, *supra* footnote 576.

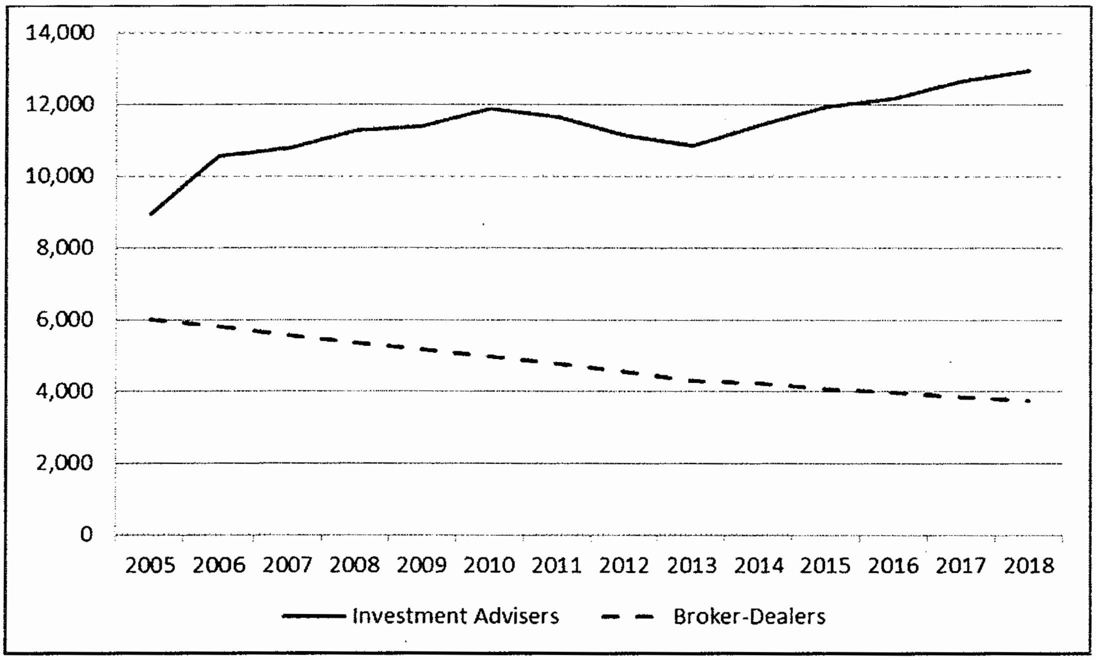
[904] Part 2A of Form ADV contains 18 mandatory disclosure items about the advisory firm, including information about an adviser's: (i) Range of fees; (ii) methods of analysis; (iii) investment strategies and risk of loss; (iv) brokerage, including trade aggregation polices and directed brokerage practices, as well as the use of soft dollars; (v) review of accounts; (vi) client referrals and other compensation; (vii) disciplinary history; and (viii) financial information, among other things. Much of the disclosure in Part 2A addresses an investment adviser's conflicts of interest with its investors, and is disclosure that the adviser, as a fiduciary, must make to investors in some manner regardless of the form requirements. *See* Brochure Adopting Release, *supra* footnote 576.

[905] Part 2B, or the "brochure supplement," includes information about certain advisory personnel that provide retail client investment advice, and contains educational background, disciplinary history, and the adviser's supervision of the advisory activities of its personnel. *See* General Instruction 5 to Form ADV. Registrants are not required to file Part 2B (brochure supplement) electronically, but must preserve a copy of the supplement(s) and make the copy available upon request.

[906] *See* Brochure Adopting Release, *supra* footnote 576.

[907] *See* Investment Adviser Public Disclosure, *available at https://adviserinfo.sec.gov/*.

Figure 1: Time Series of the Number of SEC-Registered Investment Advisers and Broker-Dealers (2005–2018)



An increase in the number of investment advisers and a decrease in the number of broker-dealers could have occurred for a number of reasons, including anticipation of possible regulatory changes to the industry, other regulatory restrictions,[908] technological innovation (*i.e.*, robo-advisers and online trading platforms), product proliferation (*e.g.*, index mutual funds and exchange-traded products), and industry consolidation driven by economic and market conditions, particularly among broker-dealers. Commission staff has observed the transition by broker-dealers from traditional brokerage services to also providing investment advisory services (often under an investment adviser registration, whether federal or state), and many firms have been more focused on offering fee-based accounts that provide a steady source of revenue rather than accounts that charge commissions and are dependent on transactions.[909] Broker-dealers have indicated that the following factors have contributed to this migration: Provision of revenue stability or increase in profitability,[910] perceived lower regulatory burden, and provisions of more services to retail customers.[911]

Further, there has been a substantial increase in the number of retail clients of investment advisers, both high net worth clients and non-high net worth clients as shown in Figure 2. Although the number of non-high net worth retail customers of investment advisers dipped between 2010 and 2012, since 2012, more than 12 million new non-high net worth retail clients have been added. With respect to assets under management, we observe a similar, albeit more pronounced pattern for non-high net worth retail clients as shown in Figure 3. For high net worth retail clients, there has been a pronounced increase in AUM since 2012, although AUM has leveled off since 2015.

[908] *See* Hester Peirce, *Dwindling Numbers in the Financial Industry*, Brookings Center on Markets and Regulation Report (May 15, 2017), at 5, *available at https://www.brookings.edu/research/dwindling-numbers-in-the-financial-industry* (''Brookings Report'') which notes that ''SEC restrictions have increased by almost thirty percent [since 2000],'' and that regulations post-2010 were driven in large part by the Dodd-Frank Act. Further, the Brookings Report observation of increased regulatory restrictions on broker-dealers only reflects CFTC or SEC regulatory actions, but does not include regulation by FINRA, SROs, National Futures Association, or the MSRB.

[909] *See id.* at 7. Beyond Commission observations, the Brookings Report also discusses the shift from broker-dealer to investment advisory business models for retail investors. Declining transaction-based revenue due to declining commission rates and competition from discount brokerage firms has made fee-based products and services more attractive to providers of such products and services. Although discount brokerage firms generally provide execution-only services and do not compete directly in the advice market with full service broker-dealers and investment advisers, entry by discount brokers has contributed to lower commission rates throughout the broker-dealer industry. Further, fee-based activity generates a steady stream of revenue regardless of the customer trading activity, unlike commission-based accounts; *see also* Angela A. Hung, *et al.*, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND Institute for Civil Justice Technical Report (2008), *available at https://www.rand.org/content/dam/rand/pubs/technical_reports/2008/RAND_TR556.pdf* (''RAND 2008''), which discusses a shift from transaction-based to fee-based brokerage accounts prior to recent regulatory changes.

[910] Commission staff examined a sample of recent Form 10–K or Form 10–Q filings of large broker-dealers, many of which are dually registered as investment advisers, that have a large fraction of retail customer accounts to identify relevant broker-dealers. *See, e.g.*, The Jones Financial Companies, L.L.L.P., Form 10–K (Mar. 14, 2019), *available at https://www.sec.gov/Archives/edgar/data/815917/000156459019007788/ck0000815917-10k_20181231.htm*; Raymond James Financial, Inc., Form 10–K (Nov. 21, 2018), *available at https://www.sec.gov/Archives/edgar/data/720005/000072000518000083/rjf-20180930x10k.htm*; Stifle Financial Corp., Form 10–K (Feb. 20, 2019), *available at https://www.sec.gov/Archives/edgar/data/720672/000156459019003474/sf-10k_20181231.htm*; Wells Fargo & Co., 10–K (Feb. 27, 2019) *available at https://www.sec.gov/Archives/edgar/data/72971/000007297119000227/wfc-12312018x10k.htm*; and Ameriprise Financial Inc., Form 10–K (Feb. 23, 2018), *available at https://www.sec.gov/Archives/edgar/data/820027/000082002718000008/amp12312017.htm.* Discussions in Form 10–K and 10–Q filings of this sample of broker-dealers here may not be representative of other large broker-dealers or of small to mid-size broker-dealers. Some firms have reported record profits as a result of moving clients into fee-based accounts, and cite that it provides ''stability and high returns.'' *See* Hugh Son, *Morgan Stanley Wealth Management fees climb to all-time high*, Bloomberg (Jan. 18, 2018), *available at https://www.bloomberg.com/news/articles/2018-01-18/morgan-stanley-wealth-management-fees-hit-record-on-stock-rally.* Morgan Stanley increased the percentage of client assets in fee-based accounts from 37% in 2013 to 44% in 2017, while decreasing the dependence on transaction-based revenues from 30% to 19% over the same time period (Morgan Stanley, *Strategic Update* (Jan. 18, 2018), *available at https://www.morganstanley.com/about-us-ir/shareholder/4q2017-strategic-update.pdf*); *see also* Lisa Beilfuss & Brian Hershberg, *WSJ Wealth Adviser Briefing: The Reinvention of Morgan and Merrill, Adviser Profile*, The Wall Street Journal (Jan. 25, 2018), *available at https://blogs.wsj.com/moneybeat/2018/01/25/wsj-wealth-adviser-briefing-the-reinvention-of-morgan-and-merrill-adviser-profile/.*

[911] *See* Regulation Best Interest Release, *supra* footnote 47, at Section III.B.2.e.ii, which discusses industry trends.

Figure 2: Time Series of the Number of Retail Clients of Investment Advisers (2010 – 2018)

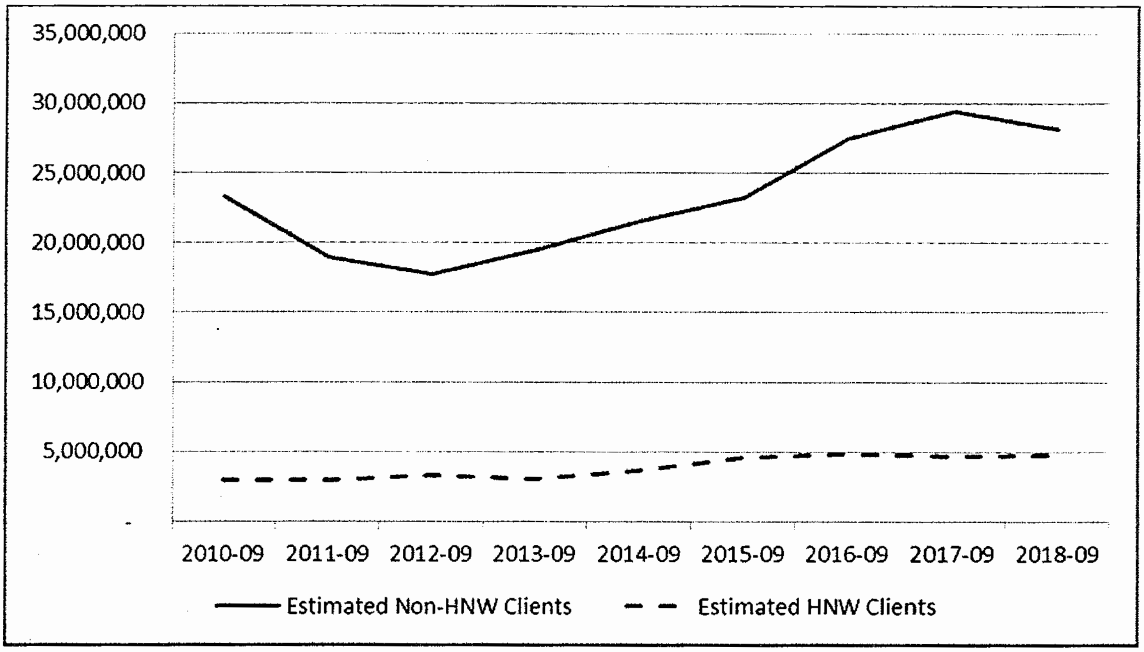
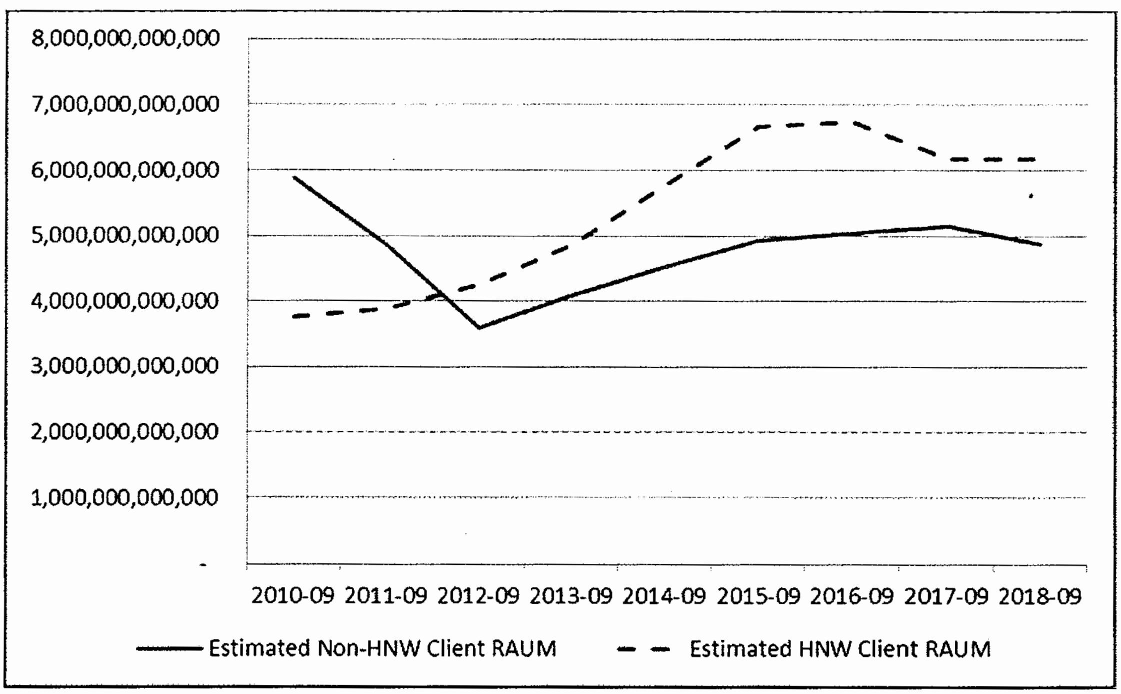


Figure 3: Time Series of the Retail Clients of Investment Advisers Assets under Management (2010 – 2018)



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d. Registered Representatives of Broker-Dealers, Investment Advisers and Dually Registered Firms

We estimate the number of associated natural persons of broker-dealers through data obtained from Form U4, which generally is filed for individuals who are engaged in the securities or investment banking business of a broker-dealer that is a member of a SRO ("registered representatives").[912] Similarly, we approximate the number of supervised persons of registered investment advisers through the number of registered investment adviser representatives (or "registered IAR"s), who are supervised persons of investment advisers who meet the definition of investment adviser representatives in Advisers Act rule 203A–3 and are registered with one or more state securities authorities to solicit or communicate with clients.[913]

We estimate the number of registered representatives and registered IARs, including dually registered financial professionals, (together "registered financial professionals") at broker-dealers, investment advisers, and dual registrants by considering only the employees of those firms that have Series 6 or Series 7 licenses or are registered with a state as a broker-dealer agent or investment adviser representative.[914] We only consider employees at firms who have retail-facing business, as defined previously.[915] We observe in Table 6 that approximately 60% of registered financial professionals are employed by dually registered entities. The percentage varies by the size of the firm. For example, in firms with total assets between $1 billion and $50 billion, 67% of all registered financial professionals are employed by dually registered firms. Focusing on dually registered firms only, approximately 62.7% of total licensed representatives at these firms are dually registered financial professionals, approximately 36.9% are only registered representatives; and less than one percent are only registered investment adviser representatives.

TABLE 6—TOTAL REGISTERED REPRESENTATIVES AT BROKER-DEALERS, INVESTMENT ADVISERS, AND DUALLY REGISTERED FIRMS WITH RETAIL INVESTORS

Size of firm (total assets for standalone BDs and dually registered firms; AUM for standalone IAs)	Total number of reps.	% of reps. in dually registered firms	% of reps. in standalone BD w/an IA affiliate	% of reps. in standalone BD w/o an IA affiliate	% of reps. in standalone IA w/a BD affiliate	% reps. in standalone IA w/o a BD affiliate
>$50 billion	84,461	73	7	0	19	1
$1 billion to $50 billion	170,256	67	11	0	15	7
$500 million to $1 billion	29,874	71	5	1	7	16
$100 million to $500 million	66,924	51	27	0	4	18
$10 million to $100 million	106,178	55	42	1	1	1
$1 million to $10 million	33,790	35	54	11	0	0
<$1 million	12,522	8	52	36	3	1
Total Licensed Representatives[916]	504,005	60	23	2	9	6

In Table 7 below, we estimate the number of employees who are registered representatives, registered investment adviser representatives, or both ("dually registered representatives").[917] Similar to Table 6, we calculate these numbers using Form U4 filings. Here, we also limit the sample to employees at firms that have retail-facing businesses as discussed previously.[918]

In Table 7, approximately 25% of registered employees at registered broker-dealers or investment advisers are dually registered representatives. However, this proportion varies significantly across size categories. For example, for firms with total assets between $1 billion and $50 billion,[919] approximately 35% of all registered employees are both registered representatives and investment adviser

[912] The number of associated natural persons of broker-dealers may be different from the number of registered representatives of broker-dealers because clerical/ministerial employees of broker-dealers are associated persons but are not required to register with the firm. Therefore, the registered representative number does not include such persons. However, we do not have data on the number of associated natural persons and therefore are not able to provide an estimate of the number of associated natural persons. We believe that the number of registered representatives is an appropriate approximation because they are the individuals at broker-dealers that provide advice and services to customers.

[913] *See* 17 CFR 275.203A–3. However, the data on numbers of registered IARs may undercount the number of supervised persons of investment advisers who provide investment advice to retail investors because not all supervised persons who provide investment advice to retail investors are required to register as IARs. For example, Commission rules exempt from IAR registration supervised persons who provide advice only to non-individual clients or to individuals that meet the definition of "qualified client." In addition, state securities authorities may impose different criteria for requiring registration as an investment adviser representative.

[914] We calculate these numbers based on Form U4 filings. Representatives of broker-dealers, investment advisers, and issuers of securities must file this form when applying to become registered in appropriate jurisdictions and with SROs. Firms and representatives have an obligation to amend and update information as changes occur. Using the examination information contained in the form, we consider an employee a financial professional if he has an approved, pending, or temporary registration status for either Series 6 or 7 (RR) or is registered as an investment adviser representative in any state or U.S. territory (IAR). We limit the firms to only those that do business with retail investors, and only to licenses specifically required for an RR or IAR.

[915] *See supra* footnotes 864 and 893.

[916] The classification of firms as dually registered, standalone broker-dealers, and standalone investment advisers comes from Forms BD, FOCUS, and ADV as described earlier. The number of representatives at each firm is obtained from Form U4 filings. Note that all percentages in the table have been rounded to the nearest whole percentage point.

[917] We calculate these numbers based on Form U4 filings.

[918] *See supra* footnotes 864 and 893.

[919] Firm size is defined as total assets from the balance sheet for broker-dealers and dually registered firms (source: FOCUS reports) and as assets under management for investment advisers (source: Form ADV). We are unable to obtain customer assets for broker-dealers, and for investment advisers. We can only obtain information from Form ADV as to whether the firm assets exceed $1 billion. We recognize that our approach of using firm assets for broker-dealers and customer assets for investment advisers does not allow for direct comparison; however, our objective is to provide measures of firm size and not to make comparisons between broker-dealers and investment advisers based on firm size. Across both broker-dealers and investment advisers, larger firms, regardless of whether we stratify on firm total assets or assets under management, have more customer accounts, are more likely to be dually registered, and have more representatives or employees per firm, than smaller broker-dealers or investment advisers.

representatives. In contrast, for firms with total assets below $1 million, 13% of all employees are dually registered representatives.

TABLE 7—EMPLOYEES AT RETAIL FACING FIRMS WHO ARE REGISTERED REPRESENTATIVES, INVESTMENT ADVISER REPRESENTATIVES, OR BOTH

Size of firm (total assets for standalone BDs and dually registered firms; AUM for standalone IAs)	Total number of employees	Percentage of dually registered representatives	Percentage of registered representatives only	Percentages of IARs only
>$50 billion	218,539	19	16	1
$1 billion to $50 billion	328,842	35	12	4
$500 million to $1 billion	43,211	18	40	10
$100 million to $500 million	119,214	23	24	9
$10 million to $100 million	176,559	20	39	1
$1 million to $10 million	56,230	17	39	1
<$1 million	18,334	13	46	3
Total Employees at Retail Facing Firms [920]	960,929	25	23	4

Approximately 87% of investment adviser representatives are dual-hatted as registered representatives. This percentage is relatively unchanged from 2010. According to information provided in a FINRA comment letter in connection with the 913 Study,[921] 87.6% of registered investment adviser representatives were dually registered as registered representatives as of mid-October 2010.[922] In contrast, approximately 52% of registered representatives were dually registered as investment adviser representatives at the end of 2018.[923]

Broker-dealers and investment advisers must report certain criminal, regulatory, and civil actions and complaint information and information about certain financial matters in Forms U4 [924] and U5 [925] for their representatives. SROs, regulators and jurisdictions report disclosure events on Form U6.[926] FINRA's BrokerCheck system and IAPD discloses to the public certain information on registered representatives and investment adviser representatives, respectively, such as principal place of business, business activities, owners, and criminal prosecutions, regulatory actions, and civil actions in connection with any investment-related activity.

e. Investor Account Statistics

Investors seek financial advice and services to achieve a number of different goals, such as saving for retirement or children's college education. The OIAD/RAND survey estimates that approximately 73% of adults live in a household that invests.[927] The survey indicates that non-investors are more likely to be female, to have lower family income and educational attainment, and to be younger than investors.[928] Approximately 35% of households that do invest do so through accounts such as broker-dealer or advisory accounts.[929]

As shown above in Figures 2 and 3, the number of retail investors and their assets under management associated with investment advisers has increased significantly, particularly since 2012. According to the Investment Company Institute ("ICI"), as of December 2016, nearly $24.2 trillion is invested in retirement accounts, of which $7.5 trillion is in IRAs.[930] A total of 43.3 million U.S. households have either an IRA or a brokerage account, of which an estimated 20.2 million U.S. households have a brokerage account and 37.7 million households have an IRA (including 72% of households that also hold a brokerage account).[931] With respect to IRA accounts, one commenter, the ICI, documents that 43 million U.S. households own either traditional or Roth IRAs and that approximately 70% are held with financial professionals, with the remainder being direct market.[932]

[920] *See supra* footnotes 918 and 919. Note that all percentages in the table have been rounded to the nearest whole percentage point.

[921] *See* Staff of the Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011), *available at www.sec.gov/news/studies/2011/913studyfinal.pdf* ("913 Study").

[922] Comment Letter of FINRA to File Number 4-606; Obligations of Brokers, Dealers and Investment Advisers (Nov. 3, 2010), at 1, *available at https://www.sec.gov/comments/4-606/4606-2836.pdf.*

[923] In order to obtain the percentage of IARs that are dually registered as registered representatives of broker-dealers, we sum the representatives at dually registered firms and those at investment advisers across size categories to obtain the aggregate number of representatives in each of the two categories. We then divide the aggregate dually registered representatives by the sum of the dually registered representatives and the IARs at investment adviser-only firms. We perform a similar calculation to obtain the percentage of registered representatives of broker-dealers that are dually registered as IARs.

[924] Form U4 requires disclosure of registered representatives' and investment adviser representatives' criminal, regulatory, and civil actions similar to those reported on Form BD or Form ADV as well as certain customer-initiated complaints, arbitration, and civil litigation cases. *See generally* Form U4.

[925] Form U5 requires information about representatives' termination from their employers.

[926] *See* FINRA, Current Uniform Registration Forms for Electronic Filing in Web CRD®, *available at http://www.finra.org/industry/web-crd/current-uniform-registration-forms-electronic-filing-web-crd.*

[927] *See* OIAD/RAND, *supra* footnote 3 (defining "investors" as persons "owning at least one type of investment account, (*e.g.*, an employer-sponsored retirement account, a non-employer sponsored retirement account such as an IRA, a college savings investment account, or some other type of investment account such as a brokerage or advisory account), or owning at least one type of investment asset (*e.g.*, mutual funds, exchange-traded funds or other funds, individual stocks, individual bonds, derivatives, and annuities)").

[928] OIAD/RAND, *supra* footnote 3.

[929] *Id.*.

[930] *See* Sarah Holden & Daniel Schrass, *The Role of IRAs in US Households' Saving for Retirement, 2016,* 23 ICI Res. Persp. 23–1 (Jan. 2017), *available at https://www.ici.org/pdf/per23-01.pdf.*

[931] The data is obtained from the Federal Reserve System's 2016 Survey of Consumer Finances ("SCF"), a triennial survey of approximately 6,200 U.S. households and imputes weights to extrapolate the results to the entire U.S. population. As noted, some survey respondent households have both a brokerage and an IRA account. *See* Board of Governors of the Federal Reserve System, *Survey of Consumer Finances* (2016), *available at https://www.federalreserve.gov/econres/scfindex.htm.* The SCF data does not directly examine the incidence of households that could use advisory accounts instead of brokerage accounts; however, some fraction of IRA accounts reported in the survey could be those held at investment advisers.

[932] *See* Sarah Holden & Daniel Schrass, *The Role of IRAs in U.S. Households' Saving for Retirement, 2018,* ICI Res. Persp. 24–10 (Dec. 2018), *available at https://www.ici.org/pdf/per24-10.pdf.*

Further, ICI finds that approximately 64% of households have aggregate IRA (traditional and Roth) balances of less than $100,000, and approximately 36% of investors have balances below $25,000. As noted in one study, the growth of assets in traditional IRAs comes from rollovers from workplace retirement plans; for example, 58% of traditional IRAs consist of rollover assets, and contributions due to rollovers exceeded $460 billion in 2015 (the most recently available data).[933]

While the number of retail investors obtaining services from investment advisers and the aggregate value of associated assets under management has increased, the OIAD/RAND study also suggests that the general willingness of investors to use planning or to take financial advice regarding strategies, products, or accounts is relatively fixed over time.[934] With respect to the account assets associated with retail investors, the OIAD/RAND survey also estimates that approximately 10% of investors who have broker-dealer or advisory accounts hold more than $500,000 in assets, while approximately 47% hold $50,000 in assets or less. Altogether, many investors who have brokerage or advisory accounts trade infrequently, with approximately 31% reporting no annual transactions and an additional approximately 30% reporting three or fewer transactions per year.[935]

With respect to particular products, commenters have provided us with additional information about ownership of mutual funds and IRA account statistics. For example, ICI stated that 56 million U.S. households and nearly 100 million individual investors own mutual funds, of which 80% are held through 401(k) and other workplace retirement plans, while 63% of investors hold mutual funds outside of those plans.[936] Of those investors that own mutual funds outside of workplace retirement plans, approximately 50% rely on financial professionals, while nearly one-third purchase direct-sold funds either directly from the fund company or through a discount broker.[937]

Table 8 below provides an overview of account ownership segmented by account type (*e.g.*, IRA, brokerage, or both) and investor income category based on the SCF.[938]

TABLE 8—OWNERSHIP BY ACCOUNT TYPE IN THE U.S. BY INCOME GROUP

[As reported by the 2016 SCF]

Income category	% Brokerage only	% IRA only	% Both brokerage and IRA
Bottom 25%	1.2	7.6	2.4
25%–50%	3.2	14.	5.4
50%–75%	4.1	21.4	11.4
75%–90%	7.5	33.4	16.5
Top 10%	12.0	24.7	43.9
Average	4.4	18.3	11.6

With respect to the nature of the accounts held by investors and whether they are managed by financial professionals, the OIAD/RAND survey finds that 36% of its sample of participants report that they currently use a financial professional and approximately 33% receive some kind of recommendation service.[939] Of the subset of those investors who report holding a brokerage, advisory, or similar account, approximately 33% self-direct their own account, 25% have their account managed by a financial professional, and 10% have their account advised by a professional.[940] For those investors who take financial advice, the OIAD/RAND study suggests that they may differ in characteristics from other investors. Investors who take financial advice are generally older, retired, and have a higher income than other investors, but also may have lower educational attainment (*e.g.*, high school or less) than other investors.[941]

Similarly, one question in the SCF asks what sources of information households' financial decision-makers use when making decisions about savings and investments. Respondents can list up to fifteen possible sources from a preset list that includes "Broker" or "Financial Planner" as well as "Banker," "Lawyer," "Accountant," and a list of non-professional sources.[942] Panel A of Table 8 below presents the breakdown of where households who have brokerage accounts seek advice about savings and investments. The table shows that of those respondents with brokerage accounts, 23% (4.7 million households) use advice services of broker-dealers for savings and investment decisions, while 49% (7.8 million households) take advice from a "financial planner." Approximately 36% (7.2 million households) seek advice from other sources such as bankers, accountants, and lawyers. Almost 25% (5.0 million households) do not use advice from the above sources.

Panel B of Table 9 below presents the breakdown of advice received for

[933] *See id.*

[934] OIAD/RAND, *supra* footnote 3 (noting that this conclusion was limited by the methodology of comparing participants in a 2007 survey with those surveyed in 2018).

[935] OIAD/RAND, *supra* footnote 3.

[936] *See* ICI Letter; *see also* Sarah Holden, Daniel Schrass & Michael Bogdan, *Ownership of Mutual Funds, Shareholder Sentiment, and Use of the internet, 2018,* ICI Res. Persp. 24–8 (Nov. 2018), *available at https://www.ici.org/pdf/per24-08.pdf.*

[937] *See id.*

[938] *Id.* To the extent that investors have IRA accounts at banks that are not also registered as broker-dealers, our data may overestimate the numbers of IRA accounts held by retail investors that could be subject to this rulemaking.

[939] OIAD/RAND, *supra* footnote 3. In a focus group preceding the survey, focus group participants provided a number of reasons for not using a financial professional in making investments, including being unable or unwilling to pay the fees, doing their own financial research, being unsure of how to work with a professional, and being concerned about professionals selling products without attending to investors' plans and goals.

[940] *Id.*

[941] *Id.*

[942] The SCF, *supra* footnote 931, specifically asks participants "Do you get advice from a friend, relative, lawyer, accountant, banker, broker, or financial planner? Or do you do something else?" (*see* Federal Reserve, *Codebook for 2016 Survey of Consumer Finances* (2016), *available at https://www.federalreserve.gov/econres/files/codebk2016.txt*). Other response choices presented by the survey include "Calling Around," "Magazines," "Self," "Past Experience," "Telemarketer," and "Insurance Agent," as well as other choices. Respondents could also choose "Do Not Save/Invest." The SCF allows for multiple responses, so these categories are not mutually exclusive. However, we would note that the list of terms in the question does not specifically include "investment adviser."

households who have an IRA. 15% (5.7 million households) rely on advice services of their broker-dealers and 48% (18.3 million households) obtain advice from financial planners. Approximately 41% (15.5 million households) seek advice from bankers, accountants, or lawyers, while the 25% (9.5 million households) use no advice or seek advice from other sources.

TABLE 9—PANEL A: SOURCES OF ADVICE FOR HOUSEHOLDS WHO HAVE A BROKERAGE ACCOUNT IN THE U.S. BY INCOME GROUP [943]

Income category	% Taking advice from brokers	% Taking advice from financial planners	% Taking advice from lawyers, bankers, or accountants	% Taking no advice or from other sources
Bottom 25%	20.55	53.89	35.64	24.30
25%–50%	22.98	38.03	43.92	32.36
50%–75%	20.75	52.00	31.42	23.61
75%–90%	22.56	48.94	32.25	28.10
Top 10%	25.29	50.53	38.47	21.06
Average	23.02	49.02	35.99	24.94

TABLE 9—PANEL B: SOURCES OF ADVICE FOR HOUSEHOLDS WHO HAVE AN IRA IN THE U.S. BY INCOME GROUP [944]

Income category	% Taking advice from brokers	% Taking advice from financial planners	% Taking advice from bankers, accountants, or lawyers	% Taking no advice or from other sources
Bottom 25%	12.14	38.30	43.69	31.85
25%–50%	9.79	43.82	40.67	32.74
50%–75%	14.93	45.20	41.23	25.23
75%–90%	14.68	52.14	41.65	24.26
Top 10%	21.40	55.40	40.03	18.56
Average	15.25	48.45	41.17	25.28

The OIAD/RAND survey notes that for survey participants who reported working with a specific individual for investment advice, 70% work with a dually registered firm, 5.4% with a broker-dealer, and 5.1% with an investment adviser.[945]

2. Investor Perceptions About the Marketplace for Financial Services and Disclosures

Our proposal discussed a number of studies providing information on investors' perceptions of the market for financial services and advice, including those conducted by Siegel & Gale [946] in 2005, RAND [947] in 2008 and CFA in 2010.[948] Commenters to the proposal provided their own studies or survey evidence conducted by third party research firms, which we have discussed throughout the release.[949] In addition, the Commission's Office of the Investor Advocate collaborated with RAND to prepare the OIAD/RAND study,[950] which included focus groups and a survey about the retail market for investor advice. The Commission's Office of the Investor Advocate also engaged RAND to conduct investor testing of the proposed relationship summary using the dual registrant sample in the proposal. The report, RAND 2018,[951] discusses both larger sample survey results and smaller sample in-depth interview results. Finally, the proposal solicited public feedback from individual investors on a feedback form issued with the Proposing Release.[952] Responses and data from these sources inform our understanding of how investors approach the marketplace for financial services and how investors respond to disclosures about financial services generally.

a. How Investors Select Financial Firms or Professionals

A number of surveys show that retail investors predominantly find their current financial firm or financial professional from personal referrals by family, friends, or colleagues.[953] For instance, the RAND 2008 study reported that 46% of survey respondents indicated that they located a financial professional from personal referral, although this percentage varied

[943] *Id.*

[944] *Id.*

[945] OIAD/RAND, *supra* footnote 3. As documented by OIAD/RAND, retail investors surveyed had difficulty in accurately identifying the type of relationship that they have with their financial professional.

[946] Proposing Release, *supra* footnote 5, at n.555.

[947] *Id.*, at n.556.

[948] *Id.*, at n.557.

[949] *See supra* footnotes 17–21.

[950] OIAD/RAND consisted of focus group discussions with 35 participants in total. OIAD/RAND caveats in its report that the participants in its focus groups were neither nationally representative nor randomly selected and that their results are anecdotal. OIAD/RAND also included a nationally representative probability based survey to allow researchers to reliably construct population estimates. OIAD/RAND, *supra* footnote 3.

[951] For RAND 2018, a sample of 1,816 individuals from the ALP Survey Panel were invited to complete the survey, and 1,460 (80.4%) actually completed the survey. 26% of respondents are categorized as non-investor. Median time spent going through the initial five screens of the relationship summary text was 4 minutes. RAND 2018, *supra* footnote 13.

[952] Proposing Release, *supra* footnote 5; *see also* Feedback Forms Comment Summary, *supra* footnote 13. More than 90 individuals answered with a response or comment relevant to at least one of the questions on the form, using an online version of the feedback form or by submitting a copy of the feedback form to the comment file in PDF format.

[953] *See* RAND 2008, *supra* footnote 912; 917 Financial Literacy Study, *supra* footnote 589.

depending on the type of service provided (*e.g.,* only 35% of survey participants used personal referrals for brokerage services). After personal referrals, RAND 2008 survey participants ranked professional referrals (31%), print advertisements (4%), direct mailings (3%), online advertisements (2%), and television advertisements (1%), as their source of locating individual professionals. The RAND 2008 study separately inquired about locating a financial firm,[954] in which respondents reported selecting a financial firm (of any type) based on: Referral from family or friends (29%), professional referral (18%), print advertisement (11%), online advertisements (8%), television advertisements (6%), direct mailings (2%), with a general "other" category (36%).

The 917 Financial Literacy Study provides similar responses, although it allowed survey respondents to identify multiple sources from which they obtained information that facilitated the selection of the current financial firm or financial professional.[955] In the 917 Financial Literacy Study,[956] 51% of survey participants received a referral from family, friends, or colleagues. Other sources of information or referrals came from: Referral from another financial professional (23%), online search (14%), attendance at a financial professional-hosted investment seminar (13%), advertisement (*e.g.,* television or newspaper) (11.5%), other (8%), while approximately 4% did not know or could not remember how they selected their financial firm or financial professional. Twenty-five percent of survey respondents indicated that the "name or reputation of the financial firm or financial professional" affected the selection decision.

The OIAD/RAND focus group study notes that among the factors that group participants report for not working with a financial professional was participants being unsure how they would go about working with a professional.[957]

b. Investor Confusion

As discussed in the Proposing Release and by commenters to the proposal, many sources indicate that retail investors do not understand or find confusing the distinctions between broker-dealers and investment advisers, particularly in terms of services provided and applicable standards of conduct.[958]

Studies such as those conducted by Siegel & Gale[959] in 2005, RAND[960] in 2008, and CFA in 2010,[961] discussed in the Proposing Release, support findings that retail investors are confused about the roles and titles of financial professionals. The OIAD/RAND study assessed survey and focus group participants' understanding of the types of financial services and financial professionals they used.[962] Specifically, the authors of the OIAD/RAND study asked survey participants who were investors to identify which type of financial professional they worked with (investment adviser, broker-dealer, or dually-registered firm). The authors compared the types of financial professionals reported by the survey participants with the actual status of those financial professionals as verified on the IAPD database, and found that the verified types of financial professionals in many cases did not match the types of financial professionals that were reported by the survey participants.[963] For example, when financial professionals were verified to be dually registered, only 34% were reported by survey participants to be dually registered (and 56% were reported to be only investment advisers). In addition to the survey, the OIAD/RAND authors also asked a small focus group of participants that used financial professionals to identify which type of professional they were using, which was then verified by IAPD. Only one of the twelve participants was able to identify the correct type of financial professional unambiguously (although it was not clear if clients of verified dually-registered firms were only utilizing one type of that professional's services). The study authors concluded that this showed low awareness of the classification of investment advisers and broker-dealers.

Further, the OIAD/RAND survey asked all survey recipients whether they could identify the type of financial professional that would typically exhibit certain business practices (such as executing transactions or being paid by commission), and concluded that at least a significant minority of participants could not do so for any of the typical practices. Between 13% and 21% of survey participants incorrectly answered "none of the above" for each of the business practices offered by the survey, although those practices were aligned with either investment advisers or broker-dealers in the marketplace. Moreover, only 36% of participants were able to identify that investment advisers were typically paid by a percentage of assets, whereas 43% of participants thought that practice was typical of broker-dealers. Twenty-six percent of participants incorrectly indicated that investment advisers execute transactions for clients.[964] In

[954] The Commission notes that only one-third of the survey respondents that responded to "method to locate individual professionals" also provided information regarding locating the financial firm.

[955] *See* 917 Financial Literacy Study, *supra* footnote 589.

[956] The data used in the 917 Financial Literacy Study comes from the Siegel & Gale, Investor Research Report (Jul. 26, 2012), available at *https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part3.pdf.*

[957] OIAD/RAND, *supra* footnote 3.

[958] *See generally supra* Section II.B.2 (discussing benefits of including disclosure on individualized firm services); Section II.B.6 (discussing removal of generalized comparisons between advisers and broker-dealers); *see also* Proposing Release, *supra* footnote 5 (discussing commenters in response to Chairman Clayton's 2017 request for comment and commenters to the 913 Study).

[959] Proposing Release, *supra* footnote 5, at Section IV.A.3.h. (stating that the Siegel & Gale Study found that focus group participants did not understand that the roles and legal obligations of broker-dealers differed from investment advisers' roles and legal obligations, and were further confused by different labels or titles used by advice providers (*e.g.,* financial planner, financial advisor, financial consultant, broker-dealer, or investment adviser). More specifically, participants in the Siegel & Gale Study focus groups believed that brokers executed trades and were focused on "near-term" advice, while financial advisors and consultants provided many of the same services as brokers, but also provided a greater scope of long-term planning advice (*e.g.,* portfolio allocation). "Investment adviser," on the other hand, was a term unfamiliar to many participants, but financial professionals using this label were perceived to provide similar services to financial advisors and financial consultants. Financial planners were viewed to provide services related to insurance and estate planning in addition to investment advice, and encompassed long-term financial planning including college, retirement, and other long-term savings and investment goals. The Siegel & Gale Study focus group participants assumed that financial advisors/consultants, investment advisers, and financial planners provided planning services, while brokers, financial advisors/consultants, and investment advisers provided trade execution services); *see also id.,* at n.5.

[960] Similarly, the RAND 2008 study generally concluded that investors did not understand the differences between broker-dealers and investment advisers and that common job titles contributed to investor confusion. RAND 2008, *supra* footnote 909.

[961] Infogroup/ORC, *U.S. Investors & The Fiduciary Standard,* National Opinion Survey (Sept. 15, 2010), *available at https://www.cfp.net/docs/public-policy/us_investors_opinion_survey_2010-09-16.pdf* ("CFA Survey"). The CFA Survey suggested that respondents were confused about differences between broker-dealers and investment advisers as described by the study's authors to the respondents.

[962] OIAD/RAND, *supra* footnote 3.

[963] OIAD/RAND, *supra* footnote 3. Note that the authors caveated that it was unclear if survey participants who were customers of verified dually registered firms had misidentified the type of financial professional because they only received one type of service (brokerage or advisory) from the dually registered firm.

[964] OIAD/RAND, *supra* footnote 3. The study authors also concluded that "an investor who works with an investment adviser because he or she is unaware that broker-dealers can execute transactions, and who seeks a professional solely to execute transactions on their behalf, might not

all, the study authors concluded that the survey participants' knowledge of the marketplace for financial professionals appeared to be incomplete.

The OIAD/RAND study authors draw further conclusions from their focus group study, where after being offered explanations of the differences between investment advisers and broker-dealers, some focus group participants continued not to be able to understand the distinctions between the two types of professionals. For the OIAD/RAND study authors, the focus group exercise underscored the difficulty of the topic for some investors.

Investors are also confused about financial professionals' standards of conduct and legal obligations. As discussed in the Proposing Release, the Siegel & Gale and RAND 2008 studies found that focus group participants generally did not understand legal terms, such as "fiduciary" or "best interest." [965] In addition, the RAND 2008 study noted that the confusion about titles, services, legal obligations, and compensation persisted even after a fact sheet on broker-dealers and investment advisers was provided to participants.[966]

Similarly, many survey respondents in the OIAD/RAND study had difficulty understanding the basic relational aspects of financial advice and the responsibility for taking risk in any form.[967] Thirty percent of survey respondents believed that financial professionals would get paid only if an investor made money on an investment, and another quarter of respondents indicated that they did not know if financial professionals would get paid only if an investor made money on an investment.[968] A majority of survey respondents expected that a financial professional acting in the client's best interest would monitor the account, help the client choose the lowest cost products, disclose payments they receive, and avoid taking higher compensation for selling one product over another when a similar but less costly product is available.[969] OIAD/RAND focus group discussions about the distinctions between investment advisers and broker-dealers also suggested that some focus group participants were not able to distinguish investment advisers from broker-dealers. The study's authors concluded that comments of those focus group participants also suggest that some individuals might value having a clear distinction between professionals who do act in the client's best interest and professionals who do not act in the client's best interest.[970] Similarly, in RAND 2018 and in interview-based studies submitted by a group of commenters that test the proposed sample dual-registrant relationship summary, it was observed that investors could have difficulty understanding distinctions between the standard of conduct applicable to broker-dealers and investment advisers.[971]

With respect to investor perceptions of financial advisers' fees and potential conflicts of interest, the OIAD/RAND study revealed that "some participants seemed unconcerned with conflicts or took it as a good sign if their professional had not disclosed a conflict to them . . . In all three groups that had experience using a financial professional . . . participants reported that their professional had not disclosed any conflicts." [972] The OIAD/RAND study also found that almost a half of the investors who received investment advice in the study believed that their investment professional receives commissions. About a third believed the provider received payments from product companies (*e.g.,* mutual funds); another 20% of participants believed the provider received a bonus. Altogether, more than half of the participants believed the provider received some sort of compensation whether through commission, bonus or product payment.[973] The study concluded that "awareness of the nature of provider payments could help investors to recognize conflicts of interest . . ." and thus it could potentially improve investors' decision making. Potential investor recognition of the importance of the conflicts of interest is reflected in that 51% of the OIAD/RAND study respondents said that it was important or extremely important that the financial professional receive all compensation from the customer, and only 15% reported that it was not important at all.[974]

With respect to investor trust, one commenter discussed the results of an online survey it had initiated that found that 96% of survey respondents mostly or completely trusted their financial professional.[975] The vast majority of survey respondents (97%) also believed that their financial professional always or mostly has their investors' best interest in mind.[976]

3. Investor Responses to Disclosures About Financial Professionals and Firms

a. Retail Investors and Financial Disclosures Generally

Commenters provided conclusions based on studies of potential limitations to the efficacy of financial disclosures, as discussed below.[977] With respect to the particular areas of disclosure that retail investors find helpful, commenters provided us with information about the usefulness of such disclosures to retail investors from surveys or assessments. We generally note that the RAND 2018 survey and other surveys that were provided by commenters gathered participants' subjective views and were not designed to objectively assess whether any sample disclosures improved participant comprehension.[978] However, the RAND 2018 qualitative interviews included some general questions to participants about comprehension and helpfulness of the sample proposed relationship summary, which provided some insight into participants' understanding of concepts introduced, as did another survey and two interview-based studies with respect to sample relationship summaries.[979] Further, the RAND 2018 report and surveys and studies submitted by commenters reported that their participants subjectively thought that they were informed from the sample disclosures that they were provided. The RAND 2018 study authors found that nearly 90% of respondents stated that the sample proposed relationship summary that they reviewed would help them make informed decisions about investment accounts and services.[980] Likewise, the RAND 2018 study authors also observed that interview participants demonstrated that they learned new information from the proposed relationship summary that they were provided. However, there was variation in understanding among participants and the interviews also revealed areas of

necessarily be matched with the most appropriate professional."

[965] Proposing Release, *supra* footnote 5.

[966] RAND 2008, *supra* footnote 909.

[967] OIAD/RAND, *supra* footnote 3.

[968] OIAD/RAND, *supra* footnote 3.

[969] OIAD/RAND, *supra* footnote 3.

[970] OIAD/RAND, *supra* footnote 3.

[971] *See supra* Section II.B.3.b at footnotes 470–479 and accompanying text.

[972] OIAD/RAND, *supra* footnote 3.

[973] OIAD/RAND, *supra* footnote 3.

[974] OIAD/RAND, *supra* footnote 3.

[975] CCMC *Letter* (investor polling), *supra* footnote 21.

[976] *Id.*

[977] *See infra* Section IV.C for a discussion of this research.

[978] *See generally supra* footnote 14.

[979] *See supra* footnotes 14 and 20 and accompanying text.

[980] *See* RAND 2018, *supra* footnote 13.

confusion.[981] Similarly, the Woelfel survey authors noted that after survey respondents were given time to read a sample proposed dual registrant relationship summary, the majority, regardless of their current investments or relationship with an investment adviser or broker-dealer, believed that they knew a "little more" about investment advisers and broker-dealers.[982]

Several commenters suggest that generally not all investors fully read or are able to digest information from disclosures about financial professionals. One commenter reports that almost half of its survey participants said they selectively skim the disclosures and eight percent said they rarely or do not ever read them.[983] Along similar lines, commenters pointed to observations that investors may be overconfident in their ability to read and understand disclosures and that investors are unable to understand disclosures relating to compensation arrangements and conflicts of interest.[984] Similarly, the RAND 2008 study highlighted that participants' confusion about titles, services, legal obligations, and compensation persisted even after a fact sheet on broker-dealers and investment advisers was provided to participants.[985]

With respect to what type of disclosures from firms or financial professionals retail investors find helpful, commenters provided two surveys of retail investors' general views of disclosures about financial professionals in response to the Proposing Release.[986] One commenter reported results from an online survey that provides support for the idea that retail investors value at least some disclosures from financial professionals. From the a survey of 801 individuals, a majority of the survey participants (62%) said they would be interested in reading a hypothetical standardized document provided to all new clients that explained the relationship between a financial professional and clients and thought that such a document would "boost transparency and help build stronger relationships between me and my financial professional" (72%).[987] Separately, with respect to what aspects of financial disclosures retail investors might find most helpful, Koski Research conducted an investor survey on behalf of another commenter and reported that the "majority of retail investors want communications that are relevant to them (91%), short and to the point (85%), and visually appealing (79%)."[988] The survey also reported that the top four things retail investors wanted communicated were the costs for advice, description of advice services, the obligations of the firm and its representatives, and the conflicts of interest.[989] Additionally, approximately 70% of the participants in the 917 Financial Literacy Study indicated that they would read disclosures on conflicts of interest if made available.[990]

b. Investor Perceptions About Specific Disclosures Concerning Financial Professionals

(1) Conflicts of Interest

As discussed in the Proposing Release, previous studies have found that investors consider conflicts of interest to be an important factor in disclosures from firms and financial professionals.[991] For example, in the 917 Financial Literacy Study, approximately 52.1% of survey participants indicated that an essential component of any disclosure would be their financial intermediary's conflicts of interest, while 30.7% considered information about conflicts of interest to be important, but not essential.[992] Investors also were asked to rate their level of concern about potential conflicts of interest that their adviser might have. Approximately 36% of the investors expressed concerns that their adviser might recommend investments in products for which its affiliate receives a fee or other compensation, while 57% were concerned that their adviser would recommend investments in products for which it gets paid by other sources. In addition to conflicts directly related to compensation practices of financial professionals, some investors were concerned about conflicts related to the trading activity of these firms. For example, more than 26% of participants were concerned that an adviser might buy and sell from its own account at the same time it is recommending securities to investors; and more than 55% of investors were also concerned about their adviser's engaging in principal trading.

Among those participants in the 917 Financial Literacy Study who indicated that they would read disclosures on conflicts of interest if made available, 48% would request additional information from their adviser, 41% would increase the monitoring of their adviser, and 33% would propose to limit their exposure of specific conflicts. The majority of participants (70%) also wanted to see specific examples of conflicts and how those related to the investment advice provided.

(2) Fees

With respect to disclosures about fees, the Proposing Release also discussed the 917 Financial Literacy Study as well as the FINRA Investor Study[993] regarding the importance that investors place on disclosures about fees and compensation of financial professionals, and how those disclosures should be presented.[994] Similar to the findings regarding conflicts of interest, the 917 Financial Literacy Study found that a majority participants indicated that disclosure of the fees and compensation of investment advisers was an essential element to any disclosure.[995]

(3) Disciplinary History

As discussed in the Proposing Release, survey evidence in the 917 Financial Literacy Study indicate that knowledge of a firm's and financial professional's disciplinary history is among the most important items for retail investors deciding whether to receive financial services from a particular firm.[996] Despite this, most

[981] *Id.*

[982] *See* Cetera Letter II (Woelfel), *supra* footnote 17.

[983] Schwab Letter I (Koski), *supra* footnote 21.

[984] *See, e.g.,* AARP Letter. *See* also Better Markets Letter, CFA Letter I; Consumers Union Letter.

[985] *See* RAND 2008, *supra* footnote 909. The fact sheet provided to RAND 2008 study participants included information on the definition of broker and investment adviser, including a description of common job titles, legal duties and typical compensation. Participants in the focus groups indicated that they were confused over common job titles of broker-dealers and investment advisers, thought that because brokers are required to be licensed, investment advisers were not as qualified as brokers, deemed the term "suitable" too vague, and concluded that it would be difficult to prove whether or not an investment adviser was not acting in the client's best interest.

[986] *See* Schwab Letter I (Koski), *supra* footnote 21 and CCMC Letter (investor polling), *supra* footnote 21.

[987] *See* CCMC Letter (investor polling), *supra* footnote 21.

[988] *See* Schwab Letter I (Koski), *supra* footnote 21.

[989] *Id.* For similar evidence, *see* also CCMC Letter (investor polling), *supra* footnote 21 (reporting that issues that "matter most" to investors include: "explaining fees and costs," explaining conflicts of interest" and "explaining own compensation").

[990] 917 Financial Literacy Study, *supra* footnote 588.

[991] *See* Proposing Release, *supra* footnote 5, at Section IV.A.3.c.

[992] 917 Financial Literacy Study, *supra* footnote 588.

[993] FINRA Investor Education Foundation, *Investors in the United States 2016* (Dec. 2016), *available at http://www.usfinancialcapability.org/downloads/NFCS_2015_Inv_Survey_Full_Report.pdf* ("FINRA Investor Study").

[994] *See* Proposing Release, *supra* footnote 5, at Section IV.A.3.c.

[995] 917 Financial Literacy Study, *supra* footnote 588.

[996] *See* 917 Financial Literacy Study, *supra* footnote 588, at nn.311 and 498 and accompanying text (Approximately 67.5% of the online survey respondents considered information about an adviser's disciplinary history to be absolutely

investors do not actively seek disciplinary information for their advisers and broker-dealers. For example, a FINRA survey in 2009, found that only 15% of survey respondents checked their financial professional's background, although the Commission notes that the study encompasses a wide group of advisers, such as debt counselors and tax professionals.[997] The FINRA Investor Study found that only 7% of survey respondents use FINRA's BrokerCheck and approximately 14% of survey respondents are aware of the Investment Adviser Public Disclosure (IAPD) website.[998]

C. Broad Economic Considerations

We are adopting a requirement for broker-dealers and investment advisers and firms that are dually registered to deliver a relationship summary to retail investors because, as discussed in the baseline,[999] many retail investors can be confused about their choices in the market for brokerage and investment advisory services. To that end, the relationship summary is meant to assist retail investors with both the process of deciding whether to engage or remain with a particular firm or financial professional and whether to establish or maintain an investment advisory or brokerage relationship. Specifically, low financial literacy, lack of knowledge about the market for financial advice, and lack of information about important aspects of the relationship between particular firms and their customers or clients,[1000] may harm retail investors by deterring them from seeking brokerage or investment advisory services even if they could potentially benefit from it,[1001] or by increasing the risk of a mismatch between the investors' preferences and expectations and the actual brokerage or advisory services they receive from a firm or professional.[1002] To ameliorate this potential harm, the relationship summary is intended to reduce investor confusion and search costs in the process of (i) deciding whether to engage a particular firm or financial professional, (ii) whether to establish an investment advisory or brokerage relationship, and (iii) whether to terminate or switch the relationship or specific service provided. The relationship summary is expected to provide significant benefit to retail investors by focusing their attention on salient features of their potential relationship with a particular broker-dealer or investment adviser and highlighting the most important elements of this relationship in a single, succinct, and easy-to-understand document. The relationship summary also allows for comparability among broker-dealers and investment advisers by requiring disclosures on the same topics under standardized headings in a prescribed order to retail investors.[1003] As we discuss above in Section I, we do not believe that existing disclosures provide this level of transparency and comparability across investment advisers, broker-dealers, and dual registrants.

Below, we discuss in more detail the nature of the potential harm faced by retail investors from confusion about the market for brokerage and investment advisory services. We also discuss considerations involved in creating disclosures for retail investors that may reduce the potential for investor harm by increasing their knowledge about the market for brokerage and investment advisory services and facilitating their search for a firm or financial professional.[1004]

Academic studies have documented a multitude of potential benefits that accrue to retail investors as a result of seeking investment advice, including, but not limited to: Higher household savings rates, setting long-term goals and calculating retirement needs, more efficient portfolio diversification and asset allocation, increased confidence and peace of mind, facilitation of small investor participation, improvement in financial situations, and improved tax efficiency.[1005] Further, financial

essential, and about 20.0% deemed it important, but not essential, and "When asked how important certain factors would be to them if they were to search for comparative information on investment advisers, the majority of online survey respondents identified the fees charged and the adviser's disciplinary history as the most important factors.").

[997] FINRA Investor Education Foundation, Financial Capability in the United States: Initial Report of Research Findings from the 2009 National Survey (Dec. 1, 2009), available at *http://www.usfinancialcapability.org/downloads/NFCS_2009_Natl_Full_Report.pdf.*

[998] *See* FINRA Investor Survey, *supra* footnote 993.

[999] *See supra* Section IV.B.

[1000] Examples of such aspects of the relationship include the services and fees of particular firms, and conflicts of interest that may arise between particular firms and customers or clients.

[1001] The potential loss to investors with low financial literacy from not seeking advice is illustrated by, *e.g.*, the study by Hans-Martin von Gaudecker, *How Does Household Portfolio Diversification Vary with Financial Literacy and Financial Advice?*, 70 J. Fin. 489 (2015), which showed that investors with low financial literacy that do not seek financial advice on average incur significantly larger losses (by more than 50 basis points) from underdiversification compared to investors who seek financial advice (irrespective of financial literacy) and investors with higher financial literacy who do not seek advice.

[1002] Studies provide results of investor misunderstanding that is consistent with some investors being at risk of entering into a mismatched relationship. For example, survey results in OIAD/RAND, *supra* footnote 3 suggest that a non-trivial subset of retail investors may misunderstand the type of their financial professional, the type of services the professional offers, and how the professional is compensated.

[1003] *See supra* discussion in Section II.A.2.

[1004] We are extending our discussion on broad economic considerations from the Proposing Release in response to concerns about the economic analysis in the Proposing Releases by commenters; *see, e.g.*, Letter from Charles Cox, Former SEC Chief Economist, *et al.* (Feb. 6, 2019), *available at https://www.sec.gov/comments/s7-07-18/s70718-4895197-177769.pdf.* ("Former SEC Senior Economists Letter"). The Former SEC Senior Economists Letter raised three main concerns about the economic analysis in the proposed Regulation Best Interest and the Proposing Release: (1) The discussion of the potential problems in the customer-advisor relationship was incomplete and identified other features of the market for ongoing retail investment advice that might be problematic; (2) there was inadequate discussion and analysis of the existing economic literature on financial advice; and (3) there were questions of whether the disclosure requirements in the proposing release would provide meaningful information for customers. These concerns more directly focused on the economic analysis of the proposed Regulation Best Interest. However, concerns (1) and (3) appear to also apply to the economic analysis of the Proposing Release to some extent, and we address those concerns in this economic analysis. For instance, with respect to (1), this section provides a more in depth discussion compared to the Proposing Release of the harm that may arise when retail investors lack knowledge or are confused about the market for investment advisory and brokerage services, including a discussion of why additional disclosure may be useful to investors. With respect to (3), the discussion in this section expands on the discussion already provided in the Proposing Release on the potential limits to the effectiveness of disclosure to address the identified investor harm, but also discusses how disclosure should be designed to be effective, including how appropriately designed disclosures can help overcome some of the identified potential limitations of disclosure. The latter discussion provides a framework that informs our analysis in Section IV.D of the anticipated economic impacts of the relationship summary. In addition, the Former SEC Senior Economists Letter stated that "[w]e feel (preliminarily) that the new CRS forms would provide some helpful information. But we would far prefer for there to be evidence that the intended targets of these disclosures feel the same." Our discussion takes into account the various investor surveys and studies that were conducted after the Proposing Release that reported that large majorities of investors believed the relationship summary would help them make more informed decisions about types of accounts and services. *See, e.g.*, RAND 2018.

[1005] *See, e.g.*, Mitchell Marsden, Catherine Zick, & Robert Mayer, *The Value of Seeking Financial Advice*, 32 J. Fam. & Econ. Issues 625 (2011); Jinhee Kim, Jasook Kwon, & Elaine A. Anderson, *Factors Related to Retirement Confidence: Retirement Preparation and Workplace Financial Education*, 16 J. Fin. Counseling & Plan. (2005); Daniel Bergstresser, John Chalmers & Peter Tufano, *Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry*, 22 Rev. Fin. Stud. 4129 (2009); Ralph Bluethgen, Steffen Meyer, & Andreas Hackethal, *High-Quality Financial Advice Wanted!*, Euro. Bus. Sch., Working Paper, (Feb. 2008), *available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.596.2310&rep=rep1&type=pdf*; Neal M. Stoughton, Youchang Wu, &

Continued

professionals may also explain to retail investors the informational asymmetries between product providers and their customers. Retail investors might not be able to disentangle such information asymmetries on their own. Studies also find that low financial literacy is negatively associated with the propensity to seek financial advice.[1006] These findings collectively suggest that retail investors of low level financial literacy might be harmed because they might be less likely to seek financial advice in spite of the potential benefit from it.

For a retail investor who decides to enter a relationship with a financial services provider, a low level of knowledge about the market for financial services might reduce the investor's ability to accurately identify whether any given firm or financial professional offers a type of relationship that matches his or her preferences and expectations. This, in turn, increases the risk that the firm or financial professional is a poor match for the retail investor when compared to an alternative financial services provider. A relationship that represents a poor match between an investor and a firm or financial professional can leave an investor worse-off, relative to a better match, or no match at all, because the relationship could result in a cost of services that is higher than the investor expects or a level or type of service that is different than the investor expects, such as episodic recommendations versus continuing advice.

A retail investor might search across a set of financial service providers to find a financial professional that best meets his or her needs.[1007] For an investor who is able to acquire information from the financial service providers the investor chooses to evaluate, the more extensive a search the investor engages in, the more likely the investor will locate a good match. However, conducting such a search is costly and requires time, effort, and access to resources. Investors likely balance the benefits of evaluating each additional provider against the incremental cost of doing so, ending their search when the expected marginal cost of the search is greater than the expected marginal benefit from the search.[1008] Moreover, some investors may experience higher-level of uncertainty about the benefits or costs of a search. For example, investors who are less knowledgeable about the general differences between different types of financial professionals, the services these professionals provide, and the factors they should consider in their choice, may not fully appreciate the benefits of searching for a provider that best meets their needs. To the extent such investors perceive a search as burdensome because they underestimate the benefits of searching, they might refrain from conducting a search or conduct a less extensive search to learn about potential alternatives, thereby increasing their risk of entering a relationship with a firm or financial professional that is a poor match with their expectations and preferences or not engaging in a relationship even if one might be beneficial.[1009]

General trust (in the sense of confidence) in financial markets can help alleviate certain behavioral biases and encourage participation in, for example, the stock market.[1010] Trust at an interpersonal level may be less beneficial in certain circumstances. Research suggests that lower financial literacy among investors is positively associated with higher personal trust in their financial professionals.[1011] However, to the extent retail investors substitute trust for knowledge in their relationship with a financial professional, overreliance on trust may induce some investors to maintain a mismatched relationship longer than they otherwise would if they had higher financial literacy and a better understanding of the costs and benefits of the financial advice they receive from the professional, as well as awareness of alternative services or providers.[1012] That is, particularly for less-knowledgeable investors, a high level of trust in a particular financial professional or firm may exacerbate the potential harm of a mismatched relationship. Similarly, some retail investors that select a firm or financial professional based on referrals from friends and family may do so solely on the basis of a high level of trust in these referring parties.[1013] This can exacerbate the potential harm of a mismatched relationship in particular for less sophisticated investors and/or for investors who relied on referrals from less financially sophisticated parties.[1014]

Further, investors may endure a mismatched relationship for a longer period of time than they would absent switching costs, including the cost of a new search and any transaction costs involved in moving assets from one firm to another. These costs lower a retail investor's incentive to look for a new firm or financial professional even if the

Josef Zechner, *Intermediated Investment Management*, 66 J. Fin. 947 (2011). Francis M. Kinniry, *et al., Putting a value on your value: Quantifying Vanguard Advisor's Alpha*, Vanguard Research (Sept. 2016) estimates the value to investors associated with obtaining financial advice of approximately 3% in net returns to investors, associated with suitable asset allocation, managing expense ratios, behavioral coaching, alleviating home bias, among others.

[1006] For a discussion of the academic research on the role of financial literacy in seeking financial advice *see, e.g.*, OIAD/RAND, *supra* footnote 3 at 8.

[1007] The evidence discussed in *supra* Section IV.B.2.a on how investors select a financial professional or firm suggests that a large majority of retail investors rely on personal or professional referrals, which may indicate that they evaluate very few, if any alternative providers. One potential reason for this reliance on referrals could be that investors currently perceive their search costs to be high. Another possible reason, among others, could be that investors value the information derived from other people's experiences more than other sources of information.

[1008] This assumes a sequential search process, but an analogous argument can be made if an investor instead searches by deciding ex ante on a fixed number of alternatives to evaluate, in which case the marginal decisions then relates to what this number will be. *See, e.g.*, Babur De los Santos, *et al., Testing Models of Consumer Search Using Data on Web Browsing and Purchasing Behavior*, 102 Am. Econ. Rev. 2955 (2012). We have expanded our discussion on search costs in response to main concern (1) of the Former SEC Senior Economists Letter; see *supra footnote* 1004.

[1009] This argument assumes that less knowledgeable investors can learn at least some information from engaging in an initial search or a continued search that could be used to evaluate fit (albeit imperfectly so). If less knowledgeable investors cannot learn from a search at all, the choice of a firm or financial professional becomes similar to a random draw and a search, no matter how extensive, will not decrease the risk of a mismatch.

[1010] *See, e.g.*, the literature review in discussion in OIAD/RAND, *supra* footnote 3, at 11.

[1011] *See, e.g.*, Thomas Pauls, Oscar Stolper, & Adreas Walter, *Broad-Scope Trust and Financial Advice*, Working Paper (Nov. 2016), *available at https://www.researchgate.net/publication/314235638_Broad-scope_trust_and_financial_advice*.

[1012] We acknowledge commenters' concerns that higher financial literacy and more disclosures alone may not fully address the risk that retail investors would rely on trust in their financial services providers over other factors, such as knowledge about financial services industry participants, practices and products. *See* CFA Letter I ("We've seen anecdotal evidence in our own personal encounters with investors of their tendency to trust their "financial adviser" without actually verifying how or how much they are paying or how their investments are performing. Even investors who would be considered sophisticated by any reasonable measure can exhibit a level of trust and confidence in their financial professional that isn't based on data. Any disclosures about their financial professional's services, duties, costs, and conflicts are unlikely to change those views"); AARP Letter ("Recent behavioral science studies have shown that disclosures are largely ineffective because they tend to increase conflict in advisers and make the investor more likely to trust the adviser and thus follow biased advice"); *see also* Regulation Best Interest Release, *supra* footnote 47, (discussing how that rulemaking addresses the limitations of disclosure for customers of broker-dealers).

[1013] We recognize that trust is not the only reason to rely on referrals; for example, there is informational value in other people's personal experiences.

[1014] *See supra* Section IV.B.2.a for survey evidence on the role of personal referrals in retail investors' choice of financial professionals.

current relationship turns out to be a poor match. Both overreliance on trust and the presence of switching costs increase the ex-ante value of avoiding a mismatched relationship in the first place.

Retail investors could increase their knowledge about the market for brokerage and investment advisory services, and thereby engage in a more efficient search, by accessing information and disclosures currently provided directly by firms or available in a number of existing regulatory forms and platforms. Current sources of information include, among others, Form ADV (and IAPD) and BrokerCheck.[1015] However, because existing disclosures are made on multiple and sometimes lengthy forms, and are obtained in different ways, it can be difficult for investors to grasp the most important features of the financial services from reading these materials.[1016] In addition, the information available to retail investors about broker-dealers on BrokerCheck does not include the same information that investment advisers provide in the Form ADV brochure and brochure supplement, which makes direct comparisons between broker-dealers and investment advisers more difficult.

Voluntary disclosures and educational efforts made by financial services providers such as broker-dealers and investment advisers can potentially inform investors about the specific relationships they can have with providers and the types of services providers offer, but also about the overall market for financial advice and the different types of service providers and relationships available in the market. And such voluntary disclosure could, in principle, facilitate investor search. However, financial services providers may lack incentives to voluntarily disclose salient information or make the effort needed to educate investors about the various alternatives available to them because it is costly to do so. In addition to the costs of producing disclosures and training employees to deliver disclosures, providers may also perceive a risk that competitors would take advantage of disclosed information. Furthermore, disclosures that are not tailored to the provider and have more general educational value to retail investors have the features of a public good. If providers rely on their competitors to educate potential clients generally about the market for financial advice, there is an inefficiently low level of general educational material available to investors. Underprovision might occur even if such disclosures, were they to be provided, would increase the overall efficiency of the market for financial advice and thus benefit financial services providers as a group in the long run, for example, by sufficiently reducing confusion among the general investing public that more investors are willing to search for a financial services provider.

Additionally, some broker-dealers and investment advisers may even privately gain from a lack of knowledge among retail investors to the extent they profit from attracting and retaining customers and clients who would be a better match with another provider.[1017] For example, a customer of a broker-dealer who has a preference for active investing may actually be better off being a client of an investment adviser and paying a fixed percentage of assets per year as a fee for the advice instead of broker commissions each time she receives a recommendation that results in a transaction. However, this investor is likely a profitable customer for the broker-dealer. Similarly, a client of an investment adviser who prefers buy-and-hold investments in a few index funds could potentially be better off in a relationship with a broker-dealer, by only paying a few one-time sales charges and commissions instead of a recurring percentage fee on the assets, which is likely more profitable to the investment adviser. In both of these cases, the firm has little incentive to provide the investor with information about available advice relationships that could persuade the investor to seek advice elsewhere or to switch to a different business line.

In the presence of the frictions described above, requiring firms and financial professionals to furnish a short summary disclosure like Form CRS can benefit retail investors by reducing information asymmetry between investors and firms and financial professionals and turning investor attention to more salient aspects of a firm and its services. In addition, as discussed above, no current required disclosure allows for comparability among broker-dealers and investment advisers by requiring disclosures on the same topics under standardized headings in a prescribed order to retail investors. A reduction in information asymmetry and improved comparability may reduce search costs for investors and increase their understanding about differences in offered relationships across firms and financial professionals, thereby reducing the risk of investors' hiring a provider that is a poor match for their needs. However, for the relationship summary to be effective for retail investors it must be understandable. Studies have found that the format and structure of disclosure may improve (or decrease) investor understanding of the disclosures being made.[1018] We discuss these studies below.

Some commenters questioned the general efficacy of disclosure in the context of investment advice to retail investors.[1019] We do not share this view. As we discussed above, we believe a short summary disclosure like Form CRS can provide benefits to retail investors. However, as we also discussed in the Proposing Release,[1020] we recognize that there may be limits to the efficacy of disclosure in some

[1015] *See* Proposing Release, *supra* footnote 5, at n.280. Investment advisers and broker-dealers may also provide additional information to retail investors through the firm's website and the retail investor's account agreement. Additionally, investment advisers and broker-dealers may provide information to retail investors through marketing materials (*e.g.*, brochures) and other customer communications (*e.g.*, fee schedules).

[1016] There is some evidence suggesting investors are not reading current disclosures. For example, RAND 2018 reports that 13% of surveyed investors said that they had viewed Form ADV (11% said they viewed both an ADV and broker account opening document, 2% had only reviewed Form ADV). RAND 2018, *supra* footnote 13.

[1017] *See, e.g.*, CFA Letter I (stating that "[t]he problem is that investors are being misled into relying on biased sales recommendations as if they were objective, best interest advice and that they are suffering significant financial harm as a result. Investor confusion is relevant only because it limits the tools the Commission has available to address that harm . . .").

[1018] *See*, Justine S. Hastings & Lydia Tejeda-Ashton, *Financial Literacy, Information, and Demand Elasticity: Survey and Experimental Evidence from Mexico*, NBER Working Paper 14538 (Dec. 2008) (finding that providing fee disclosures to Mexican investors in peso rather than percentage terms caused financially inexperienced investors to focus on fees); *see* Richard G. Newell & Juha Siikamaki, *Nudging Energy Efficiency Behavior*, Resources for the Future Discussion Paper 13–17 (Jul. 10, 2013) (finds that providing dollar operating costs in simplified energy efficiency labeling significantly encouraged consumers to choose higher energy efficiency appliances, while another related study presents similar evidence from payday loans).

[1019] *See, e.g.*, AARP Letter (stating that "[r]ecent behavioral science studies have shown that disclosures are largely ineffective because they tend to increase conflict in advisers and make the investor more likely to trust the adviser and thus follow biased advice"); Comment Letter of Economic Policy Institute (Aug. 7, 2018) ("EPI Letter") (stating that "Disclosure requirements can be onerous, and disclosure may not only be ineffective, but counterproductive. For example, detailed disclosures can serve to bury important information, or disclosure of conflicts can be interpreted by consumers as evidence of honesty. Disclosure can make sellers more comfortable recommending products and services that are not in buyers' best interests, and it can make clients less comfortable rejecting these recommendations at the risk of giving offense").

[1020] *See* Proposing Release, *supra* footnote 5, at Section IV.B.1.

circumstances. For example, the documented low level of financial sophistication of many retail investors can make it harder for them to process the implications of disclosure.[1021] Another limitation of the efficacy of disclosure documented in research is that investors may have various behavioral biases, such as anchoring[1022] and over-confidence,[1023] which could affect how the disclosed information is interpreted.[1024] This could in turn lead investors to misinterpret, under-weight, or over-weight the implications of disclosures. Limited attention problems can also impede investors' ability to effectively process the implications of some disclosures.[1025]

In addition, academic studies find that sometimes certain disclosures may result in unintended consequences. In particular, existing research has found that conflict of interest disclosures can increase the likelihood that the disclosing party would act on the conflict of interest.[1026] This bias can be caused by "moral licensing," a belief that the disclosing party has already fulfilled its moral obligations in the relationship and therefore can act in any way (including to the customer's detriment), or it can be caused by "strategic exaggeration," aimed at compensating the disclosing party for the anticipated loss of profit due to the disclosure. Experimental evidence also suggests that disclosure could turn some clients or customers into "reluctant altruists."[1027] For example, if financial professionals disclose that they earn a referral fee if a customer enrolls in a program, the customer may implicitly feel that they are being asked to help their financial professional receive the fee. One study also found evidence that disclosure of a professional's financial interests (particularly in face-to-face interactions) can induce a "panhandler effect," whereby customers may face an implicit social pressure to meet the professional's financial interests.[1028] The above literature indicates that conflicts of interest disclosures may interact with psychological biases to produce unintended effects that undermine the intended benefits of the disclosures. However, these studies also suggest certain factors that may mitigate the unintended consequences. For example, in the case of the "panhandler effect," researchers have found that distancing the client or customer from the financial professional either in the decision or disclosure phase can dampen this effect.[1029]

Academic research has identified a set of characteristics that may increase the effectiveness of a disclosure document to consumers. These characteristics, discussed below, frame our analysis of the economic impacts of the proposed rule.[1030]

Studies have found that the structure or format of disclosure may improve (or decrease) investor understanding of the disclosures being made.[1031] Every disclosure document not only presents new information to retail investors but also provides a particular structure or format for this information that affects investors' evaluation of the disclosure.[1032] This "framing effect" could lead investors to draw different conclusions depending on how information is presented. For example, if the disciplinary history information is presented first, it could affect the way investors perceive all subsequent disclosures in the relationship summary and, possibly, discount more heavily the information provided by firms with disciplinary history relative to firms with no disciplinary history. If, instead, disciplinary history information were provided at the end of the relationship summary, the effect of the information could be moderated because it would no longer frame the other information provided to investors. Because of such framing effects, it is important that the structure of a disclosure document supports the intended purpose of the disclosure.

Because individuals can exhibit limited ability to absorb and understand the implications of the disclosed information, for example due to limited attention or low level of sophistication,[1033] more targeted and simpler disclosures may be more effective in communicating information to investors than more complex disclosures. Academic studies suggest that costs, such as increased investor confusion or reduced understanding of the key elements of the disclosure, are likely to increase as disclosure documents become longer, more convoluted, or more reliant on narrative text.[1034] Consistent with such findings, other empirical evidence suggests that disclosure simplification may benefit consumers of disclosed information.[1035] In general, academic research appears to support the notion that shorter and more focused disclosures could be more effective at increasing investors understanding than longer, more complex disclosures.

[1021] *See, e.g.*, L.E. Willis, *Decision making and the limits of disclosure: The problem of predatory lending: Price*, 65 Md. L. Rev. 707 (2006) ("Willis Study"). Commenters discussed similar issues, *see, e.g.*, Comment Letter of Charles Ryan (Aug. 7, 2018); CFA Letter I; American Investment Council Letter.

[1022] Anchoring bias implies undue reliance on a particular information signal at the expense of other signals. *See, e.g.*, Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 Wis. L. Rev. 1059, at 1083 (2011) (explaining "people tend to anchor on the first information they receive, and then revise their judgments in the face of new information, but to an insufficient degree").

[1023] Over-confidence bias implies over-estimation of probabilities of certain outcomes over objective probabilities. *Id.*, at 1072, explains that "studies indicate that people tend, in mathematically impossible percentages, to believe that they are above average in driving, auditing, and teaching."

[1024] *See, e.g.*, Jorgen Vitting Anderson, *Detecting Anchoring in Financial Markets*, 11 J. Behav. Fin. 129 (2010).

[1025] *See, e.g.*, David Hirshleifer & Siew Hong Teoh, *Limited Attention, Information Disclosure, and Financial Reporting*, 36 J. Acct. & Econ. 337 (2003) ("Hirshleifer and Teoh Study").

[1026] *See*, Daylian M. Cain, George Loewenstein, & Don A. Moore, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. Legal Stud. 1 (2005) ("Cain 2005 Article"); Daylian M. Cain, George Loewenstein & Don A. Moore, *When Sunlight Fails to Disinfect: Understanding the Perverse Effects of Disclosing Conflicts of Interests*, 37 J. Consumer Res. 836 (2011); Bryan K. Church & Xi (Jason) Kuang, *Conflicts of Disclosure and (Costly) Sanctions: Experimental Evidence*, 38 J. Legal Stud. 505 (2009); Christopher Tarver Robertson, *Biased Advice*, 60 Emory L.J. 653 (2011). These papers study conflicts of interest in general, experimental settings, not specialized to the provision of financial advice.

[1027] *See* Jason Dana, Daylian M. Cain, & Robyn M. Dawes, *What You Don't Know Won't Hurt Me: Costly (but Quiet) Exit in Dictator Games*, 100 Organizational Behav. & Hum. Decision Processes 193 (2006).

[1028] Sunita Sah, George Loewenstein, & Daylian M. Cain, *The Burden of Disclosure: Increased Compliance With Distrusted Advice*, 104(2) J. Personality & Soc. Psychol. 289–304 (2013).

[1029] *See id.*

[1030] *See* George Loewenstein, Cass R. Sunstein, & Russell Golman, *Disclosure: Psychology Changes Everything*, 6 Ann. Rev. Econ. 391 (2014). The paper provides a comprehensive survey of the literature relevant to disclosure regulation.

[1031] To that end, in order to facilitate more effective processing of disclosures by investors, some commenters emphasized the need to incorporate "design thinking" into the structure of the relationship summary. *See, e.g.*, Fidelity Letter. *See* also *supra* footnotes 58–59.

[1032] *See* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Sci. 453 (1981).

[1033] *See, e.g.*, Hirshleifer and Teoh Study, *supra* footnote 1025; and Willis Study, *supra* footnote 1021.

[1034] *See, e.g.*, Samuel B. Bonsall & Brian P. Miller, *The Impact of Narrative Disclosure Readability on Bond Ratings and the Cost of Debt*, 22 Rev. Acct. Stud. 608 (2017) and Alistair Lawrence, *Individual Investors and Financial Disclosure*, 56 J. Acct. & Econ. 130 (2013); *see also* CCMC Comment Letter.

[1035] *See, e.g.*, Sumit Agarwal, *et al.*, *Regulating Consumer Financial Products: Evidence from Credit Cards*, NBER Working Paper No. 19484 (Jun. 2014), *available at https://www.nber.org/papers/w19484* (finding that a series of requirements in the Credit Card Accountability Responsibility and Disclosure Act (CARD Act), including several provisions designed to promote simplified disclosure, has produced substantial decreases in both over-limit fees and late fees, thus saving U.S. credit card users $12.6 billion annually).

Another characteristic of effective disclosures documented in academic research is disclosure salience.[1036] Salience detection is a key feature of human cognition allowing individuals to focus their limited mental resources on a subset of the available information and causing them to over-weight this information in their decision making processes.[1037] Within the context of disclosures, information disclosed to promote greater salience, such as information presented in bold text, or at the top a page, would be more effective in attracting attention than less saliently disclosed information, such as information presented in a footnote. Limited attention among individuals also increases the importance of focusing on salient disclosure signals. Some research finds that more visible disclosure signals are associated with stronger stakeholder response to these signals.[1038] Moreover, research suggests that increasing signal salience is particularly helpful in reducing limited attention of consumers with lower education levels and financial literacy.[1039] There is also empirical evidence that visualization improves individual perception of information.[1040] For example, one experimental study shows that tabular reports lead to better decision making and graphical reports lead to faster decision making (when people are subject to time constraints).[1041] Overall these findings suggest that problems such as limited attention may be alleviated if key information in Form CRS is emphasized, is reported closer to the beginning of the document, and is visualized in some manner. This is also consistent with the recommendation of several commenters.[1042] However, it is also important to note that given a choice, registrants may opt to emphasize elements of the disclosure that are most beneficial to themselves rather than investors, while deemphasizing elements of the disclosure that are least beneficial to them. As discussed further in the economic analysis below and discussions above, the final instructions of the relationship summary include requirements that are designed to mitigate this risk. For example, the final instructions require standardized headers in a prescribed order, certain other prescribed language (including for the required conversation starters), page limits, and certain text features, which mitigate providers' incentives to behave opportunistically.

There is also a trade-off between allowing more disclosure flexibility and ensuring disclosure comparability (*e.g.*, through standardization).[1043] Greater disclosure flexibility potentially allows the disclosure to reflect more relevant information, as disclosure providers can tailor the information to firms' own specific circumstances.[1044] Although disclosure flexibility allows for disclosure of more decision-relevant information, it also allows registrants to emphasize information that is most beneficial to themselves rather than investors, while deemphasizing information that is least beneficial to the registrants. Economic incentives to present one's services in better light may drive investment advisers and broker-dealers to deemphasize information that may be relevant to retail investors.[1045] Moreover, although standardization makes it harder to tailor disclosed information to a firm's specific circumstances, it also comes with some benefits. For example, people are generally able to make more coherent and rational decisions when they have comparative information that allows them to assess relevant trade-offs.[1046] The final rules are intended to strike a balance between the relative benefits and costs of disclosure standardization versus disclosure flexibility; for example, by requiring standardized headings and a prescribed order of topics but allowing some flexibility in the firm's own wording and the order of presentation within each topic.

D. Economic Effects of the Relationship Summary

1. Retail Investors

a. Overall Anticipated Economic Effects of Form CRS

Overall, we expect that these final rules requiring firms to deliver a relationship summary will benefit retail investors in several ways, including by reducing information asymmetry between investors and firms (and their financial professionals), reducing search costs and facilitating easier comparisons between and among brokerage and investment advisory firms, and increasing understanding of, and confidence in, the market for financial services more generally.

First, in the specific context of a retail investor considering a firm or financial professional, the relationship summary will reduce the information asymmetry between the investor and the firm or professional by increasing transparency to that investor about a firm's services, fees, conflicts of interest, standard of conduct, and disciplinary history.[1047] Some—though not all—of this information is currently available in the marketplace. The relationship summary, however, will require all firms to provide information on these topics in one summary disclosure, which will be available on firms' websites, if they have one, at BrokerCheck and IAPD, and through *Investor.gov*. Current disclosure requirements do not provide this level of transparency and comparability for both broker-dealers and investment

[1036] This is a view also supported by commenters. *See, e.g.*, AARP Letter ("A good disclosure statement will highlight the information most important to the consumer.").

[1037] Daniel Kahneman, THINKING, FAST AND SLOW (2013). Susan Fiske & Shelley E. Taylor, SOCIAL COGNITION: FROM BRAINS TO CULTURE (3rd ed. 2017).

[1038] *See* Hirshleifer and Teoh Study, *supra* footnote 1025. Commenters also addressed the benefit of visible disclosure signals. For example, the Fidelity Letter refers to Stanford Law School Design Principles stating "[u]se visual design and interactive experiences, to transform how you present legal info to lay people." Also, Kleimann II states that "[f]or good design, we want to build upon this tendency by identifying the key questions investors should or are likely to ask and featuring them prominently in the text, thus easing the cognitive task for readers. . . ." Kleimann II, *supra* footnote 19.

[1039] *See, e.g.*, Victor Stango & Jonathan Zinman, *Limited and Varying Consumer Attention: Evidence from Shocks to the Salience of Bank Overdraft Fees*, 27 Rev. of Fin. Stud. 990 (2014).

[1040] *See* John Hattie, VISIBLE LEARNING. A SYNTHESIS OF OVER 800 META-ANALYSES RELATING TO ACHIEVEMENT (2008).

[1041] *See* Izak Benbasat & Albert Dexter, *An Investigation of the Effectiveness of Color and Graphical Information Presentation Under Varying Time Constraints*, 10–1 MIS Q. 59 (1986). However, one commenter noted that participants in the RAND 2018 qualitative interviews did not appear to process side-by-side tabular disclosures effectively. *See* Schwab Letter II.

[1042] *See, e.g.*, CFA Letter I; Morgan Stanley Letter.

[1043] *See* CFA Institute Letter I.

[1044] *See, e.g.*, Cambridge Letter; FSI Letter I; Mutual of America Letter; Northwestern Mutual Letter; SIFMA Letter; Vanguard Letter; Primerica Letter; TIAA Letter.

[1045] Commenters had similar concerns, *see, e.g.*, EPI Letter; Regulatory Impact Analysis, *supra* footnote 853; CFA Letter I.

[1046] *See, e.g.*, JR Kling, *et al.*, *Comparison Friction: Experimental Evidence from Medicare Drug Plans*, 127 Q. J. Econ. 199 (2012) (finding that in a randomized field experiment, in which some senior citizens choosing between Medicare drug plans that were randomly selected to receive a letter with personalized, standardized, comparative cost information ("the intervention group") while another group ("the comparison group") received a general letter referring them to the Medicare website; plan switching was 28% in the intervention group, but only 17% in the comparison group, and the intervention caused an average decline in predicted consumer cost of about $100 a year among letter recipients); CK Hsee, *et al.*, *Preference Reversals Between Joint and Separate Evaluations of Options: A Review and Theoretical Analysis*, 125 Psychol. Bull. 576 (1999).

[1047] These aspects of the relationship summary are consistent with, for example, the disclosure items identified in the 917 Financial Literacy Study as essential for retail investors: adviser's fees (76%), disciplinary history (67%), adviser's conflicts of interest (53%), and adviser's methodology in providing advice (51%); *see* 917 Financial Literacy Study, *supra* footnote 588.

advisers. In addition, through the use of layered disclosure, the relationship summary will facilitate investors' access to additional, more detailed, information. The relationship summary is also the first narrative disclosure for broker-dealers' retail customers that will be filed with the Commission and widely available to the public. We believe providing this overview of information in one place will enhance the accessibility of this information for the retail investor reviewing it relative to the baseline. Moreover, some information, such as the payments to financial professionals, is not currently required to be publicly disclosed, making that information available for the first time. The relationship summary may also benefit investors by helping them separate "hard" information about services and fees from marketing communications. To the extent the relationship summary will be effective at informing retail investors,[1048] it should improve their ability to assess whether a relationship offered by a particular firm is a good match with their preferences and expectations. Moreover, a reduction in information asymmetry may also help retail investors increase the value from any given relationship they enter with a firm or financial professional by potentially increasing their ability to monitor the relationship and to make more informed decisions related to the relationship during its duration, including whether to terminate the relationship.

Second, Form CRS will provide benefits to those retail investors that want to compare more than one provider or service, including those that want to compare brokerage and advisory services, relative to the baseline. Form CRS is distinct from other required disclosures as it is a standardized disclosure to retail investors that is broadly uniform between investment advisers and broker-dealers, or that requires dual registrants to describe both brokerage and advisory services. In facilitating this comparability, the relationship summary may promote competition between financial service providers along dimensions such as fees, costs, and conflicts, in ways that improve retail investor welfare. The comparative benefits discussed above could increase further should third-party data aggregators enter the market and use the information disclosed in relationship summaries to provide consolidated data on firms, as search and processing costs could be reduced even further for retail investors.[1049]

Third, we also believe that requiring all broker-dealers and investment advisers that serve retail investors to provide a relationship summary, along with the other initiatives we are adopting, will increase understanding of, and confidence in, the market for financial advice more generally. Specifically, because of confusion about the market for brokerage and advisory services or a general lack of confidence in the market, some retail investors are potentially discouraged from seeking a relationship with a financial provider and do not participate in the market for financial services.[1050] The relationship summary may help spread awareness and understanding about the market for financial services by increasing transparency about the services, fees, conflicts and standard of conduct of financial professionals; reducing confusion among investors generally; and increasing the general level of confidence. This general increase in understanding and confidence should, in turn, make it more likely that investors participate in the market for financial services when participation is likely to benefit them.

Some commenters suggested the general benefits to investors of the proposed relationship summary would be limited.[1051] More specifically, several commenters were concerned that retail investors may be subject to information overload from reading the relationship summary, reducing the potential benefits to investors because of the cognitive costs of digesting the information.[1052] We acknowledge that there are limits to investor cognition with respect to lengthy and detailed disclosures,[1053] however the relationship summary is shorter and more concise than disclosures currently available to investors, which should reduce the likelihood of information overload. Moreover, we have modified the relationship summary from the proposal to further streamline and shorten it, and minimize the use of legal or technical jargon, thereby further reducing the potential that the relationship summary poses a cognitive burden for retail investors that undermines the overall benefit of the disclosure.

We also recognize that the relationship summary, as with other required disclosures, has costs.[1054] For example, as discussed above, there is a risk that disclosure of conflicts of interest can actually increase costs to investors by, for example, providing a perceived "moral license" to financial professionals to act on disclosed conflicts and encourage them to provide more conflicted advice at the expense of investors.[1055] In addition, some commenters expressed a belief that the disclosures in the proposed relationship summary, particularly due to the prescribed wording, may increase investor confusion[1056] or may "create misimpressions, and may even constitute outright misstatements, inaccuracies, or misrepresentations" in certain contexts.[1057] In consideration of these comments, the final requirements for Form CRS permit firms, within the parameters of the instructions, largely to describe their services, investment offerings, fees, and conflicts of interest using their own wording. The final requirements also incorporate many other changes in response to commenters' concerns and suggestions and insights from investor surveys and roundtables, which are intended to increase the benefits and reduce the costs to investors relative to the proposed disclosure. Additionally, as with required disclosures generally, we recognize that the relationship summary alone likely would not fully alleviate investor confusion or risk of mismatched relationships in the marketplace.

Moreover, firms may attempt to pass through some of the direct compliance costs we discuss further below to retail investors, for example, by charging higher commissions, asset-based management fees, or other fees. However, we believe such pass through of costs is likely to be limited because we expect these direct expenses to be

[1048] As discussed *supra*, in Sections I and II, we commissioned the RAND 2018 report and received several surveys and studies provided by commenters. *See supra* footnotes 13–21 and accompanying text. Results of the RAND 2018 survey and other surveys or studies submitted to the comment file indicate that survey and study participants indicated their subjective view that a relationship summary would be useful for retail investors; *see supra* Section I and IV.B.3.b.

[1049] The requirement that the headings should be machine-readable may facilitate such entry by third-party data aggregators.

[1050] *See, e.g.,* OIAD/RAND, *supra* footnote 3, for a review of the academic evidence on such effects.

[1051] *See, e.g.,* CFA Letter I and EPI Letter.

[1052] Such concerns are raised in, *e.g.,* AARP Letter; ACLI Letter; Rhoades Letter. Relatedly, some commenters argued that the relationship summary is duplicative of other disclosures and is unnecessary. *See, e.g., supra* footnote 33.

[1053] *See supra* footnote 1034 and accompanying text.

[1054] *See* the discussion on the limits and potential costs of disclosures to retail investors in *supra* Section IV.C.

[1055] Some commenters raised similar concerns. *See, e.g.,* CFA Letter I.

[1056] *See, e.g.,* Financial Planning Coalition Letter (expressing concern that Form CRS may exacerbate investor confusion). *See supra* footnotes 77 and 80 and accompanying text.

[1057] Committee of Annuity Insurers Letter. *See supra* footnotes 76–81 and accompanying text.

relatively small in the context of the overall size of the brokerage and investment advisory industries.[1058] Additionally, to the extent the relationship summary may promote competition between financial service providers, as discussed above, any increase in competition both among and between broker-dealers and investment advisers could reduce the pricing power of firms, and thereby reduce the ability to pass through the compliance costs associated with the relationship summary.

The magnitude of the anticipated economic effects discussed above will depend on a number of factors, including the extent to which the relationship summary will increase investors' understanding about their potential or current relationships with firms and financial professionals, and in what ways such an increase in understanding would affect their behavior. Given the number and complexity of assumptions that would be required to be able to estimate how the relationship summary will affect investors' understanding and their decision-making, and the lack of data on relevant characteristics of individual firms and their prospective and existing retail investors, the Commission is not able to meaningfully quantify the magnitude of these anticipated economic effects.

We discuss the benefits and costs to retail investors of certain elements of the relationship summary requirements below, including requirements regarding length and presentation, standardization, content (including layered content), delivery, and filing. As part of these discussions, we also discuss certain changes from the proposal and how we anticipate those changes affect the benefits and costs of the final relationship summary relative to the proposed requirements.

b. Presentation and Format

The presentation and format of the relationship summary are designed to facilitate retail investors' processing of the provided information to help them compare information about firms' relationships and services, fees and costs, specified conflicts of interest and standards of conduct, and disciplinary history, among other things. The relationship summary is also designed to promote effective communication between firms and their retail investors. Several features of the relationship summary should reduce some of the limitations discussed above that may undermine the efficacy of disclosures, such as cognitive limitations and disclosure overload, as discussed further below.

The magnitude of the anticipated benefits and costs to retail investors discussed below will depend on a number of factors, including the extent to which the presentation and formatting requirements for the relationship summaries will help increase investors' understanding about the content of the relationship summaries, and in what ways such an increase in understanding would affect their behavior.

(1) Length and Amount of Information

Unlike many other required disclosures by financial firms, the relationship summary has a page limit. We believe that limiting the disclosure length and prescribing certain elements of the relationship summary's content could benefit investors relative to the baseline by forcing firms to provide concise and clear investor-relevant information, thereby reducing information overload and increasing the likelihood that investors will focus their attention on the relationship summary. The optimal length of the relationship summary for investors may vary from investor to investor based on individual limits to attention and ability to process a lengthier document, though investor and commenter feedback indicated many investors preferred a relationship summary no longer than, and in some cases shorter than, what was proposed.[1059] We have also reduced the page limit for standalone broker-dealers' and standalone investment advisers' relationship summaries from four to two, thereby potentially increasing the benefits of a shorter document relative to the proposal.

However, we recognize that there are potential costs to requiring a page limit.[1060] For example, as pointed out by commenters, a prescribed page limit may make it more difficult for some firms to effectively describe the nature or range of the relationships and may prompt them to exclude details that investors might find important.[1061] To the extent the provided disclosure becomes too abbreviated it may confuse investors rather than inform them about the relationship, which could increase search costs and increase the risk of a mismatched relationship relative to the baseline. The relationship summary includes several elements to mitigate the potential costs of providing less comprehensive information by utilizing layered disclosure, which includes encouraging, and in some cases requiring, hyperlinks to additional information and other textual features, such as hovers, to provide descriptions or definitions of terms.[1062] The relationship summary also includes conversation starters that are designed to elicit more substantial conversations on certain topics. Such conversations could further mitigate the costs of less comprehensive information by encouraging the providers to elaborate on topics that investor may find confusing.

Finally, we believe that allowing only the required and permitted information will promote standardization of the information presented to retail investors, minimize information overload, and allow retail investors to focus on information that we believe is particularly helpful in deciding among firms. However, we acknowledge that the potential cost of this level of standardization is that firms will not be able to include other information that might also be helpful to investors.

(2) Organization of Information and Text Features

As discussed above, academic research has documented how individual perceptions of information can change depending on the framing of the information.[1063] The relationship summary's requirement to use standardized questions as headings should help retail investors frame the information that follows the question by establishing sufficient context and increasing salience of the information presented.[1064]

The final instructions include an instruction encouraging the use of

[1058] *See infra* Section IV. D.2.b.(4) for a summary of estimates of certain compliance costs developed for the purpose of the Paperwork Reduction Act analysis.

[1059] For example, 57% of RAND 2018 survey respondents indicated that the relationship summary was too long, 41% said it was about right, and roughly 2% said it was too short. RAND 2018, *supra* footnote 13. *See also supra* footnotes 129–139.

[1060] Just as reducing the maximum page length from four to two for standalone broker-dealers and investment advisers could increase the benefits relative to the proposal; this change could also increase these costs relative to the proposal.

[1061] *See supra* Section II.A.2 for examples of commenters raising this concern.

[1062] *See generally supra* Section II.A.4 for examples of graphical features encouraged by the Relationship Summary instructions.

[1063] *See supra* footnote 1032 and accompanying text.

[1064] The proposal had required headings to frame the information, but did not require they be in the form of questions. *See supra* Section II.A.2 for a discussion of comments related to the question-and-answer format, including its potential utility to investors' understanding, and our decision to require this format.

electronic and graphical features in the relationship summary.[1065] Additionally, the relationship summary requires the use of text features for certain information, such as the conversation starters, which should increase the salience of this particular information and increase the likelihood that investors will review it. Based on academic research on disclosure readability,[1066] we believe the use of text features, whether voluntary or required, will facilitate retail investors' absorption of the provided information. Additionally, certain electronic features, such as embedded hyperlinks and hovers, should facilitate retail investors' access to additional information if they are interested, thereby reducing their costs in locating the information.

We recognize that because we are encouraging, but not requiring, firms to use graphical and electronic features, some firms might not use text features beyond what is required, potentially reducing their use and the attendant benefits. We believe, however, that providing some flexibility in design to firms may provide a benefit to retail investors, because firms competing for retail investors likely have incentives to use graphical and electronic features to enhance the retail investor's experience. Moreover, flexibility also allows firms to continuously improve their use of graphical and electronic features as they learn over time what features are the most effective. We recognize, however, that one potential cost of allowing this flexibility is that firms may also have incentives to use certain text features to increase the salience of the portions of the disclosed information that they prefer to highlight, rather than the information that may be the most useful to investors to highlight.

The final instructions do not include certain presentation requirements that we had proposed. For example, we proposed requiring that dual registrants present their information in a single relationship summary, using a two-column format. The final instructions permit dual registrants (or affiliated broker-dealers and investment advisers) to prepare either a single relationship summary describing both brokerage and investment advisory services, or two separate relationship summaries describing each service.[1067] Additionally, we are requiring such firms to use standardized headings in a prescribed order, and to design their relationship summary in a manner that facilitates comparison, but the final instructions do not specifically require a two-column format. We believe this modification could increase the benefits relative to the proposal to investors of the relationship summary by permitting firms to choose design elements that might facilitate comparison more effectively than a two column format. We recognize, however, that absent a specific design requirement, some firms might present this information in a manner that is less effective at facilitating investors' understanding than the proposed two-column format. We believe, however, that the potential benefits of allowing firms with differing business models to determine the design methods most effective at facilitating comparability justifies the change from a single, prescribed design element. Additionally, the final rule does not adopt the proposed restrictions on paper size, font size, or margin width, and instead requires them to be "reasonable." We believe that these modifications from the proposal will incentivize firms to design relationship summaries that most effectively and accurately communicate their disclosed information to the benefit of investors, as well as encourage firms to make interactive, electronic disclosures available.

c. Standardization

(1) Standard Question-and-Answer Format and Standard Order of Information

The final rules require that firms present information under standardized headings and respond to all the items in the final instructions in a prescribed order.[1068] We expect that requiring the same set of headings in a prescribed order for each relationship summary will facilitate retail investors' ability to compare relationship summaries across firms. In addition, the prescribed wording of the headings reduces the risk that firms would use the headings to "frame" each topic in ways that would be less useful for retail investors' understanding of the disclosed information. As discussed above, academic research has documented how individuals' perceptions of information can change depending on the framing of the context of the information.[1069]

We expect retail investors to benefit from this standardization to the extent they review relationship summaries from more than one firm, as the standardized headings in the prescribed order will allow them to compare firms' responses.[1070] Additionally, the requirement that firms structure the headings in machine-readable format could reduce the cost of third party data aggregators to analyze relationship summaries across many firms and display comparisons of responses, ultimately reducing search costs for investors.[1071]

Because firms will be given very limited flexibility in terms of language for headings and the order of the sections,[1072] some firms may find it more difficult to effectively present the information specific to their business and circumstances they believe should be made salient to retail investors. To the extent that the headings and the specified order do not specifically promote such information for a particular firm, and this information is relevant to investment decisions, investors may potentially find the relationship summary less useful in evaluating the specific firm. To mitigate this potential cost and provide some flexibility to firms, the final rules allow firms to discuss the required sub-topics within each item in an order that firms believe best promotes accurate and readable descriptions of their business.[1073] The final rules also allow firms to omit or modify a disclosure or conversation starter that is inapplicable to their business or specific required wording that is inaccurate. The benefit of such flexibility is that it allows firms to increase saliency of and direct investor attention to the more relevant

[1065] For a non-exclusive list of features the instructions encourage firms to use, *see supra* Section II.A.3. Some features are exclusive to electronic versions of the disclosure, such as hovers, while others could be used as part of a paper disclosure, such as comparison boxes. The benefits and attendant costs of any electronic features will generally be limited to those retail investors that access the document electronically.

[1066] *See, e.g., supra* footnote 1034 and accompanying text.

[1067] *See generally* Section II.A.5 for a discussion of specific instructions, as well as comments received.

[1068] *See generally infra* Section II.A.2 for discussion of the specific instructions, as well as comments received. In terms of specifically adopting a question-and-answer format for the standardized headings, we believe that adopting this format is likely to increase the salience of the information under each heading and improve investors' cognitive engagement with the document, which should facilitate their understanding of the disclosed information.

[1069] *See supra* footnote 1032 and accompanying text.

[1070] *See* Morningstar Letter (commenting on the importance of standardized disclosure, that "[f]urther, it is extremely important for conflict-mitigation disclosures to be standardized. . . The Commission could require a table, as we discuss below, for the Client Relationship Summary that standardizes how all broker/dealers list their relevant fees, making the costs of opening and maintaining an account transparent and comparable").

[1071] Two commenters argued for machine-readability to allow for third party development of comparison tools. *See supra* footnotes 663 and 664.

[1072] *See supra* footnote 91.

[1073] The proposed instructions prescribed the order of information within each item. *See supra* footnote 121.

disclosures. We believe the mix of requiring standardized headings and a prescribed order of topics but allowing some flexibility in the order of presentation within each topic strikes an appropriate balance in the inevitable trade-off, discussed further below, between the relative benefits and costs of disclosure standardization versus disclosure flexibility.

The magnitude of the anticipated benefits and costs to retail investors discussed above will depend on a number of factors, including the extent to which the standardized headings and prescribed order of information will help increase investors' understanding about the content of the relationship summaries, and in what ways such an increase in understanding would affect their behavior.

(2) Prescribed Wording

The final instructions include a mixture of limited prescribed wording that firms must include and requirements for firms to draft their own descriptions that comply with instructions about topics they must address.[1074] As with any disclosure document, there are inevitable trade-offs between prescribing specific wording for firms to use (when applicable) and providing discretion to firms to use their own wording. We describe those trade-offs, as they relate to the final instructions, below.

The proposed instructions would have required prescribed wording in several items of the relationship summary, including fees and costs and a comparison section for standalone broker-dealers and investment advisers. We explained in the Proposing Release that prescribed wording for these items could benefit investors through standardization and by improving comparability across relationship summaries, while at the same time could impose costs on investors if prescribed wording does not accurately represent a firm's services.[1075] We are adopting final instructions that largely eliminate prescribed wording for most of these items and instead permit firms, within the parameters of the instructions, to respond to the relationship summary items using their own wording.[1076] We continue to prescribe wording for headings, conversation starters, and the standard of conduct, as well as a factual disclosure concerning the impact of fees and costs on investments over time.[1077] However, firms may omit or modify required disclosures or conversation starters that are inapplicable to their business or specific wording required by the final instructions that is inaccurate.[1078] Based on feedback from commenters and observations reported by investor studies and surveys, this change will increase the benefits of the relationship summary to investors relative to the proposal. Specifically, several commenters suggested that some of the prescribed wording would not only reduce the accuracy of the information provided by firms but could also confuse investors about a firm's offerings, and we have made changes in light of those comments. We believe the final rules strike an appropriate balance between comparability between firms and the accuracy and relevance of information contained in relationship summaries, increasing potential benefits to investors relative to the proposal.

We nevertheless recognize reductions in benefits relative to the proposal stemming from this approach. It decreases the degree of standardization of the information which could impact comparability across relationship summaries, as suggested by some academic research.[1079] However, to the extent some of the prescribed language in the proposed rules would be considered "boilerplate" by investors or would not be applicable to a particular firm's services or business, the reduction of such prescribed wording in the final rules is not likely to come at a cost to investors (and in fact is likely to benefit investors). The risk of lower standardization and comparability also is mitigated because, while not prescribing specific wording, the final instructions require prescribed topics that all firms must include in each item. For example, in their description of services, all firms must address monitoring, investment authority, limited investment offerings, and account minimums.[1080] Moreover, increased flexibility for firms to describe their services and offerings relative to the proposal could impose costs on retail investors if it increases the potential ability of some firms to provide information in a less useful or clear way in their own words than when required to use prescribed wording.[1081]

One section proposed for standalone broker-dealers and investment advisers, which we referred to as the Comparisons section, had entirely prescribed wording.[1082] We are not adopting this proposed section. Additionally, we removed prescribed wording from the proposed introduction, which would have noted that brokerage and advisory services were distinct.[1083] On one hand, omission of the Comparisons section potentially could reduce the risk of information overload for investors. On the other hand, omitting this section might reduce benefits relative to the proposal by reducing the salience of potentially valuable comparative information available to retail investors at the point of forming a relationship, particularly if a retail investor does not review relationship summaries of multiple firms. We have taken specific measures to maintain some of the benefits we had intended to achieve in the proposed Comparisons section by using other methods to enable retail investors to continue to view comparative information and access more general educational information. For example, all firms must provide at the beginning of the document a link to *Investor.gov/CRS*, which offers educational information about investment advisers, broker-dealers, financial professionals and other information about investing in securities. In addition, dual registrants and affiliated firms that offer their brokerage and investment advisory services together are required to provide information about both types of services with equal prominence and in a manner that clearly distinguishes and facilitates comparison. This instruction applies regardless if they prepare a single relationship summary or two separate relationship summaries describing each type of service. If dual registrants prepare two separate relationship summaries, they must cross-reference or link to the other and deliver both with equal prominence and at the same time. Affiliates offering brokerage and investment advisory services together have similar presentation and delivery requirements.

The magnitude of the anticipated benefits and costs to retail investors discussed above will depend on a number of factors, including the extent

[1074] *See generally supra* Section II.A.1 for a discussion of these instructions, comments received on the proposal, and changes made regarding the amount of prescribed wording.

[1075] *See* Proposing Release, *supra* footnote 5, at Section IV.B.2.a.

[1076] *See generally* Section II.A.1.

[1077] *See generally* Section II.A.1. We discuss the benefit and costs of these items, including related to the prescribed wording, below, in Section IV.A.c.

[1078] *See supra* footnote 91.

[1079] *See generally supra* Section IV.C.

[1080] *See generally supra* Section II.A.3.

[1081] We also acknowledge there is a risk that some firms could use the flexibility to strategically omit or obscure information. Such action, however, would risk liability under Form CRS or the antifraud provisions of the Advisers Act. *See, e.g.*, General Instruction 2.B. to Form CRS.

[1082] *See generally supra* Section VI for a discussion of the proposed requirements as well as comments received.

[1083] *See supra* Section I.

to which the specific requirements regarding wording will help increase investors understanding about the content of the relationship summaries, and in what ways such an increase in understanding would affect their behavior.

d. Content

The final instructions require firms to include specific items in the relationship summary. Below we discuss the anticipated benefits and costs to retail investors from these items.[1084] The magnitude of these anticipated benefits and costs to retail investors will depend on a number of factors, including the extent to which the specific items of disclosure will help increase investors understanding about their potential or current relationships with firms and financial professionals, and in what ways such an increase in understanding would affect their behavior.

(1) Relationship and Services

The relationship summary requires an overview of the services that the firm provides to retail investors.[1085] The topics that the firm must discuss include principal brokerage and advisory services, monitoring, investment authority, limited investment offerings, as proposed, and, new to the adopting release, account minimums and other requirements. The services firms provide to retail investors vary widely. These differences exist not only between broker-dealers and investment advisers, but also within different types of broker-dealers and investment advisers. We believe that this section will increase the transparency, saliency, and comparability of information about the types of services, accounts, and investments provided by firms, which should likewise improve matching between firms and retail investors.

We have made some changes from the proposal intended to increase the potential matching benefit. In particular, instead of using prescribed wording, firms will describe their services using their own wording. Firms must also describe account minimums, which could improve matching with the provider and may reduce investor search costs, especially for investors that fall short of required minimums so that retail investors can be aware of potential limitations on their initial or continued eligibility for services.[1086] Because all firms must describe particular topics, we believe investors can also use this information to compare firm services if they review multiple relationship summaries. We believe the approach of firms using their own wording to describe their services will increase the benefit to investors relative to the proposal by allowing firms to provide descriptions that are a better match for their particular services. This approach also avoids the cost of firms being required to make inaccurate or confusing disclosures given their specific business models, as raised by commenters.[1087] This potential increase in benefit, however, comes with attendant potential increases in costs to the extent that firms do not present the most relevant aspects of their services or their descriptions are unclear, as discussed in the considerations regarding prescribed wording above. On balance, we believe that allowing for a description that is accurate and better matched to a firm's services likely would be more beneficial and less confusing to investors.

(2) Fees and Costs, Standard of Conduct, and Conflicts of Interest

The relationship summary requires several prescribed questions and required responses about fees, conflicts of interest, and the standard of conduct.[1088] Some of this information will be required to be provided to investors for the first time, such as an articulation of the standard of conduct. Other information, while currently available in various sources, will be presented centrally in the relationship summary, with links to more detailed, layered information about fees and conflicts. Additionally, providing retail investors with context for the more detailed information could potentially pique their interest and lead retail investors to seek more information about fees and conflicts through the required links. We believe both the information not previously required and the consolidated summary of information already available elsewhere will benefit investors by increasing salience, transparency, and comparability, and reducing information asymmetry compared to the baseline. More specifically, including these disclosures prominently, in one place, in a digestible manner, at or before the start of a retail investor's relationship with a firm or financial professional could facilitate meaningful disclosure in the relationship summary, as well as conversations between the retail investor and his or her financial professional, and help the retail investor decide on the types of services that are right for him or her. In addition, to the extent that the specified conflicts of interest disclosures could draw retail investors' attention to conflicts, they may improve retail investors' ability to select and monitor firms and financial professionals.

The fees, costs, and conflicts disclosure also potentially has costs for investors. In particular, and as discussed above,[1089] the perception that an investor has been warned (via the disclosure) of a firm's and financial professional's potential bias may lead some financial professionals to believe that they are less obligated to provide unbiased advice. Further, the standard of conduct and conflict disclosures could make firms and financial professionals appear more trustworthy and as a result reduce the incentives for retail investors to examine additional information more carefully. Conversely, a potential cost for investors of such disclosures is that some investors may mistakenly leave the market for financial services or choose to not engage with a financial professional because they infer from the discussion of conflicts of interest and fees that a financial professional could provide bad advice or recommend products that will reduce their financial well-being. However, the placement of the prescribed standard of conduct disclosure immediately preceding the conflicts disclosure may alleviate the risk that investors will overreact to the conflicts of interest disclosure in this manner, because the standard of conducts disclosure clarifies that the firm or financial professional must act in the investor's best interest.

We received significant comments about the potential efficacy of the proposed disclosures related to fees and costs, conflicts, and the standard of conduct, and the ultimate benefit of such disclosures to investors. Likewise, feedback from investors through surveys and studies and in Feedback Forms revealed confusion about the proposed standard of conduct section in

[1084] *See supra* Section II.B.

[1085] *See supra* Section II for a discussion of the requirements and comments received on the proposal.

[1086] Disclosures of account minimums could also help make retail investors more focused on their future planning needs, for example, by incentivizing them to target minimal future investment levels to reach an asset value level that will make lower fees or additional services available from a particular provider.

[1087] *See, e.g., supra* footnote 269.

[1088] *See supra* Section III for a discussion of the requirements and comments received on the proposal.

[1089] *See supra* footnote 1026 and accompanying text.

particular.[1090] Results reported in investor surveys and studies also showed that the proposed conflicts section was rated one of the least useful sections, which may suggest that some investors did not understand the role of conflicts based on the disclosure as presented by the sample proposed dual registrant relationship summary.[1091] We have made several changes from the proposed relationship summary designed to increase the clarity and salience of the disclosures, thereby increasing the potential benefit and reducing the potential costs discussed above relative both to the baseline and the proposal. We also believe the changes will reduce the risk that investors will not read the section or will misinterpret it, increasing the effectiveness of these disclosures and therefore the potential benefit.

First, by integrating the section covering fees, costs, conflicts of interests, standard of conduct, and how representatives are paid,[1092] we believe retail investors may be more primed to process implications of these disclosures in a more integrated fashion due to their proximity. In particular, providing these disclosures in the same section could increase the salience of this information for investors,[1093] both relative to the proposal and the baseline, and may potentially improve investor cognitive processing of how conflicts of interest can have an impact on the services and advice provided and costs paid by investors.

Second, with respect to fees, the relationship summary requires firms to discuss under separate question headers (i) the principal fee and the incentive that it creates and (ii) other fees and costs that the investor will pay. We are requiring firms to summarize, in their own words, the principal fees and costs that retail investors will incur, including how frequently they are assessed and the conflicts of interest that they create. We think investors will be better able to process the implications of the principal fee disclosure through this requirement. Additionally, requiring firms to describe other fees and costs investors will pay, distinct from the principal fee, will clarify for investors that they pay not only a principal fee for advice, but also additional fees and costs. This may potentially prompt investors to use the required link to learn more information, ask follow-up questions, or monitor for such fees and costs.

Third, the instructions require that the standard of conduct disclosure be placed under the same header as the summary of firm-level conflicts. The expected benefit of placing these conflicts of interest and standard of conduct disclosures together is to improve investor processing of the implications of conflicts of interest disclosure and legal obligations underlying the particular standard of conduct (*i.e.,* best interest for broker-dealers and fiduciary duty for investment advisers) as well as to prevent investor misinterpretation of these disclosures. We continue to prescribe wording for the standard of conduct, which we believe will have greater benefits than giving firms flexibility to describe the standard of conduct. Unlike other areas where we are allowing firms to use their own words, the standard of conduct, whether a fiduciary duty for an investment adviser or Regulation Best Interest for a broker-dealer, applies during the course of the adviser's relationship or where a broker-dealer makes recommendations. We also changed from the proposal the specific wording in an effort to simplify the disclosure relating to the standard of conduct and thereby increase understanding by investors. We believe reducing the length and the complexity of the prescribed wording for the standard of conduct will increase the salience and comprehension of the required standard of conduct disclosure, because a more readable and shorter disclosure is less likely to be ignored by investors due to information overload and limited attention.

While retail investors may benefit from understanding the standard of conduct that firms and financial professionals are subject to when providing investment advice or recommendations, discussing the standard of conduct in connection with conflicts of interest may benefit investors by making it clear that the standard of conduct does not mean that advice is conflict-free.

Regarding the conflicts disclosure itself, we have added a new requirement that if none of the enumerated conflicts required to be disclosed by the instructions is applicable to a firm, the firm must select at least one of its material conflicts to describe. This was designed to eliminate the potential that firms would not have to disclose any conflicts, which would have been costly to investors if it caused them to believe that the firm had no conflicts. The relationship summary does not require disclosure of all conflicts but does require firms to include a link to additional information about their conflicts. We believe this will benefit investors relative to the baseline by providing sufficient information about certain conflicts to increase their understanding of incentives generally and potentially inducing them to review the linked information, which also minimizes the potential for information overload.

Finally, in addition to requiring firm-level conflicts, the relationship summary includes a separate question and required response about how financial professionals are compensated and the conflicts of interest those payments create. This disclosure will distinguish firm-level from financial professional-level conflicts, which we believe will benefit retail investors by helping them better understand the role of conflicts and how these conflicts might impact a financial professional's motivation when providing investment advice.

Despite the changes to presentation of fees, costs, conflicts, and standard of conduct relative to the proposal to increase clarity, we recognize the complexity of these issues. Accordingly, we recognize benefits to investors could be limited by investors' potential lack of ability to comprehend the disclosure.[1094] In the extreme, standards of conduct disclosure may also have a reverse effect of unduly enhancing investor trust in providers because investors may misperceive providers as holding themselves to a standard higher than legally required, and making investors discount the severity of the disclosed conflicts.[1095] Because firms have some flexibility to decide what additional fees and costs to describe and, in the case of a firm with none of the enumerated conflicts, which conflict to use as an example, benefits could be reduced to the extent that they choose examples that are not informative to the retail investor. Additionally, there could be a cost to investors to the extent they believe the enumerated fees and conflicts in the relationship summary are the only fees and conflicts the firm has, although we believe that the required wording that explains the

[1090] *See supra* footnotes 475–478 and accompanying text.

[1091] *See supra* footnotes 522–524 and accompanying text.

[1092] *See supra* discussion in Section II.A.4.

[1093] This is also consistent with some commenters' suggestions and the organization of several sample relationship summaries submitted by commenters. *See supra* footnote 373 and accompanying text.

[1094] *See supra* footnotes, 378–382, 475–478, 522–524, and accompanying text, for a discussion of comments and investor survey results on the comparative difficulty for investors to comprehend these disclosures.

[1095] *See, e.g.,* Betterment Letter I (Hotspex), *supra* footnote 18 (reporting that only 26% of participants correctly identified as false a statement that broker-dealers are held to a fiduciary standard).

summarized conflicts are examples, as well as the required links to more information about fees and conflicts, mitigate the risk of this misperception.

In addition, referencing academic research on the potential negative effects of conflicts of interest disclosure, several commenters expressed concerns that the proposed required disclosure of conflicts of interest in the relationship summary could lead to a "moral license" for financial professionals to provide even more biased advice and thus take unfair advantage of investors, or lead investors to fail to discount biased advice, trust their providers even more or make them feel pressured to remain in a potentially disadvantageous relationship, *i.e.*, the panhandler effect.[1096] Despite the changes we have made from the proposal to the required conflicts of interest disclosure in the final instructions, we acknowledge that there is still some risk for such negative unintended consequences.

(3) Disciplinary History

As proposed, the relationship summary will contain a section where firms must state in binary fashion whether or not they have disciplinary history, as well as include a reference to *Investor.gov/CRS*, where investors can conduct further search for additional information on those events.[1097] We have made a change to increase the salience of this information relative to the proposal by making a separate Disciplinary History section, including its own question and required response, rather than—as proposed—including it with other content in an Additional Information section, which should increase any benefits or costs relative to the proposal.

The primary benefit of the disciplinary history disclosure relative to the baseline is that investors will be alerted to a potential need to search and review their provider's disciplinary information and will have a mechanism to find more information about any disciplinary history. Although this information already exists publicly, clearly linking to *Investor.gov/CRS* for further information about disciplinary history at the time investors are selecting a firm or financial professional will help retail investors know where to find additional information about those events, which should reduce search costs and is an improvement relative to the baseline.[1098] The conversation starters also will provide investors with a cue to the importance of understanding the disciplinary history and could trigger more information gathering and ultimately more effective cognitive processing of this disclosure. As a result, an investor may choose to not engage a firm or financial professional if the disciplinary history is considered to be too problematic, or, if an investor chooses to proceed with a provider that has some concerning disciplinary history, awareness of those events could provide incentives to the investor to monitor his or her account more carefully than if she were not aware.

The potential cost is that investors may overreact to the "yes" or "no" response reported in the Disciplinary History section. Investors may attribute the disciplinary history of one or few financial professionals at a firm to the entire firm, and thus choose not to select a provider that could be a good match for them (for example, a larger firm with more employees and thus a greater likelihood of disclosable events)[1099] or avoid hiring a financial professional altogether. Retail investors may also misinterpret a higher baseline rate of disciplinary history for broker-dealers than for investment advisers, given that the scope of events that trigger a disclosure event is arguably broader for broker-dealers than for investment advisers.[1100] As a result, retail investors may avoid choosing a broker-dealer, even when such a relationship would be a better match for the investors. Relatedly, investors may over-rely on lack of disclosure of disciplinary history as evidence of more ethical conduct; however, lack of such disclosures may be due to unrelated factors such as a comparatively short history of a particular firm or fewer employees (and thus less likelihood of having employees with disclosable events). However, the risk of some investors misinterpreting, or over-relying on, the disciplinary history should be mitigated to the extent firms or financial professionals provide more information about and encourage retail investors to ask follow-up questions regarding the nature, scope, or severity of any disciplinary history. On balance, we believe the benefits to investors from including the disclosure on disciplinary history, as discussed above, justify any potential negative effects.[1101]

(4) Additional Information

The relationship summary will conclude with a section where registrants will let investors know where investors can find additional information about their services and request a copy of the relationship summary, which should benefit investors relative to the baseline by providing this general resource, in addition to the links or references provided throughout the document.[1102] In a change from the proposal, the Additional Information section eliminates the proposed requirement to provide information on how investors should report complaints about their investments, accounts, or financial professionals. Instead, we are requiring a conversation starter on whom investors should contact about their concerns. The benefit of this approach is that it improves readability of the form by reducing prescribed wording and potentially facilitates a conversation between investors and their financial professionals; the cost of this approach is that some investors will not have access to direct instructions on how to report their complaints. Finally, investors with limited or no access to internet (*e.g.*, due to costs of internet access or due to a disability) will also benefit from a requirement that firms provide a number through which retail investors can request up-to-date information or a copy of the relationship summary.

(5) Conversation Starters

Disclosures currently required by investment advisers and broker-dealers generally do not have suggested questions for investors to ask their financial professional. The relationship summary will require firms to incorporate suggested follow-up questions for the investor to ask, which the instructions refer to as "conversation starters."[1103]

Conversation starters should benefit investors relative to the baseline by improving the potential to match investors with providers that provide services more suitable to the investors'

[1096] *See, e.g.*, Better Markets Letter; AARP Letter; Warren Letter; CFA Letter I; *see also supra* Section IV.C for a discussion of moral license.

[1097] *See supra* Section II.B.4 for a discussion of the requirements and comments received on the proposal.

[1098] *See, e.g.*, RAND 2018, *supra* footnote 13 (when investors were asked why they would not look up disciplinary history, 37% of all respondents indicated that they did not know where to get the information, whereas 19% of all respondents indicated that it would take too much time or effort).

[1099] *See supra* Section II.B.4.

[1100] *See id.*

[1101] This view is supported by survey evidence that suggests that investors consider disciplinary history to be an important factor when searching for a provider of investment advice. See *supra* footnote 996; *see also supra* footnotes 566 and 567.

[1102] *See supra* Section II.B.5 for a discussion of the requirements and comments received on the proposal.

[1103] *See supra* Section II.B.2.c for a discussion of the requirements and comments received on the proposal.

preferences and needs. We believe that this is accomplished through enabling the investor to be more engaged, potentially assisting the investor with comprehension of relevant disclosures, and assisting the investor in receiving more personalized information than the firm-level disclosure documents, such as Form ADV or documents issued by broker-dealers. That is, to the extent that these conversation starters promote more transparency and better communication between investors and financial professionals, retail investors are more likely to understand the information and select the right firm or financial professional to meet their preferences and expectations. In addition, to the extent the conversation starters help increase investors' engagement in a selected relationship it may also increase their monitoring of their relationship and more critically evaluate any advice or recommendations they receive. However, a closer personal engagement between retail investors and financial professionals may cause some investors to feel social pressure to act on the advice or recommendations of the professional due to a panhandler effect,[1104] which may attenuate some of the benefits of the conversation starters.

A potential cost associated with the conversation starters is that the particular required questions may anchor the attention of retail investors to those prescribed questions and reduce the likelihood that they would explore other potential questions that could be important to them based on their individualized circumstances. In response, we have reframed the proposed questions, which were at the end of the proposed relationship summary as "Key Questions," and instead have integrated them within the relevant information item throughout the relationship summary to reduce the risk that investors only focus on this set of questions in their discussions.[1105] Moreover, many of the conversation starter questions are broad and open-ended, which could further mitigate the risk of investors' anchoring on the content of these questions at the expense of the other disclosures in the relationship summary.

As pointed out by one commenter, unless the "Key Questions" in the relationship summary are provided to investors in advance, some retail investors may entirely ignore these questions.[1106] As discussed above, the final rules incorporate the questions as "conversation starters" directly in the different sections of the relationship summary, which should increase their salience and reduce the risk of them being ignored by investors compared to the proposal. In addition, because the relationship summaries will be available to investors online on firms' websites or through *Investor.gov/CRS*, the relationship summaries may be downloaded and accessed by some investors prior to meeting a financial professional, which would give such investors the opportunity to review the conversation starters before meeting a financial professional.

e. Filing, Delivery, and Updating Requirements

(1) Filing Requirements

The final instructions require firms to file their relationship summaries with the Commission (using IARD, Web CRD®, or both, as applicable), and make their relationship summaries available on their websites. In addition to firms' websites, firms' most recent relationship summaries will be accessible to the public through IAPD and BrokerCheck, public interfaces of IARD and Web CRD®, respectively. Investors also will be able to use the Commission's website *Investor.gov*, which has a search tool on its main landing page and at *Investor.gov/CRS* that links to BrokerCheck and IAPD. If investors prefer, they may request copies of firms' relationship summaries by calling the numbers that firms must include in their relationship summaries. We expect that making firms' relationship summaries accessible in these ways should reduce investor search costs in connection with selecting investment firms or financial professionals. We also believe that retail investors could benefit from their ability to access the relationship summaries independently through the companies' websites, BrokerCheck, IAPD, or *Investor.gov* prior to any contact with a financial professional. Such access could increase retail investors' understanding about differences between firms and financial professionals even before approaching a particular firm or financial professional, which could reduce search costs for investors early on in the search process and further reduce the risk of a mismatched relationship. The online availability of the relationship summaries will also enable investors who are currently not participating in the market to become better informed about the market for financial advice and the particular relationships provided without the need to incur the cost of actively contacting a firm or financial professional, which may ultimately encourage them to seek out a relationship with a provider.

In addition, the online availability of the relationship summaries in central locations and the machine-readable headers of the summaries will allow third-party data aggregators to more easily collect relationship summaries and facilitate the development of comparison tools for the investing public. To the extent such tools and metrics are developed, it could facilitate investors' searches by helping them narrow the set of available financial service providers to those that are most likely to provide a good match. However, the benefits to investors from the development of such tools will be mitigated by any fees charged by third-party aggregators for access to the tools.

(2) Delivery and Updating Requirements

Firms will deliver a relationship summary to each new or prospective retail investor based on the initial delivery triggers specific to investment advisers, broker-dealers, and dual registrants.[1107] Firms also must deliver the relationship summary to existing clients and customers who are retail investors in certain circumstances.[1108] For these existing clients and customers, the final rules require that firms deliver the relationship summary (including updates) in a manner consistent with the Commission's electronic delivery guidance and the firm's existing arrangement with that client or customer.[1109]

Because retail investors may face substantial switching costs when they move from one financial professional to another, the benefits associated with finding a good match may be particularly significant. Accordingly, investors' benefits should increase in accordance with their ability to understand and compare relationship summaries, which may take time. We recognize that, as some commenters noted, if a financial professional delivers the relationship summary at the time of service, retail investors may not have sufficient time to thoroughly evaluate the financial professional or may have already made a preliminary decision to engage the particular financial professional by the time they receive the relationship summary. As discussed above, however, there are

[1104] *See supra* footnote 1028 and accompanying text.

[1105] *See supra* Section II.A.4. for discussion on conversation starters.

[1106] *See* CFA Institute Letter I.

[1107] *See supra* Section II.C.3.b.

[1108] *See supra* Section II.C.3.c.

[1109] *See supra* Section II.C.3.a.

compliance uncertainties and other costs associated with requiring a relationship summary be delivered at first contact or requiring a waiting period, as suggested by some commenters.[1110] First contact between an investor and a financial professional may include circumstances that are not limited to the seeking of investment advice, such as business interactions for other purposes or social interactions. In addition, as noted by commenters, a waiting period may prevent investors from meeting certain deadlines.[1111] As we discuss above, the availability of relationship summaries online may mitigate the concern that retail investors will not have enough time to review them, to the extent that it provides retail investors an opportunity to compare firms before contacting them to obtain services.

We expect that the rules regarding form of delivery—electronic or paper—generally will be beneficial for retail investors relative to the baseline by enabling a form of delivery that is a good match for the particular retail investor. For retail investors who prefer electronic delivery, electronic forms of delivery should facilitate both the engagement with and the processing of the disclosed information, particularly the required and optional hyperlinks and other features. For the investors who prefer paper documents, paper delivery should result in greater likelihood of the investor paying attention to the relationship summary disclosures. We believe that maintaining the mode of delivery consistent with the way information was requested for new customers and consistent with existing arrangements for existing customers will help to further ensure that the investors will not miss and will process the information contained in the relationship summaries. Customers requesting the relationship summary in paper format may be less likely to access the additional information available through the electronic means of access discussed above, which could result in their inability to process potentially important additional information.

We also believe that existing clients and customers of broker-dealers and investment advisers that are retail investors will benefit from the requirement that firms deliver the relationship summary again if they: (i) Open a new account that is different from the retail investor's existing account(s); (ii) recommend that the retail investor roll over assets from a retirement account into a new or existing account or investment; or (iii) recommend or provide a new brokerage or investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in an existing account, for example, the first time purchase of a direct-sold mutual fund or insurance product that is a security through a "check and application" process, *i.e.*, not held directly within an account.

This requirement should have the benefit of increasing retail investors' attention to disclosures provided in the relationship summary and the implications of new services or account options at the time of that decision. Additionally, the instructions require firms to update their relationship summaries to existing retail clients or customers if the existing relationship summary becomes materially inaccurate, which would include information that is materially outdated or materially incomplete. Firms must communicate the changes by delivering the amended relationship summary or by communicating the information through another disclosure that is delivered to the retail investor. Firms delivering the amended relationship summary must highlight the most recent changes by, for example, marking the revised text or including a summary of material changes and attaching the changes as an exhibit to the unmarked amended relationship summary. Investors should benefit from receiving updated relationship summaries under these circumstances because this information is relevant to the decision of whether to enter into new services or continue existing services, based upon whether the new or existing services match or continue to match their preferences and expectations. The requirement to attach revised text or a summary of material changes to the amended relationship summary should benefit retail investors by helping them to process the new information quickly. However, we recognize that to the extent that retail investors with established financial professional relationships tend to remain in such relationships, it may attenuate the benefits of receiving the relationship summary again.

2. Broker-Dealers and Investment Advisers (Registrants)

a. Benefits to Registrants

Beyond benefits to retail investors, we also expect broker-dealers and investment advisers potentially to benefit from the relationship summary. Some retail investors, who could benefit from obtaining advice and other services from financial professionals, currently may choose to stay out of the market for financial services because they do not understand what type of firm or financial professional they require. The relationship summary may provide a clear and concise document that may draw new investors to the market. If the relationship summary draws new retail investors to the market for financial services, both broker-dealers and investment advisers may gain new customers and clients, respectively. An increase in new retail investors could enhance revenues for firms and financial professionals, although firms and financial professionals could also bear additional costs, which are discussed below.

Moreover, the relationship summary could provide additional benefits to firms and financial professionals by improving the efficiency of the search process in the market for financial advice. For example, retail investors will be able to access and obtain relationship summaries for any number of firms online, including both broker-dealers and investment advisers. To the extent investors use this feature at the start of their search for a firm, they are more likely to opt to approach only firms that ex ante meet their preferences and expectations. Thus, broker-dealers and investment advisers may be less likely to expend time and effort meeting and discussing their business model and services with prospective customers and clients, who are seeking a different kind of relationship and that would ultimately not engage in a relationship with the firm or financial professional. Instead, firms and financial professionals can devote their efforts to acquiring customers and clients that are more likely to contract for their services. In addition, to the extent the relationship summary leads to fewer retail investors entering or remaining in a mismatched relationship that does not meet their expectations, it may benefit firms by reducing costly customer complaints and arbitrations.

While some commenters suggested that brokers have incentives to provide ineffective disclosures,[1112] academic studies show that sellers can benefit from better disclosure of product quality information to the buyers, and competitive sellers thus have incentives to disclose better information.[1113] While

[1110] *See supra* footnotes 720–724 and accompanying text.

[1111] *See supra* footnote 719 and accompanying text.

[1112] *See, e.g.*, CFA Letter; Warren Letter.

[1113] Steven Tadelis & Florian Zettelmeyer, *Information Disclosure as a Matching Mechanism: Theory and Evidence from a Field Experiment*, 105 some disclosure documents may contain topics of material that investors may not understand or prioritize, the relationship summary has been designed to focus on issues already identified by retail investors to be of first-order importance with respect to their relationship with their financial professional,[1114] such as fees and costs, conflicts of interest, and disciplinary history of firms and financial professionals, among other items.[1115] Further, the relationship summary is intended to be clear, concise, and readable, while permitting firms the flexibility to provide information pertinent to their business model and services offered. Finally, firms may benefit from providing more clear and understandable disclosures to the extent it will facilitate a more efficient matching process with prospective investors. Firms could also bear potential legal liability[1116] and reputational costs as a result of providing potentially less transparent disclosures. For these reasons we believe registrants will generally have incentives to use the discretion permitted in the final instructions to design a relationship summary that is effective at informing retail investors about the nature of their business and offerings.

The magnitude of the anticipated benefits discussed above will depend on a number of factors, including the extent to which investors' will change their behavior as a result of receiving the relationship summary and how firms and financial professionals will react to such a change. Given the number and complexity of assumptions that would be required to be able to estimate how the relationship summary will affect investors' understanding and their decision-making, and the lack of data on relevant characteristics of individual firms and their prospective and existing retail investors, the Commission is not able to meaningfully quantify the magnitude of these anticipated benefits.

b. Costs to Registrants

The final rule will also impose costs on affected broker-dealers and investment advisers, including: costs associated with preparation, filing, delivery, and firm-wide implementation of the relationship summary; costs of the associated recordkeeping rules; and as well as training, monitoring, and supervision for compliance. We expect that these costs may differ across firms depending on their type (broker-dealer or investment adviser), size, and complexity of business. We discuss these costs in more detail below. The Commission has, where possible, quantified the costs expected to result from the final rules in the analysis below. However, we are unable to quantify some of the potential costs discussed below, because of the number and complexity of assumptions that would be required to be able to estimate how the relationship summary will affect investors' understanding and choice of financial services provider and the lack of data on relevant characteristics of individual firms and their prospective and existing retail investors.

(1) Preparation, Implementation, and Content

Registrants will incur costs in connection with preparing and implementing the relationship summary. With respect to aggregate compliance costs, as discussed in more detail below, some commenters suggest these costs could be high.[1117] One commenter provided a survey of financial professionals that indicate that 79% of survey participants agree that implementation costs may be higher at first but will likely lessen over time, and 40% of firms in the same survey anticipate moderate or substantial time to implement the requirements of Form CRS (and Regulation Best Interest).[1118]

Broker-dealers currently are not required to prepare a consolidated disclosure document for their customers similar to the Form ADV, Part 2A brochure and may incur comparatively greater costs in preparing the relationship summary than investment advisers, given that investment advisers can draw on their experience with preparing and distributing Form ADV Part 2A. The Commission believes that costs of preparation would also fall differently across firms with relatively smaller or larger numbers of retail investors as customers or clients. For example, to the extent that developing the relationship summary entails a fixed cost, firms with a relatively smaller number of retail investors as customers or clients may be at a disadvantage relative to firms with a larger number of such customers or clients since the former would amortize these costs over a smaller retail investor base.

The relationship summary requires the use of standardized headings in a prescribed order, while permitting some flexibility in other aspects of the relationship summary's wording and design within the parameters of the instructions. There is a trade-off in terms of preparation costs to registrants between requirements that prescribe specific wording and formats for disclosures and requirements that do not provide any prescribed language and format. For example, we would expect that the more extensively the relationship summary would rely on prescribed format and wording, the lower the preparation costs for providers, because there would be less need for them to devote resources to construct their own format and wording. On the other hand, the more extensively the relationship summary would rely on prescribed format and wording, the more likely it would turn into a "one-size-fits-all" document with largely boilerplate language, and firms would lose the benefit of being able to more precisely and accurately describe their own business and offerings to investors. We believe the final instructions strike an appropriate balance in this trade-off, with some higher-level prescribed format and language, such as the standardized language and order of headings, while firms generally will be able to (and have to) choose their own wording and organization of the required information under each heading.

The final instructions provide for more flexibility than the proposed instructions. We acknowledge that this change could increase certain compliance costs relative to the proposal, as firms will have to develop more of their own wording and organization of the information that is required to be included. However, the flexibility permitted by the final instructions is mainly in terms of the wording while the topics and sub-topics of information that are required to be discussed are largely proscribed. This narrows the field of subjects that firms could choose to discuss and potentially mitigates the cost increase from additional flexibility. Moreover, we believe that the expected benefits of this additional flexibility justify this cost increase. In particular, we expect this change from the proposal to benefit firms by allowing them to more

Am. Econ. Rev. 886 (2015); *see also* Tao Zhang, *et al., Information disclosure strategies for the intermediary and competitive sellers*, 271 Eur. J. Operational Res. 1156 (2018).

[1114] RAND 2018, *supra* footnote 13 (survey results re: Importance of each topic to respondents).

[1115] *See supra* Section IV.B.3.b.

[1116] *See supra* footnotes 92–105 and accompanying text (discussing the parameters for the scope of information expected within the relationship summary and the antifraud standard as applied to the relationship summary).

[1117] *See infra* Sections V.A.1 and V.D.1 for examples of commenters discussing the costs.

[1118] *See* CCMC Letter (Survey conducted by FTI Consulting of 30 individuals at 15 broker-dealers and dually-registered firms representing $23.1 trillion in assets under management and administration (AUM/AUA), and 78.54 million investment accounts).

accurately describe their services and offerings to retail investors.[1119] We also expect the additional flexibility to benefit both firms and retail investors to the extent it results in disclosures that are more engaging and useful to investors and mitigates the possibility of a mismatch. In addition, several commenters requested greater flexibility to provide accurate descriptions of their business models and services, noting the potential for liability for prescribed disclosures in the proposal that might not be accurate for a particular registrant's business.[1120] Some topics, however, will require firms to use prescribed wording, such as the headings, conversation starters, statement of their legal standard of conduct, and two statements related to fees and costs, for the reasons generally discussed in Section II.A.1.[1121]

In a change from the proposed instructions, the final instructions encourage rather than require dual registrants and affiliates to prepare one single relationship summary, but also allow them to instead prepare two separate relationship summaries.[1122] In addition, if firms prepare one combined relationship summary, the final instructions required them to employ design elements of their own choosing to promote comparability, rather than the two-column format, as prescribed in the proposed instructions. This increased flexibility in presentation relative to the proposal can benefit dual registrants and affiliates because it allows them to design disclosures more suitable to their business models. For example, a firm which generally is marketing both sides of its business to retail investors may find it less costly and/or more beneficial to provide a combined summary. However, dual registrants for which either the brokerage or investment advisory side of their business is not generally marketed to most customers or clients may find it more beneficial to provide two separate relationship summaries. If a firm chooses to prepare two distinct relationship summaries, it may incur an extra cost of preparing the second summary, but we expect firms will only elect to prepare two separate summaries if they believe the benefits of separate summaries justify such additional preparation costs.

Beyond the more general costs discussed above from the prescribed formatting and wording requirements, some specific requirements may be costly for certain firms. For example, because the relationship summary requires information to be organized by standardized headings in a prescribed order, some firms may find it difficult to effectively present the most salient information specific to their business and services. As such, certain firms may incur costs associated with trying to fit their business model and other relevant information into the standardized headings. This is mitigated by the fact they have flexibility to present the required sub-topics of information in the order of their choosing within each subtopic and by firms' ability to omit irrelevant information. Firms and financial professionals also may bear costs in providing additional information to potential or existing investors to clarify any information that is salient to their business but does not fit into the standardized headings of the relationship summary. These costs are mitigated by firms' ability to supplement their relationship summaries with cross-references or hyperlinks to additional information.

The page limit for the relationship summary also has potential costs, particularly for firms with complex business models, even under the increased flexibility provided by the final instructions, because they would have to distill the complexity of their business into the same space as less complex firms. The use of layered disclosure, through mediums such as hyperlinks, will permit firms to provide more detailed information that may ameliorate this cost to some extent, while still adhering to the formatting requirements of the relationship summary.

Firms will also incur costs associated with the production and verification of information in the relationship summary. Although some of the information that will be summarized in the relationship summary is contained in other disclosures that firms already provide, firms will bear the cost of editing this information for the relationship summary and cross-referencing or hyperlinking to additional information. For example, to the extent that some firms do not already have in place a concise description of how fees, costs, conflicts, and standards of conduct are potentially connected, that also will allow for meeting the relationship summary's space constraints, firms will have to expend time and effort to develop an accurate, clear, and concise description of these items, written in plain English, for insertion into the relationship summary, and cross-referencing or hyperlinking to additional information about these items. These costs may be larger for broker-dealers than for investment advisers, who can directly draw on the disclosures of fees, costs, and conflicts they have to provide to retail investors in Part 2 of Form ADV. Also, to the extent the costs of developing this section have a fixed component, the relative burden of developing this section may be higher for smaller firms. On the other hand, smaller firms are likely to have fewer types of fees, costs, and conflicts to report compared to larger firms, potentially making it less burdensome for them to summarize the required information.

In addition, the relationship summary requires "conversation starters" as part of each section, and the conversation starters must be highlighted through text features to improve their prominence relative to other discussion text. Firms will incur costs associated with the conversation starters, particularly with respect to preparation and training on how financial professionals provide accurate and complete responses to the "conversation starters" when asked. We do not have access to data and information that would allow us to estimate these costs to firms, but we expect them to be comparatively greater for firms with more complex business, a wider range of offered services and products, because training and supervision costs for such firms could be more extensive. For firms that provide automated investment advisory or brokerage services, those firms will incur burdens to prepare answers to each conversation starter question and make those available on the firm's website (while providing in the relationship summary a means of facilitating access, *e.g.*, by providing a hyperlink, to that section or page).[1123]

We also anticipate that firms will bear some costs in the production of the electronic format as well as other graphical elements, such as charts and tables, which may make important information more salient to investors. Smaller firms may disproportionately incur costs associated with electronic and graphical formatting, particularly if they do not have an existing web presence or currently produce brochures or other disclosures that make use of graphical formatting. However, because the final instructions encourage, but do

[1119] *See, e.g.*, SIFMA Letter requesting greater flexibility for this reason (stating that "greater flexibility is needed to accommodate various business models, given that different firms offer different products and services").

[1120] *See generally* footnotes 76–83 and accompanying text.

[1121] *See supra* footnotes 85–90 and accompanying text.

[1122] *See supra* Section II.A.5.

[1123] *See supra* footnote 184.

not require electronic formatting and graphical, text, and online features, firms would only bear these costs if they expected these features to provide benefits that justify these costs.

Finally, there could also be some indirect costs to firms from some of the required content in the relationship summary. In particular, to the extent that including disciplinary history information in the relationship summary increases the propensity of retail investors to consider this information when selecting firms and financial professionals, firms that affirm they have one or more reportable disciplinary events may face a loss in competitiveness compared to firms that have no event to report. This can in particular be costly for firms that have few or less serious disciplinary events that may be overlooked by investors that do not research the nature of the disciplinary history in more detail.[1124] We also recognize larger firms might be more likely to incur such competitive costs, because larger firms are more likely to have at least one reportable disciplinary event than smaller firms. Similarly, holding size constant, older firms, by virtue of having a longer business history, are more likely to have one or more reportable events than younger firms. Although we acknowledge the potential for firms to incur competitive costs from having to affirm they have reportable disciplinary history, those costs are justified by the potential benefits to investors from this disclosure, as discussed above.

(2) Filing, Delivery, and Updating Requirements

As proposed, the final instructions require firms to file their relationship summaries with the Commission and make them available on firms' publicly available websites, if they have one. The relationship summary must be filed in a text-searchable format with machine-readable headings. Further, the final instructions will require investment advisers to file their relationship summaries using IARD, as proposed; however, the final instructions—in a change from the proposal—will require broker-dealers to file through Web CRD® instead of EDGAR. This should reduce overall burdens relative to the proposal as broker-dealers already have extensive experience filing on Web CRD®, which is more accessible for broker-dealers. As proposed, dual registrants will be required to file on two systems. Instead of filing on EDGAR and IARD, as proposed, dual registrants will be required to file using both Web CRD® and IARD. We recognize that requiring dual registrants to file using both Web CRD® and IARD may be more costly than filing through just one system; however, we believe that any such cost is justified to ensure a complete and consistent filing record for each firm and to facilitate the Commission's data analysis, examinations, and other regulatory efforts.

As discussed above, the firms that deliver relationship summaries electronically must do so within the framework of the existing Commission guidance regarding electronic delivery.[1125] With respect to initial delivery of the relationship summary to new or prospective investors, firm are required to deliver the relationship summary in a manner consistent with how the retail investor requested information, consistent with the Commission's electronic delivery guidance.[1126] Flexibility in the method of delivery, consistent with Commission guidance, could promote efficiency by allowing firms to communicate with retail investors in the same medium by which they typically communicate other information.[1127] Regardless of the method of delivery (*e.g.*, paper or electronic delivery), firms will incur costs associated with delivering the relationship summary to retail investors.

Moreover, requiring firms to make a copy of the relationship summary available upon request without charge will require firms to incur costs. For example, firms that provide a paper version of the relationship summary to retail customers that request it will incur printing and mailing costs when such requests are made. Further, firms may incur additional costs associated with systems for tracking customer delivery preferences.

Firms will also incur costs for updating and filing the relationship summary within 30 days of whenever any information becomes materially inaccurate.[1128] Firms could communicate this information by delivering the amended relationship summary or by communicating the information another way to the retail investor. For example, if an investment adviser communicated a material change to information contained in its relationship summary to a retail investor by delivering an amended Form ADV brochure or Form ADV summary of material changes containing the updated information, the ability to disclose material changes by delivering another required disclosure containing the updated information should mitigate the cost of the requirement to communicate updated information in the relationship summary to investors. Firms could also incur costs to keep records of when the initial or updated relationship summary was delivered; however, we believe that firms will be able to leverage their current compliance infrastructures in maintaining such information.

The Commission anticipates that the costs associated with delivery for an average broker-dealer or average dual registrant will be higher than the costs for the average investment adviser. As Table 1 and Table 3 in Section IV.A.1 indicate, broker-dealers maintain a larger number of accounts than investment advisers; therefore, delivery costs for broker-dealers could exceed those of investment advisers, if the number of accounts is a good indicator of the number of retail investors.[1129] Similarly, given that the average dual registrant has more customer accounts than the average investment adviser, and that the preparation of relationship summaries and any updates for dual registrants may require more effort than for standalone broker-dealers or investment advisers, the compliance costs could be larger for those firms.

Firms will be required to deliver the relationship summary to retail investors. The final instructions have adopted a definition of retail investor that is similar to the definition of retail customer in Regulation Best Interest, but differs to reflect the differences between the relationship summary delivery requirement and the obligations of broker-dealers under Regulation Best Interest, including that the retail investor definition covers prospective as well as existing clients and customers and natural persons who seek services from investment advisers as well as broker-dealers. This definition of retail investor relative to the proposal may reduce uncertainty for broker-dealers and investment advisers about which customers should obtain relationship summaries. We do not believe this changes the scope of retail investors that will benefit collectively from the final rules.

[1124] Commenters raised similar concerns. *See supra* footnote 586 and accompanying text.

[1125] *See supra* Section II.B.3 and footnote 678.

[1126] *See supra* footnotes 679–681 and accompanying text.

[1127] *See supra* Section II.B.3 and footnote 680.

[1128] Along this line, firms could also incur some costs in modifying certain referenced disclosures per the parameters of General Instruction 3.B to Form CRS.

[1129] The Commission is unable to obtain from Form BD or FOCUS data information on broker-dealer numbers of customers, and instead, is only provided with the number of customer accounts. The number of customer accounts will exceed the number of customers as a customer could have multiple accounts at the same broker-dealer.

(3) Recordkeeping Amendments

As adopted and discussed above, firms will be required to make and preserve records of each version of their relationship summary and each amendment filed with the Commission. Firms will also be required to make and preserve a record of the dates that each relationship summary was given to any client, customer, or prospective client or customer who subsequently becomes a client or customer and such records will be maintained in the same manner, and for the same period of time, as other books and records under the applicable recordkeeping rules. As previously discussed, commenters stated that they believe the requirement to maintain records of the dates that the relationship summary was given to prospective clients or customers may impose significant and unnecessary costs and burdens.[1130] Commenters stated that firms do not have compliance and recordkeeping systems in place that could, without substantial and costly modification, maintain records of related to prospective clients or customers who might not become actual clients or customers of the firms for weeks, months or years after firms begin communicating with such individuals. As an alternative, commenters suggested that firms only be required to maintain a record of the most recent date they delivered the relationship summary to a prospective client that becomes an actual client preceding the opening of an account. Commenters suggested only requiring a record that the relationship summary was delivered at account opening or when a retail investor becomes an investment advisory client.

The inclusion of the recordkeeping requirements in the amended rules will impose costs on firms in the form of revised recordkeeping policies and procedures and possible modifications to their recordkeeping systems. The record requirements, however, may be less burdensome if their recordkeeping and compliance systems are already capable of creating and maintaining records related to communications with prospective clients. For example, investment advisers are required to keep similar records for the delivery of the Form ADV Part 2 brochure and broker-dealers are subject to comparable recordkeeping requirements with respect to communications and correspondence with prospective retail investors.[1131] Further, these recordkeeping requirements may benefit firms by assisting them in monitoring their compliance with the relationship summary delivery requirements. Finally, these records will facilitate the Commission's ability to inspect for and enforce compliance with the relationship summary requirements.

(4) Estimates of Certain Compliance Costs

Although we are unable to quantify all costs discussed above, we quantify certain direct compliance costs based on the estimates developed for the purpose of the Paperwork Reduction Act analysis in Section V. These costs, which we discuss below, are estimated separately for investment advisers and broker-dealers that are required to prepare and file a relationship summary. We note that all aggregate cost estimates for either category of firms include the 318 dually registered firms.[1132] In addition, the costs estimates are calculated for the average investment adviser or average broker-dealer. We recognize that the actual compliance costs burdens for some firms will exceed our estimates and the burden for others will be less because firms vary in the size and complexity of their business models.

First, we quantify certain one-time costs associated with the initial preparation and filing of the relationship summary. The cost burden for an average investment adviser to initially prepare and file the proposed Form CRS for the first time is estimated to range between approximately $5,460 and $9,165, depending on the extent to which external help is used.[1133] The estimated aggregate non-amortized combined internal and external costs for all current investment advisers of initially preparing and filing the relationship summary will be approximately $65.3 million.[1134] In addition, based on IARD system data, the Commission estimates that each year approximately 656 newly investment advisers will be required to prepare and file the relationship summary with us.[1135] The aggregate non-amortized initial preparation and filing costs of the relationship summary for these new investment advisers is estimated to be approximately $5.2 million.[1136] Similarly, for broker-dealers, the cost to an average broker-dealer for preparing Form CRS for the first time is estimated to range between approximately $10,920 and $14,625.[1137] We estimate the aggregate non-amortized aggregate combined internal and external costs to all current broker-dealers of initially preparing and filing the relationship summary will be approximately $38.8 million.[1138] We do not expect any new broker-dealer firms based on the secular decline in broker-dealer firms we have seen in recent years.[1139]

Firms will also incur one-time costs of the initial delivery of relationship summaries to their existing retail investors. We expect the non-amortized initial delivery costs to be

[1130] *See, e.g.,* Edward Jones Letter.

[1131] *See supra* footnote 810.

[1132] *See supra* footnote 863 and accompanying text.

[1133] The lower end estimate is based on the assessment that, without additional external help, it will take an average investment adviser 20 hours to prepare the relationship summary for the first time, *see infra* Section V.A.2.a. We assume that performance of this function will be equally allocated between a senior compliance examiner and a compliance manager at a cost of $237 and $309 per hour, (*see infra* footnote 1232 for how we arrived at these costs). Thus, the cost for one investment adviser to produce the relationship summary for the first time is estimated at $5,460 (10 hours × $237 + 10 hours × $309 = $5,460) if no external help is needed. In addition, we estimate that if the investment adviser needs external help, the average cost to an investment adviser for the most expensive type of such help (*i.e.,* compliance consulting services) would be $3,705, *see infra* footnote 1239, which brings the total cost to $9,165.

[1134] We estimate that the aggregate internal cost of initial preparation and filing of the relationship summary for existing investment advisers is $44,963,100 (= $5,460 per investment adviser × 8,235 existing investment advisers). The aggregate external cost for existing investment advisers is estimated to be $20,371,331. *See infra* Sections V.A.2.a and V.A.2.b for more detailed descriptions of how we arrived at these estimates.

[1135] *See infra* footnote 1227 and accompanying text.

[1136] We estimate that the aggregate internal cost of initial preparation and filing of the relationship summary for expected newly registered investment advisers is $3,3,581,760 (= $5,460 per investment adviser × 656 expected new investment advisers). The aggregate external cost for expected new investment advisers is estimated to be $1,622,780. *See infra* Sections V.A.2.a and V.A.2.b for more detailed descriptions of how we arrived at these estimates.

[1137] The lower end estimate is based on the assessment that, without additional external help, it will take an average broker-dealer 40 hours to prepare the relationship summary for the first time, *see infra* Section V.D.2.a. We assume that performance of this function will be equally allocated between a senior compliance examiner and compliance manager at a cost of $237 and $309 per hour, respectively (*see infra* footnote 1365 for how we arrived at these costs). Thus, the cost for one broker-dealer to produce the relationship summary for the first time is estimated at $10,920 (20 hours × $237 + 20 hours × $309 = $10,920) if no external help is needed. In addition, we estimate that if the broker-dealer needs external help, the average cost to a broker-dealer for the most expensive type of such help (*i.e.,* compliance consulting services) would be $3,705, *see infra* footnote 1378, which brings the total cost to $14,625.

[1138] We estimate that the aggregate internal cost of initial preparation and filing of the relationship summary for existing broker-dealers is $30,204,720 (= $10,920 per broker-dealer × 2,766 existing broker-dealers). The aggregate external cost for existing broker-dealers is estimated to be $8,560,770. *See infra* Sections V.D.2.a and V.D.2.b for more detailed descriptions of how we arrived at these estimates.

[1139] *See infra* Section IV.B.c for a discussion of this decline.

approximately $4,941 for the average investment adviser. [1140] In total, we estimate that the aggregate non-amortized initial delivery costs to existing retail investors will be approximately $40.7 million for all current investment advisers,[1141] and $3.2 million for newly registered investment advisers.[1142] For the average broker dealer, we expect costs for the initial delivery to existing retail investors to be approximately $45,801.[1143] The aggregate non-amortized initial delivery cost for all current broker-dealers is estimated to be approximately $126.7 million.[1144]

Moreover, firms are required to post a current version of their relationship summary prominently on their public website (if they have one). We estimate that the initial posting will cost approximately $93 per firm (whether an investment adviser or a broker-dealer).[1145] In aggregate we expect the initial cost of posting the relationship summary to firms' websites to be approximately $686,437 for existing investment advisers,[1146] $54,682 for newly registered investment advisers,[1147] and $257,238 for broker-dealers.[1148]

In addition to the estimates of one-time costs discussed above, for the purposes of the Paperwork Reduction Act analysis, we have also developed estimates of certain expected ongoing compliance costs of the final rules. For example, firms will incur costs each year due to the requirement to re-deliver the relationship summary to existing retail investors in certain situations. We estimate that the annual average cost to re-deliver the relationship summary will be approximately $992 for an average investment adviser and in aggregate approximately $8.8 million annually for all investment advisers.[1149] For broker-dealers, we estimate that the annual average cost to re-deliver the relationship summary will be approximately $9,222 for the average firm, and in aggregate approximately $25.5 million annually for all broker-dealers.[1150] Firms will also be required to deliver relationship summaries to new and prospective retail investors. Based on the Commission's projections of future client and customer account growth, we estimate that the annual costs to current firms of delivery to new and prospective retail investors would be between approximately $223 for an average investment adviser and $5,072 for an average broker-dealer, or approximately $1.8 million annually in aggregate for investment advisers and approximately $14.0 million annually in aggregate for broker-dealers.[1151] The difference in cost estimates between investment advisers and broker-dealers is mainly due to the fact that investment advisers serving retail investors generally have fewer clients than broker-dealers serving retail investors have customer accounts, but also because we project a lower growth rate for retail clients for investment advisers (4.5%)[1152] than for retail customer accounts for broker-dealers (11.0%).[1153] In addition, firms will also incur costs associated with making paper copies of the relationship summary available upon request. We estimate that such annual costs would be approximately $31 for the average firm (whether investment adviser or broker-dealer), and the aggregate annual costs for investment advisers and broker-dealers combined would be approximately $338,272.[1154]

In Section V, for the purposes of the Paperwork Reduction Act analysis, we also estimate the quantifiable expected ongoing costs associated with updating the relationship summary. These costs would be associated with preparing updated relationship summaries when information becomes materially inaccurate, re-posting updated relationship summaries to a public website, and communicating changes to the relationship summary through re-delivery to existing retail investors. We estimate that the annual costs for firms to update and file amended relationship summaries will be approximately $467 for the average investment adviser, or approximately $3.8 million in aggregate for all investment advisers.[1155] For investment advisers with a public website, we estimate the average annual costs of re-posting amended relationship summaries to be approximately $53.32 per adviser, or $402,207 in aggregate for all investment advisers with public websites.[1156] Finally, we expect investment advisers will incur quantifiable costs of communicating changes to amended relationship summaries, if they choose to do so by delivery. We estimate the average annual costs of communicating changes to amended relationship summaries by delivery will be $8,450 per adviser that to choose to do so, and in aggregate approximately $34.8 million for all investment advisers that we expect to choose delivery to communicate updated information.[1157] For broker-dealers, we estimate the annual costs to update, file, and post amended relationship summaries will be approximately $608 for the average firm and approximately $1.7 million in aggregate for all broker-dealers.[1158] We estimate annual delivery costs will be approximately $ 91,602 for the average broker-dealer that will choose delivery to communicate updated information, and in aggregate approximately $126.7 million annually for all broker-dealers that we expect to choose delivery.[1159]

Finally, for the purposes of the Paperwork Reduction Act analysis, we also developed estimates of certain compliance costs associated with the recordkeeping requirements in the final rules. We estimate that the annual costs to firms related to these recordkeeping requirements will be $12.67 for an average investment adviser and approximately $104,354 in aggregate for all investment advisers. [1160] For broker-

[1140] *See supra* Section V.C.2.b.(1) for a description of how this is estimated.

[1141] Calculated as $4,941 per firm × 8,235 current firms = $40,689,135.

[1142] Calculated as $4,941 per firm × 656 expected new firms = $3,241,296.

[1143] Calculated as $126,684,600 (the estimated aggregate costs)/2,766 (number of broker-dealers with retail customers). *See infra* Section V.D.2.d. (1) for how the aggregate cost is estimated.

[1144] *Id.*

[1145] *See infra* sections V.C.2.a (for investment advisers) and V.D.2.a (for broker-dealers) for how the average cost per firm is estimated.

[1146] Based on IARD system data, 91.6% of investment advisers with individual clients report having at least one public website; *see infra* Section IV.B.2.a. Therefore the aggregate cost for existing investment advisers is estimated as: 91.6% × $91(average cost per firm) × 8,235 (number of existing investment advisers) = $686,437.

[1147] Assuming that the fraction of firms with at least one public website is the same for newly registered investment advisers as it is for existing investment advisers (*see id*), we estimate the aggregate costs as: 91.6% × $91(average cost per firm) × 8,235 (excepted number of new investment advisers) = $54,682.

[1148] *See infra* footnote 1370 and accompanying text.

[1149] *See infra* Section V.C.2.b.(2).

[1150] *See infra* Section V.D.2.d.(2).

[1151] *See infra* section V.C.2.c for how we estimate the costs to investment advisers, and *see infra* Section V.D.2.e for how we estimate the costs for broker-dealers.

[1152] See infra footnote 1341 and accompanying text.

[1153] See infra footnote 1415 and accompanying text.

[1154] *See infra* footnote 1339 and accompanying text for how we estimate the costs for investment advisers, and *see infra* footnote 1413 and accompanying text for how we estimate the costs for broker-dealers.

[1155] *See infra* Section V.A.2.c for how we estimate these costs.

[1156] *See infra* Section V.C.2.b.(3) for how we estimate these costs.

[1157] *Id.*

[1158] *See infra* Section V.D.2.c for how we estimate these costs.

[1159] See infra Section V.D.2.d.(3) for how we estimate these costs.

[1160] For investment advisers we estimate 0.2 additional burden hours related to the recordkeeping requirements in the final rule; *see infra* footnote 1280 and accompanying text. We expect that this incremental burden will most likely

Continued

dealers, we estimate annual recordkeeping and record retention costs to be approximately $39 for an average broker-dealer, and $107,017 in aggregate for all broker-dealers.[1161]

3. Impact on Efficiency, Competition, and Capital Formation

In addition to the specific benefits and costs discussed in the previous section, we expect that the relationship summary could produce a number of broader long-term effects on the market for financial advice. Below, we elaborate on these potential effects, in particular as they pertain to their impact on efficiency, competition, and capital formation.

a. Efficiency

The final rule requiring broker-dealers, investment advisers, and dually registered firms to produce a relationship summary could result in increased informational or allocative efficiency for retail investors by reducing the risk of matching with a firm or financial professional that is different from the investor's expectations and preferences. As discussed above, the risk of mismatch potentially imposes costs on investors, financial professionals, and firms. Investors may inadvertently, in the absence of information provided by the relationship summary, select the wrong type of financial professional or account, leading to increased costs (direct and indirect) and potentially suboptimal outcomes as it pertains to meeting the investor's financial goals. For firms and financial professionals, cultivating relationships with potential investors requires resources in terms of time and effort. If an investor and financial professional or firm is mismatched, then both sides of the relationship can incur costs. For example, the financial professional may devote time and resources to develop a relationship with a retail investor that is comparatively costly to maintain because of a mismatch between the investor's expectations and the services offered by the professional,[1162] and the investor incurs costs associated with obtaining services that do not fit his or her needs. As such, the relationship summary may reduce the costs associated with mismatch for investors, firms, and financial professionals and increase the efficiency of the market for financial advice. We expect these efficiency gains particularly in the initial matching between investors and firms and financial professionals. For some retail investors, receipt of the relationship summary from their existing firm or financial professional could highlight that they are mismatched in their current relationship. Those investors may benefit from terminating the mismatched relationship and looking for a more appropriate match, but such gains are likely to only be realized to the extent investors anticipate the long-term benefits from a better match will be greater that the short-run switching and search costs. Moreover, these efficiency benefits may be attenuated to the extent that investors tend to stay in relationships with financial professionals once investors are committed to the relationship, even if the relationship is mismatched.

Informational efficiencies could also be enhanced with the relationship summary because key information is focused on information that has been previously identified as important to retail investors, salient and consistently disclosed across broker-dealers and investment advisers. The relationship summary will provide concise, user-friendly information which will allow retail investors to better understand the relationship that they will have with their financial professionals and will allow them to seek services commensurate with their expectations. In addition, to the extent the information asymmetry between investors and financial professionals is reduced, investors may make more informed investment decisions, or become more able to critically evaluate any investment advice they receive. Further, the use of layered disclosure and conversation starters will allow retail investors to access additional information that may be relevant to them when selecting their firm or financial professional, further reducing the risk of mismatch.

The firm-specific nature of the relationship summary required by the final rules about a particular firm will enhance retail investors' information set about each firm, providing them with a more concise and simple document, which should alleviate potential investor confusion about the key elements of the relationship that the investor could expect to have with that firm.

However, such improved efficiency could be lower than that expected under the proposal because, unlike the proposed relationship summary, the adopted relationship summary will include less prescribed language and greater flexibility. For example, the relationship summary will not include a comparison between general broker-dealer and investment adviser standards and services.[1163] The elimination of this proposed requirement will likely reduce (relative to the proposal) the usefulness to retail investors from obtaining this general information from a single source (*e.g.*, any firm's relationship summary) and instead will require effort from investors in the form of search costs to provide an adequate comparison across firms within a given type of firm (*e.g.*, investment advisers). Moreover, for investors that may not know which type of firm is likely to best meet their preferences and expectations with respect to financial services, a less general relationship summary requires that investors that expend search costs also select the correct types of firms in order to make such a comparison. This may be difficult for some retail investors, and could increase the costs of search and the risk of mismatch. Also, allowing dual registrants the flexibility to prepare two separate relationship summaries rather than one combined document may result in some efficiency loss in terms of less direct comparability. Nonetheless, we believe that investors having access to specific and tailored information about the firms, as provided in the final rules, is more important for reducing investors search costs and risk of mismatch, thereby justifying the potential efficiency losses (relative to the proposal) discussed above.

Beyond informational efficiencies that could arise, the relationship summary also may lead to more efficient investor allocation of assets within their portfolios relative to the baseline. Some retail investors that previously avoided the market for financial services because they did not understand the material characteristics of either broker-dealers or investment advisers may be more

be allocated between compliance clerks and general clerks, with compliance clerks performing 17% of the function at a total cost of $70 per hours, and general clerks performing 83% of the function at total cost of $62 per hour; *see infra* footnote 1282. The average costs per investment adviser is then estimated as (17% × 0.2 hours × $70) + (83% × 0.2 hours × $62) = $12.672. The aggregate cost is then $12.672 × 8,235 (number of investment advisers) = $104,354.

[1161] *See infra* Section V.E for the estimation of recordkeeping costs (estimated at $32 annually per broker-dealer, or $87,627 in aggregate), and *see infra* section V.F.1 for the estimation of record retention costs (estimated at $7 annually per broker-dealer, or $19,390 in aggregate).

[1162] However, as discussed previously in, *e.g., supra* Section IV.B, a mismatch from the retail investors' perspective may be advantageous for firms in certain circumstances, in which case firms may not overall benefit from a decrease in the number of mismatched investors.

[1163] *See supra* Section II.B.6 for why the generalized comparison discussion was not included in the relationship summary.

likely to hire a financial professional if the costs associated with the acquisition of this information are reduced relative to the baseline. The relationship summary is a simple, concise document providing investors information about key elements of the investor-provider relationship that could incent some investors to seek the services of a financial professional. As such, for some investors that previously abstained from hiring a financial professional, portfolio efficiency could be improved, for example, through increased portfolio diversification.[1164] Furthermore, because of being provided the relationship summary, some current investors may realize that other services provided by their financial professional could be more appropriate for them. For example, an advisory client of a dual registrant may learn more about the broker-dealer services offered by the firm and realize that those services better match his or her preferences and make a switch, which may ultimately improve portfolio efficiency for the client.

However, as noted in Regulation Best Interest, certain studies suggest that for some financial professionals, the improvements to portfolio efficiency could be limited if the financial professionals are subject to the same behavioral biases, such as limited attention or anchoring, as retail investors in their portfolio allocation decisions.[1165] Further, to the extent the relationship summary makes the conflicts of interest of financial professionals more salient to retail investors relative to the baseline, there is a risk that some professionals would feel they have a "moral license" to act on their conflicts,[1166] which could harm the efficiency of retail investors' portfolio allocations. Despite such potential negative effects related to conflicts of interest disclosure, we believe that, on balance, retail investors will benefit from the inclusion of this disclosure in the relationship summary. In particular, the conflicts of interest disclosure should enhance investors' ability to evaluate which relationship is best for them and also help them more critically evaluate the recommendations or investment advice they receive, which should ultimately improve the efficiency of their portfolio allocations.

[1164] As discussed above, academic studies have identified several potential benefits to retail investors from seeking investment advice, including increased diversification; *see supra* footnote 1005 and accompanying text.

[1165] *See* Regulation Best Interest, Section III.B.3.b.

[1166] *See supra* footnote 1027 and accompanying text.

In addition, and in a modification from the Proposing Release, the headings on the relationship summary will be machine readable, which will facilitate third-party data aggregators', as well as the Commission's, analysis and comparison of certain elements of the relationship summary across firms to the benefit of retail investors. Comparability will lead to greater informational efficiency because retail investors will be better able to choose the right type of firm or financial professional and the right type of account and services, thereby increasing the likelihood that they choose what best meets their needs and reduces the likelihood of mismatch. Providers may likewise benefit from higher information acquisition efficiency because firms may be more likely to initially attract retail investors who prefer their services, thereby potentially reducing customer acquisition costs, such as time and effort spent on initial engagement with prospective customers who ultimately do not contract for their services.

b. Competition

Beyond increased efficiency for retail investors, the relationship summary may also increase competition among broker-dealers and investment advisers. Provision of the relationship summary by firms could enhance the competitiveness of broker-dealers and investment advisers by allowing retail investors to better evaluate and compare firms and financial professionals through increased transparency, and more generally increase retail investors' understanding of the market for brokerage and investment advisory services. In particular, increased transparency may allow investors to better assess the types of services available and the types of fees and costs associated with such services. Moreover, and as discussed above, the relationship summary may facilitate comparisons across firms and lead to reduced search costs for retail investors, allowing investors to match their preferences and expectations for certain financial services, possibly at lower costs relative to the baseline, and may increase competitiveness between firms to lower prices for some services. We believe the changes made to the relationship summary in the final rules have potentially strengthened such competitive effects, for example, by using less prescribed general language and instead requiring disclosure of firm-specific information about services, fees, costs, and conflicts, and by making the headings machine readable, which may encourage the development of search tools by third party providers. An increase in competition may apply only between like firms (*i.e.*, broker-dealers only or investment advisers only) or may have intra-industry effects across broker-dealers and investment advisers.

As discussed above, increased competition both among and between broker-dealers and investment advisers could reduce the pricing power of firms, benefitting investors through lower fees. Lower fees could draw more retail investors that are not currently seeking investment advice to the market, although some retail investors may be willing to pay higher prices for other reasons, including enhanced services and firm reputation. Combined with improved informational efficiency, increased competition for retail investors resulting from information provided by the relationship summary may drive prices at the margin to competitive levels across all types of firms, depending on how price sensitive retail investors are. Alternatively, and similar to what we have today, a separating equilibrium may result where investors' demand for particular services is relatively price insensitive and they cannot be persuaded to move to a different level of service simply because of lower prices (*e.g.*, investors seeking ongoing advice may be more likely to pay higher prices for advisory services provided by investment advisers, even though a potentially lower cost option could be available through broker-dealers).

Further, lower costs of information acquisition and processing due to the content, format, and structure of the relationship summary may lead to more people entering the market for brokerage and investment advisory services and may increase overall retail investor participation. Such an increase in the number of retail investors in the market for financial services could raise demand for brokerage and investments advisory services and mitigate the potential increase in competition discussed above. However, increased levels of retail investor participation could also encourage new broker-dealer and investment adviser entrants to meet the needs of the new pool of investors, and may increase competition for investor capital through lower fees and costs.

How the competitive landscape will shift as a result of the relationship summary is difficult to determine and the effect on aggregate level of competition among and between broker-dealers and investment advisers could be limited. For example, the relationship summary may not necessarily increase the number of new broker-dealer or investment adviser entrants to the market, but could lead to shifts of investors between broker-dealers and investment advisers to the extent that some currently engaged retail investors are mismatched, and that search and switching costs associated with correcting the mismatch do not justify the costs associated with the potential mismatch. Moreover, the incidence of mismatched relationships with retail investors could be likely for both broker-dealers and investment advisers, so competition could be relatively unaffected in the aggregate; therefore, any mismatch corrected as a result of the relationship summary may not result in a significant net loss of investors for either broker-dealers or investment advisers. In addition, to the extent currently mismatched investors are customers of dual registrants, any switch in account type (brokerage or investment advisory), as a result of the relationship summary, may take place within a dual registrant rather than between different firms, further attenuating any competitive impact.

By reporting legal or disciplinary history, the relationship summary may provide benefits to retail investors by prompting them to seek out additional information (*e.g.*, from *Investor.gov* or BrokerCheck) on their current or prospective firms and financial professionals and take that information into account when considering whom to engage for financial services. Competition between firms may be enhanced if firms and financial professionals with better disciplinary records drive out those with worse records. We note, however, that legal and disciplinary history reported in the relationship summary may bias firms towards hiring financial professionals with fewer years of experience (*i.e.*, fewer opportunities for customer complaints) and against hiring experienced financial professional with some (minor) complaints. Further, investors may also bias their choice of firm or financial professional in the same manner. One commenter stated that reporting of legal and disciplinary history "imposes an inappropriate competitive imbalance and inaccurate picture concerning the relative number of disciplinary actions in sales organizations with large number of financial professionals." [1167] The expected economic impact of disciplinary reporting on competition across large and small firms, however, is generally unclear because small firms may suffer disproportional reputational penalties from more salient disciplinary history disclosure. In general, reportable disciplinary history is less common for smaller firms than for larger firms.[1168] Thus, small firms may appear to have better disciplinary history reputation than large firms solely because of their size of operations, rather than their actual legal and regulatory compliance or the professional ethics or integrity of their employees. At the same time, investors may over-react to generally more frequent disciplinary history disclosure by larger firms and forego potentially well-matched relationship with the larger firms as a result.

Disclosing reportable legal and disciplinary history in the relationship summary may confer a small competitive advantage for investment advisers over broker-dealers because broker-dealers are more likely to have to report that they have a disciplinary history due to broader broker-dealer disclosure obligations. Reporting from Form BD with respect to broker-dealer disclosures of disciplinary actions taken by any regulatory agency or SRO show than 308 (86%) out of 318 retail-facing dual-registered broker-dealers disclosed a disciplinary action. In contrast, 1,330 (54%) out of 2,448 retail-facing standalone broker-dealers disclosed a disciplinary action. For investment advisers, Form ADV requires disclosure of any disciplinary actions taken in the past 10 years, and 284 (79%) of 318 retail-facing dual-registered investment advisers disclosed a disciplinary action. However, for standalone investment advisers, only 1,176 (15%) of 7,917 retail-facing investment advisers disclosed a disciplinary action.[1169] As broker-dealers have relatively more reportable legal and disciplinary history than investment advisers, retail investors may engage investment advisers with greater frequency than broker-dealers as a result of the disciplinary history reporting on the relationship summary, potentially creating a competitive advantage for some investment advisers.

Although the relationship summary applies to SEC-registered broker-dealers and SEC-registered investment advisers, it could exhibit some spillover effects for other categories of firms not affected by the rule changes such as investment advisers not registered with the SEC (*e.g.*, state registered investment advisers), bank trust departments, insurance companies, and others. In particular, the relationship summary could change the size of the broker-dealer and investment adviser markets—relative to each other, as well as relative to other markets. To the extent the relationship summary reduces retail investors' confusion and makes it easier for them to choose a relationship in line with their preferences and expectations, this could attract new retail investors to the broker-dealer and investment adviser markets from firms in other markets. At the same time, it is possible that, as a result of conflicts of interest and the existence of disciplinary history being saliently disclosed in the relationship summary, some investors may be deterred from seeking services of registered investment advisers or broker-dealers and instead seek the services provided by a state registered advisor or another professional not regulated by the Commission, or forego seeking financial services altogether.

Firms' current retail investors also may consider switching to a different type of firm if the relationship summary makes the different services provided and the types of fees and costs of investment advisory and brokerage services more prominent. Such a switch could be within the market for investment advisory and brokerage services, or to a financial services provider outside this market (such as a bank or insurance company). The information disclosed in the relationship summary may also lead some investors to realize a relationship with any financial services provider may not be in their best interest, and therefore withdraw altogether from the market. The exact extent and direction of substitution among different types of providers' services is hard to predict and depends on the nature of the current mismatch between retail investor preferences and expectations and the type of services for which they have contracted, and the extent to which investors will digest and use the provided information in firms' relationship summaries.

[1167] *See* ACLI Letter.

[1168] For example, while only 36% of registered investment advisers with less than $1 million of AUM disclose at least one disciplinary action as of January 1, 2019, 71% of registered investment advisers with more than $50 billion of AUM disclosed at least one disciplinary action that year. Form ADV. Similarly, while 42% of broker-dealers with less than $1 million in total assets disclose at least one disciplinary action as of January 1, 2019, 100% of broker-dealers with more than $50 billion total assets disclosed at least one disciplinary action that year. Form BD.

[1169] Source: Items 11C, 11D, and 11E of Form BD and Items 11.C., 11.D. and 11.E. of Form ADV. Form BD asks if the SEC, CFTC, other federal, state, or foreign regulatory agency, or a self-regulatory organization have ever found the applicant broker-dealer or control affiliate to have (1) made a false statement or omission, (2) been involved in a violation of its regulations or statues, (3) been a cause of an investment related business having its authorization to do business denied, suspended, revoked, or restricted, or (4) have imposed upon it a civil money penalty or cease and desist order against the applicant or control affiliate. Likewise, Form ADV asks similar questions of registered investment advisers and advisory affiliates.

To the extent the relationship summary increases competition between broker-dealers and investment advisers, and between these firms and other financial services providers, it may result in development of new products and services, and general innovation by the industry at large. Competition among firms could provide incentives for firms to seek alternative ways to attract retail investors and generate profits. In the process, firms could develop new and better ways of providing services to retail investors, for example, by utilizing information technology to deliver information to retail investors at lower costs. In this way, innovation could improve retail investors' welfare as well as the profitability of financial service providers.

Another possible long-term effect of the relationship summary is that it could decrease the prevalence of third-party selling concessions in the market by requiring broker-dealers and dual registrants to include disclosure about indirect fees associated with investments that compensate the broker-dealer, including mutual fund loads. Currently, selling concessions constitute a significant part of the compensation of broker-dealers selling mutual fund products.[1170] For example, a mutual fund may provide a selling concession, in the form of a sales charge, some portion of which could be remitted to the broker-dealer that recommended the product. To the extent the relationship summary increases the transparency and salience of such selling concessions and related conflicts of interest, investors may start to avoid investing in products that provide selling concessions, encouraging broker-dealers to avoid such arrangements. To compensate for the potential loss of concession-based revenue, dually registered firms could try to switch customers from their brokerage account to their advisory accounts. As noted above, however, if the relationship summary also increases the competitiveness in the broker-dealer and investment adviser markets, the increased competitiveness would create some general downward price pressure in the market which may spillover to selling concessions.

c. Capital Formation

As discussed above, the relationship summary may improve retail investors' understanding about, and confidence in, the market for brokerage and investment advisory services, which may increase participation in this market by investors that previously avoided it. Such additional entry by new investors could increase the level of total capital across markets and increase the demand for new investment products and securities, which could precipitate capital formation in aggregate across the economy. Depending on the magnitude of these effects, the increased availability of funds could result in lower cost of capital for companies, which could facilitate economic growth.

However, to the extent the disclosure of certain information such as conflicts of interest or disciplinary history decreases some retail investors' level of confidence in market for brokerage and investment advisory services, or the information provided makes some investors believe that they do not benefit from a relationship with a firm or financial professional, such investors could exit this market, which could attenuate any effects on capital formation. In addition, to the extent that the market for financial services is already saturated, there may only be a redistribution between broker-dealers, investment advisers, and other financial service providers (such as state-registered investment advisers, banks, and insurance companies) as a result of retail investors becoming more informed, and any effects on capital formation would be attenuated.

4. Alternatives to the Relationship Summary

To reduce retail investor search costs and costs of potential mismatch between retail investors and professionals in brokerage and investment advisory services, we considered various alternative approaches to the relationship summary, including whether to adopt additional disclosure requirements. We have previously learned through public comments, investor testing, and a staff financial literacy study that industry commenters and survey participants generally supported a short disclosure document to retail investors that would address firms' nature and scope of services, fees, and material conflicts of interest.[1171] Accordingly, we proposed rules and rule amendments to require firms to provide retail investors with disclosures designed for those purposes. In our proposal, we solicited comment on alternatives to various elements of the relationship summary. As discussed in Section I above, we also conducted extensive public outreach, including investor roundtables, specific solicitation of investor comments through the Feedback Forms, and investor testing.[1172] We considered the suggestions and recommendations received through these processes as alternative approaches in our rulemaking, many of which we discussed in greater detail in Sections I and II above. In determining the required scope and level of detail of information in the relationship summary, we balanced the need for robust disclosures with the risk of investor information overload and failure to properly process these disclosures, a recurring theme in both comment letters and investor feedback received through surveys and studies, roundtables and on Feedback Forms.

a. Amending Existing Disclosures

The relationship summary will be a new, separate disclosure, in addition to other disclosures that firms already must provide.[1173] As noted in Section I above, some commenters argued that the relationship summary is duplicative of other disclosures, for example in Form ADV or in Form BD, and is thus unnecessary.[1174] The Commission considered amending Part 2A of Form ADV to require a brief summary at the beginning of the brochure in addition to the existing narrative elements, or changing certain existing Part 2A requirements to reduce or eliminate redundancy with parts of the relationship summary. Similarly, the Commission considered whether to amend and require delivery to retail investors of a revised Form BD to include the same information as in the relationship summary, and make that information publicly available.[1175]

After careful consideration and for the reasons discussed in Section I above, we believe that a separate summary disclosure will be more effective to help retail investors to choose from among firms and investment services than modifying existing disclosures.[1176] We believe that a short, standalone relationship summary that facilitates comparisons across different providers

[1170] *See supra* Table 2, Section IV.B.1.a.

[1171] *See* Proposing Release, *supra* footnote 5, at nn.13–21 and accompanying text.

[1172] *See supra* footnotes 11–21 and accompanying text.

[1173] Broker-dealers and investment advisers have disclosure and reporting obligations under state and federal laws, including, but not limited to, obligations under the Exchange Act, the Advisers Act, and the respective rules thereunder. Broker-dealers are also subject to disclosure obligations under the rules of SROs.

[1174] *See supra* footnote 33 and accompanying text.

[1175] For example, the instructions to Form BD contain a section on the explanation of terms which could be extended to include basic (registrant-specific) information on the business practices of the registrant.

[1176] *See supra* footnotes 42–44 and accompanying text.

and types of services is necessary to highlight information that is relevant to a retail investor before or at the time she is deciding to select a firm, financial professional, account type, or services. To that end, the short and succinct relationship summary includes topics that retail investors indicated would be important to them in selecting a provider. Specifically, because the relationship summary is a shorter document and designed to be more of an overview than the existing investor-facing disclosures, such as Form ADV, and is specifically targeted to help retail investors obtain certain information before deciding to enter into a relationship with a financial professional, retail investors facing that decision can process its information content more efficiently. The relationship summary facilitates layered disclosures and highlights where investors can access more detailed information, including existing documents that investors receive, which could facilitate review of those documents, such as Form ADV Part 2. The relationship summary also promotes the investor receiving more detailed information about the provider and its services, as necessary, through conversation starters. Furthermore, when compared to other disclosures that financial professionals may make on, for example, Form ADV and Form BD, the relationship summary seeks to enhance comparability across both adviser and broker-dealer provider types for retail investors.

Thus, despite some content duplication with other existing disclosure requirements and firms having to bear the cost of creating additional disclosures, we believe that retail investors will benefit from having information relevant to deciding on a firm, financial professional, and/or accounts and services in one place in a more succinct, salient and standardized fashion. Overall, we believe that the relationship summary will enable better-informed decision-making, reduce risk of mismatch, and reduced search costs by retail investors.

b. Form and Format of the Relationship Summary

Under the final instructions, firms will be required to describe, largely in their own wording, different topics related to their offerings in a question-and-answer format. In comparison, we proposed instructions providing for standardized, declarative headings for each section of the relationship summary and a mix of prescribed and firm-specific language within each section. As discussed in Section I above, nearly all commenters and investors providing feedback at roundtables and on Feedback Forms suggested modifications to the sample relationship summary and proposed instructions, and numerous commenters submitted alternative sample relationship summaries.[1177]

Delivery of SEC-authored form. Commenters suggested that the SEC author a standard industry-wide disclosure to deliver to retail investors, which could then be supplemented by firm-specific documents.[1178] For example, one commenter suggested using as a potential framework the Buyers Guides developed by the National Association of Insurance Commissioners that insurance companies must deliver under certain circumstances.[1179] Commenters supporting an SEC-authored educational layer believed that the SEC was better placed than firms to discuss areas viewed to be educational in nature, such as comparisons, standard of conduct, and key questions to ask.

We have incorporated an element of these commenters' suggestion by removing the comparisons section, which many commenters viewed as educational, and adding a link at the beginning of the relationship summary to *Investor.gov/CRS* where investors can obtain educational materials. However, we believe that investors are better served by keeping certain disclosures that may be viewed as more educational in nature, such as the standard of conduct and some of the "conversation starters" (replacing the "Key Questions to Ask"), in the relationship summary. We believe investors are more likely to understand how such content will affect them when presented in the context of the particular firm.

Level of Flexibility in the Disclosure

As discussed in more detail above, we considered the appropriate level of prescribed wording and topics in the disclosure. Several commenters suggested that, as an alternative to the prescriptive wording in the proposed relationship summary, we provide firms with more flexibility to craft their responses to items, with or without an SEC standardized disclosure to accompany the relationship summary or available on *Investor.gov*. We considered the relative merits of prescribed wording and formatting versus allowing firms to use their own, as well as a mix of prescribed requirements and discretionary choices. We considered this for different topics and sub-topics in the relationship summary, as well as for the relationship summary overall. In some instances, we determined that prescribed wording would provide targeted benefits that discretionary wording could not, for example, through the use of standardized headings and a prescribed order of topics in order to maintain the benefits of comparability and utility for retail investors.[1180] For the reasons discussed in Section II, above, we also determined to prescribe wording for conversation starters, the standard of conduct, and a factual statement regarding the effect of fees over time. In the event that prescribed wording is inapplicable to a firm's business or inaccurate, the firm may omit or modify that wording. We believe that this approach will allow firms greater flexibility to tailor their relationship summary disclosures to reflect their offerings more closely and accurately. However, greater flexibility in terms of wording could also allow firms to present disclosures in a more advantageous manner to them, rather than in a manner that would maximize the benefits to investors from the disclosures. Nonetheless, we believe retail investors will benefit under this adopted approach by receiving disclosures that may be more understandable, and also more informative about a particular firms' offerings that they are considering.

c. Summary of Fees, Costs, Conflicts, and Standard of Conduct

In response to comments and investor feedback through surveys and studies, roundtable and the Feedback Forms, we are adopting changes from the proposal to the relationship summary's required discussion of fees, costs, conflicts of interest, and standard of conduct, as described above.[1181]

In connection with fee disclosure, the Commission considered many alternative approaches relating to the scope and types of fees firms must include in their relationship summaries, as well as the presentation of the fee disclosure.[1182] As discussed in Section II.A.4 above, commenters' views varied on the scope and types of fees that should be disclosed and their level of

[1177] *See supra* footnotes 36–40 and accompanying text.

[1178] Primerica Letter.

[1179] ACLI Letter.

[1180] *See supra* Section II.A.1.

[1181] *See supra* Section II.B.3.

[1182] *See supra* Section II.A.4. In addition, the Commission considered alternative approaches with respect to the disclosure regarding a firm's conflicts of interest and standard of conduct. A discussion of the Commission's consideration may be found in Section II.A.4.

detail.[1183] In addition to what we had proposed and what we have adopted, the Commission considered other alternatives, such as whether to require firms to list all fees that retail investors may incur, to allow firms the flexibility to determine what fees to highlight, and variations or combinations of these approaches. The final approach is designed to balance the need to provide a comprehensive view of what fees retail investors will pay with the need to produce relevant, succinct and understandable disclosures. The final instructions do not require firms to disclose every single fee and instead permit firms to highlight examples of the categories of the most common fees that their retail investors will pay directly or indirectly.[1184] We believe this approach benefits retail investors because they will be able to compare fee information that is more closely tailored to firms' particular business practices, but also reflective of common fees that retail investors are likely to incur.

The Commission also considered alternative ways in which firms should present their fees, such as whether to require firms to link to or include a fee schedule directly in the relationship summary,[1185] or to require firms to include a hypothetical fee example.[1186] Under the final instructions, firms must summarize their principal fees and costs and other fees and also include specific cross-references to more detailed information about their fees available in other sources.[1187] The Proposing Release discussed the option of including an example of the impact of fees in the relationship summary.[1188] While some commenters supported the inclusion of various forms of additional examples of fees calculations,[1189] after careful consideration of the comment file and investor feedback received through studies and surveys, roundtables and Feedback Forms, we are declining to include a hypothetical fee example in the relationship summary. We do so in light of commenters who suggested that such an example could be operationally difficult to implement, and that it could be perceived as confusing.[1190] Specifically, we believe the assumptions required to make a fee example relevant for investors vary for individual investors to the extent that a standardized example risks increasing investor confusion.

Instead, to help stimulate this discussion, a firm must include in the relationship summary the following conversation starter: "Help me understand how these fees and costs might affect my investments. If I give you $10,000 to invest, how much will go to fees and costs, and how much will be invested for me?" [1191] As discussed above,[1192] this represents a different wording from the corresponding "Do the Math for Me" Key Question in the proposal, but we expect it to similarly encourage the retail investor to ask about the amount they would typically pay per year for the account and what is included in those fees, while being easier and less costly to answer for firms at the outset of the relationship.

d. Filing and Delivery

In connection with filing and delivery, Commission considered alternatives relating to filing formats, filing systems, and timeframes for firms' initial relationship summary and subsequent updates. As discussed in Section II.C. above, firms will file copies of their relationship summaries with the Commission. The proposed instructions provided that firms must file their relationship summaries in a text-searchable format but did not specify one. We solicited comment on whether the relationship summary should be filed as a text-searchable PDF, similar to how Form ADV is currently filed, or other enumerated formats. We also asked about what type of format would facilitate greater comparability across forms. Two commenters advocated that the relationship summary should be filed not only in a text-searchable, but also machine-readable format, in order to facilitate development of data aggregation tools allowing for comparability of forms across providers.[1193] The Commission believes that although a PDF submission format would not be the most ideal for comparing or aggregating data across relationship summary filings, it would likely be the easiest and least costly. A fillable form allowing the firm to enter text, similar to Form ADV Part 1, also would not be costly, but would not easily accept formatted tables or other graphical information. The final instructions, as with the proposed instructions, do not specify a particular format, but the current filing systems default firms to PDF format. In a change from the proposal, we are requiring firms to implement machine-readable headings for their filings. We agree with the commenters that suggested this change that this approach facilitates some degree of data aggregation, while imposing limited costs on registrants.

Furthermore, we requested comments on alternative filing systems for the relationship summary. In response to comment and upon further consideration, as discussed in Section II.C.2 above,[1194] we are requiring broker-dealers to file their relationship summaries through Web CRD®, instead of EDGAR, as proposed.

As discussed in Section II.C.3.a above, we also considered whether to allow more permissive use of electronic delivery. As proposed, we are affirming that the relationship summary must be delivered in accordance with the Commission's electronic delivery guidance. We are adopting an additional instruction, however, that a firm may deliver the relationship summary to new or prospective clients or customers in a manner that is consistent with how the retail investor requested information about the firm or financial professional, and that this method of initial delivery for the relationship summary would be consistent with the Commission's electronic delivery guidance.[1195] Commenters suggested different approaches to electronic delivery, such as the "notice plus access" model, and a more comprehensive updating of the Commission's electronic delivery guidance, which we considered as alternative approaches in this rulemaking. While we recognize the

[1183] *See supra* footnotes 420–423 and accompanying text.

[1184] *See* Item 3.A. of Form CRS.

[1185] *See supra* footnotes 426–435 and accompanying text.

[1186] *See supra* footnotes 438–435 and accompanying text.

[1187] *See* Item 3.A.(ii) of Form CRS.

[1188] Proposing Release, *supra* footnote 5.

[1189] *See, e.g.,* Wahl Letter; AARP Letter; Betterment Letter I.

[1190] NSCP Letter; Edward Jones Letter (noting that given the range of services available, it would be very difficult for financial professionals to fully address this question at the outset of the relationship, particularly for investors selecting transaction-based services); TIAA Letter; LPL Financial Letter; Primerica Letter; ICI Letter; SIFMA Letter (noting most firms do not currently have systems in place to allow financial professionals to answer customer-specific questions).

[1191] Item 3.A.(iv) of Form CRS.

[1192] *See supra* Sections II.A.4 and II.B.3.a.

[1193] CFA Letter I ("past experience regarding investors' limited use of existing databases, such as IARD and BrokerCheck, cautions against placing too much reliance on investors' accessing the documents directly. We therefore urge the Commission to require that the documents be filed, not just in a text-searchable format, but in a machine-readable format."); Schnase Letter ("the data contained in the Relationship Summary should be required to be filed in a structured data format, so the document can be utilized as a stand-alone human-readable document and serve as the source for a machine-readable data set").

[1194] *See supra* footnotes 666–669 and accompanying text.

[1195] *See* Proposing Release, *supra* footnote 5, at nn.344–45 and accompanying text; *see also* 2000 Guidance, *supra* footnote 678, at 65 FR 25845–46; 96 Guidance, *supra* footnote 678, at 61 FR 24647; and 95 Guidance, *supra* footnote 678, at 60 FR 53461.

potential cost savings to firms of allowing greater use of electronic delivery, we place great importance on how investors prefer to receive information. Some commenters said that investors prefer to receive electronic disclosures because they are delivered faster and can be in more engaging formats, including video and audio. On the other hand, investor surveys and investor testing show that some investors still prefer to receive paper disclosures, including in a hybrid approach of electronic disclosure with the option for paper.[1196] As discussed in greater detail in Section II.C.3.a, the adopted approach of encouraging electronic presentations that are engaging to retail investors, while preserving the option for paper, within the framework of the Commission's electronic delivery guidance and in accordance with retail investors' preferences, is appropriate for the relationship summary.

e. Transition Provisions

As discussed above, we are adopting an initial date of June 30, 2020 for all firms that are registered, or investment advisers who have an application for registration pending with, the Commission prior to June 30, 2020, to file their initial relationship summaries with the Commission. We considered tiered compliance dates for firms of different sizes. We believe that the compliance dates, as adopted, balance the time and resources needed by different firms, as well as the assets under management and the number of firms that would be covered within the different compliance periods.

V. Paperwork Reduction Act Analysis

The amendments that we are adopting here contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[1197] In the Proposing Release, we solicited comment on the proposed collection of information requirements. We also submitted the proposed collection of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The titles for the collections of information we are amending are (i) "Form ADV" (OMB control number 3235–0049); (ii) "Rule 204–2 under the Investment Advisers Act of 1940" (OMB control number 3235–0278); (iii) "Rule 17a–3; Records to be Made by Certain Exchange Members, Brokers and Dealers" (OMB control number 3235–0033) and (iv) "Rule 17a–4; Records to be Preserved by Certain Exchange Members, Brokers and Dealers" (OMB control number 3235–0279). The new collections of information we are adopting[1198] relate to (i) "Rule 204–5 under the Investment Advisers Act of 1940" (OMB control number 3235–0767); and (ii) "Form CRS and rule 17a–14 under the Exchange Act" (OMB control number 3235–0766). We are also amending 17 CFR 200.800 to display the control number assigned to information collection requirements for "Form CRS and rule 17a–14 under the Exchange Act" by OMB pursuant to the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control OMB number.

A. Form ADV

Form ADV (OMB Control No. 3235–0049) is currently a two-part investment adviser registration form. Part 1 of Form ADV contains information used primarily by Commission staff, and Part 2A is the client brochure. We use the information to determine eligibility for registration with us and to manage our regulatory and examination programs. Clients use certain of the information to determine whether to hire or retain an investment adviser. The collection of information is necessary to provide advisory clients, prospective clients, and the Commission with information about the investment adviser and its business, conflicts of interest and personnel. Rule 203–1 under the Advisers Act requires every person applying for investment adviser registration with the Commission to file Form ADV. Rule 204–4 under the Advisers Act requires certain investment advisers exempt from registration with the Commission ("exempt reporting advisers") to file reports with the Commission by completing a limited number of items on Form ADV. Rule 204–1 under the Advisers Act requires each registered and exempt reporting adviser to file amendments to Form ADV at least annually, and requires advisers to submit electronic filings through IARD. The paperwork burdens associated with rules 203–1, 204–1, and 204–4 are included in the approved annual burden associated with Form ADV and thus do not entail separate collections of information. These collections of information are found at 17 CFR 275.203–1, 275.204–1, 275.204–4 and 279.1 (Form ADV itself) and are mandatory. Responses are not kept confidential.

We are adopting amendments to Form ADV to add a new Part 3, requiring registered investment advisers that offer services to retail investors to prepare and file with the Commission, post to the adviser's website (if it has one), and deliver to retail investors a relationship summary, as discussed in greater detail in Section II above. Advisers will deliver the relationship summary to both existing clients and new or prospective clients who are retail investors. As with Form ADV Parts 1 and 2, we will use the information to determine eligibility for registration with us and to manage our regulatory and examination programs. Similarly, clients can use the information required in Part 3 to determine whether to hire or retain an investment adviser as well as what types of accounts and services are appropriate for their needs.

The collection of information is necessary to provide advisory clients, prospective clients, and the Commission with information about the relationships and services the firm offers to retail investors, fees and costs that the retail investor will pay, specific conflicts of interest and standards of conduct, legal or disciplinary history, and how to obtain additional information about the firm. The amendment requiring investment advisers to deliver the relationship summary is contained in a new collection of information under new rule 204–5 under the Advisers Act, for which estimates are discussed below. We did not propose amendments to Part 1 or 2 of Form ADV.[1199]

As discussed in Sections I and II of this release, we received comments that addressed whether the relationship summary is duplicative of other disclosures and necessary for investment advisers, and whether we could further minimize the burden of the proposed collections of information. One commenter specifically addressed the accuracy of our burden estimates for the proposed collection of information, suggesting that our estimates were too low because compliance professionals estimated it would take 80–500 hours to

[1196] *See supra* footnotes 682–689 and accompanying text.

[1197] 44 U.S.C. 3501 *et seq.*

[1198] The Commission is not adopting two other rules in the Proposing Release that would have contained collections of information. Proposed rule 211h–1 under the Advisers Act and proposed rule 15l–3 under the Exchange Act relate to the disclosure of Commission registration status and financial professional association. As discussed in Section I above, we have concluded that the combination of the disclosure requirements in Form CRS and Regulation Best Interest should adequately address the objectives of the proposed Affirmative Disclosures.

[1199] We are adopting technical amendments to the General Instructions of Form ADV to add references to the Part 3, but these amendments would not affect the burden of Part 1 or Part 2. *See* amended General Instructions to Form ADV.

prepare, deliver, and file the relationship summary, depending on the firm's size and business model.[1200] Another commenter said the current Form ADV requirements are a burden to smaller firms and that the currently approved burdens of 23.77 hours and $6,051 are too low.[1201] Others commented more broadly that certain costs to prepare and file the relationship summary would be higher than we estimated in the proposal.[1202] We have considered these comments and are increasing our PRA burden estimates from 5 hours to 20 hours for investment advisers to prepare and file the relationship summary. We also modified several substantive requirements to mitigate some of these estimated increased costs relative to the proposal.

1. Respondents: Investment Advisers and Exempt Reporting Advisers

The respondents to current Form ADV are investment advisers registered with the Commission or applying for registration with the Commission and exempt reporting advisers.[1203] Based on the IARD system data as of December 31, 2018, approximately 13,299 investment advisers were registered with the Commission, and 4,280 exempt reporting advisers file reports with the Commission.

As discussed above, we are adopting amendments to Form ADV that will add a new Part 3, requiring certain registered investment advisers to prepare and file a short and accessible relationship summary for retail investors. Based on IARD system data as of December 31, 2018, the Commission estimates that 8,235 investment advisers have some portion of their business dedicated to retail investors, including either individual high net worth clients or individual non-high net worth clients,[1204] which is higher relative to the estimate in the Proposing Release.[1205]

This will leave 5,064 registered investment advisers that do not provide advice to retail investors [1206] and 4,280 exempt reporting advisers that will not be subject to Form ADV Part 3 requirements, but are included in the PRA analysis for purposes of updating the overall Form ADV information collection.[1207] We also note that these figures include the burdens for 318 registered broker-dealers that are dually registered as investment advisers as of December 31, 2018.[1208] We did not receive comments related to the methodology used for estimating the number of investment advisers that will be subject to Form ADV Part 3 requirements. We are maintaining the methodology we used in the Proposing Release and are updating our estimates to reflect the increased number of investment advisers and exempt reporting advisers since the last burden estimate.

2. Changes in Average Burden Estimates and New Burden Estimates

Based on the prior revision of Form ADV,[1209] the currently approved total aggregate annual hour burden estimate for all advisers of completing, amending, and filing Form ADV (Part 1 and Part 2) with the Commission is 363,082 hours, or a blended average of 23.77 hours per adviser,[1210] with a monetized total of $92,404,369, or $6,051 per adviser.[1211] The currently approved annual cost burden is $13,683,500. This burden estimate is based on: (i) The total annual collection of information burden for SEC-registered advisers to file and complete Form ADV (Part 1 and Part 2); and (ii) the total annual collection of information burden for exempt reporting advisers to file and complete the required items of Part 1A of Form ADV. Broken down by adviser type, the current approved total annual hour burden is 29.22 hours per SEC-registered adviser and 3.60 hours per exempt reporting adviser.[1212] The amendments will increase the current burden estimate due in part to the amendments to Form ADV to add Form ADV Part 3: Form CRS (the relationship summary) and the increased number of investment advisers and exempt reporting advisers since the last burden estimate. We did not propose amendments to Part 1 or Part 2 of Form ADV.

The amendments to Form ADV to add Part 3 will increase the information collection burden for registered investment advisers with retail investors. As discussed above in Sections I and II of this release, registered investment advisers providing services to retail investors will be required to prepare and file a relationship summary with the Commission electronically through IARD in the same manner as they currently file Form ADV Parts 1 and 2. We are also requiring that all relationship summaries be filed in a text-searchable format with machine-readable headings. These investment advisers also will be required to amend and file an updated relationship summary within 30 days whenever any information becomes materially inaccurate.

As noted above, not all investment advisers will be required to prepare and file the relationship summary. For those investment advisers, the per adviser annual hour burden for meeting their Form ADV requirements will remain the same, in particular, 29.22 hours per registered investment adviser without relationship summary obligations. Similarly, because exempt reporting advisers also will not have relationship

[1200] *See* NSCP Letter.

[1201] *See* Marotta Letter.

[1202] *See, e.g.,* MarketCounsel Letter. Others argued that the cost of Form CRS and Regulation Best Interest would be high. *See, e.g.,* Raymond James Letter; CCMC Letter (investor polling results); SIFMA Letter.

[1203] An exempt reporting adviser is an investment adviser that relies on the exemption from investment adviser registration provided in either section 203(l) of the Advisers Act because it is an adviser solely to one or more venture capital funds or 203(m) of the Advisers Act because it is an adviser solely to private funds and has assets under management in the United States of less than $150 million. An exempt reporting adviser is not a registered investment adviser and therefore would not be subject to the relationship summary requirements.

[1204] Proposing Release, *supra* footnote 5, at Section V.A.1. Based on responses to Item 5.D. of Form ADV, these advisers indicated that they advise either high net worth individuals or individuals (other than high net worth individuals), which includes trusts, estates, and 401(k) plans and IRAs of individuals and their family members, but does not include businesses organized as sole proprietorships in Item 5.D.(a)(1) of Form ADV or have regulatory assets attributable to either high net worth individuals or individuals other than high net worth individuals in Item 5.D.(a)(3) of Form ADV. The definition of retail investor will include the legal representatives of natural persons who seek to receive or receive services primarily for personal, family, or household purposes. As discussed in Section II.C.1 above, a legal representative of a natural person will cover only non-professional legal representatives (*e.g.,* a non-professional trustee that represents the assets of a natural person and similar representatives such as executors, conservators, and persons holding a power of attorney for a natural person). We are not able to determine, based on responses to Form ADV, exactly how many advisers provide investment advice to these types of legal representatives or trustees; however, we believe that these advisers most likely also advise individuals and are therefore included in our estimate.

[1205] We estimated in the Proposing Release that approximately 7,625 registered investment advisers of the 12,721 registered investment advisers would be subject to the relationship summary requirements, based on IARD system data as of December 31, 2017. *See* Proposing Release, *supra* footnote 5 at Section V.A.

[1206] 13,299 registered investment advisers—8,235 = 5,064 registered investment advisers not providing advice to retail investors.

[1207] Based on IARD system data.

[1208] *See supra* footnote 863.

[1209] *See* Form ADV and Investment Advisers Act Rules, Final Rule, Investment Advisers Act Release No. 4509 (Aug. 25, 2016) [81 FR 60418 (Sept. 1, 2016)] ("2016 Form ADV Paperwork Reduction Analysis").

[1210] 363,082 hours/(12,024 registered advisers + 3,248 exempt reporting advisers) = 23.77 hours.

[1211] $92,404,369 hours/(12,024 registered advisers + 3,248 exempt reporting advisers) = $6,051.

[1212] *See* 2016 Form ADV Paperwork Reduction Analysis, *supra* footnote 1209, at 81 FR 60454.

summary obligations, the annual hour burden for exempt reporting advisers to meet their Form ADV obligations will remain the same, at 3.60 hours per exempt reporting adviser. However, although we did not propose amendments to Form ADV Part 1 and Part 2, and the per adviser information collection burden will not increase for those without the obligation to prepare and file the relationship summary, the information collection burden attributable to Parts 1 and 2 of Form ADV will increase due to an increase in the number of registered investment advisers and exempt reporting advisers since the last information collection burden estimate. We discuss below the increase in burden for Form ADV overall attributable to the adopted amendments, *i.e.,* new Form ADV Part 3: Form CRS, and the increase due to the updated number of respondents that will not be subject to the adopted amendments.

a. Initial Preparation and Filing of Relationship Summary

As discussed above in Section II, investment advisers will be required to prepare and file a relationship summary summarizing specific aspects of their investment advisory services that they offer to retail investors. Much of the required information overlaps with that required by Form ADV Part 2A and therefore should be readily available to registered investment advisers because of their existing disclosure obligations. Investment advisers also already file the Form ADV Part 2A brochure on IARD, and we have considered this factor in determining our estimate of the additional burden to prepare and file the relationship summary.

In the Proposing Release, we estimated that the initial first year burden for preparing and filing the relationship summary, for investment advisers that provide advice to retail investors, would be 5 hours per registered adviser.[1213] Some commenters said that these estimated burdens were too low,[1214] and one argued that the current burden estimates for Form ADV are too low.[1215] One commenter specifically argued that preparing, delivering, and filing the relationship summary would take from 80 to 500 hours, based on input from compliance professionals, and noted there would be additional costs that are hard to quantify, including human resources and information technology programming.[1216] Commenters also said more broadly that the relationship summary would be burdensome for investment advisers[1217] and would result in additional compliance burdens including training.[1218]

We are revising our estimate of the time that it would take each adviser to prepare and file the relationship summary in the first year from 5 hours in the proposal to 20 hours in light of these comments and the changes we are making to the proposed relationship summary.[1219] For example, as discussed in the Proposing Release, we estimated that it would take firms a shorter amount of time to prepare the relationship summary than to prepare more narrative disclosures due to the standardized nature and prescribed language of the relationship summary. As discussed above, the final instructions require less prescribed wording relative to the proposal and require firms to draft their own summaries for most of the sections. In addition and in a change from the proposal, we are now requiring that all relationship summaries be filed with machine-readable headings, as well as in a text-searchable format as proposed. We acknowledge that these changes will increase cost burdens because advisers will have to develop their own wording and design, as well as implement machine-readable headings, to comply with these requirements.

The relationship summary will also require more layered disclosures relative to the proposal and will encourage the use of electronic formatting and graphical, text, online features to facilitate access to other disclosures that provide additional detail. Although much of the information that will be summarized in the relationship summary is contained in other disclosures that firms already provide, firms will bear the cost of preparing a new relationship summary and cross-referencing or hyperlinking to additional information. The higher estimated burden estimate also reflects our acknowledgement that it will take firms longer to draft certain disclosures than we estimated in the Proposing Release, such as answers to "conversation starters" that advisers providing automated investment advisory without a particular individual with whom a retail investor can discuss these questions must include on their website. We believe these factors and the other changes we made to the proposal will increase the burden to prepare a relationship summary relative to the proposal.

We are estimating the same hourly burden for investment advisers and investment advisers that are dually registered as broker-dealers because we are counting dually registered firms in the burden calculation for Form ADV and the Exchange Act rule that requires the relationship summary for broker-dealers.[1220] We recognize that the burden for some advisers will exceed our estimate, and the burden for others will be less due to the nature of their business, but we do not believe that the range could be as high as some commenters suggested.[1221] After consideration of comments and changes we made to the requirements relative to the proposal and in light of the current approved burden for Part 2 of Form ADV, which requires more disclosures than the relationship summary, we are increasing the estimated burden relative to the proposal to 20 hours in the first year.[1222] We therefore estimate that the

[1213] *See* Proposing Release, *supra* footnote 5, at nn.356 –367 and accompanying text.

[1214] *See, e.g.,* NSCP Letter; *see also* CCMC Letter (costs to implement the proposal were underestimated and greater than 40% of firms surveyed anticipate having to spend a moderate or substantial amount to implement Regulation Best Interest and Form CRS); SIFMA Letter (stating that implementation costs of Regulation Best Interest and Form CRS would be significant).

[1215] *See* Marotta Letter.

[1216] *See* NSCP Letter.

[1217] *See* MarketCounsel Letter.

[1218] *See* NSCP Letter (stating that a minimum of two hours of firm level training or two hours of training per independent registered representative will be required prior to implementation and delivery of the relationship summary).

[1219] *See infra* footnote 1221.

[1220] The burden estimates for dual registrants to prepare and file the relationship summary are accounted for in the burden estimates for Form ADV and under Exchange Act rule 17a–14. For example, a dual registrant that prepares an initial relationship summary that covers both its advisory business and broker-dealer business has an estimated burden of 60 hours amortized (20 hours to prepare and file relationship summary related to the advisory business + 40 hours to prepare and file relationship summary related to the broker-dealer business).

[1221] *See* NSCP Letter (estimating that the time required to prepare, deliver and file the relationship summary would be anywhere from 80 to 500 hours). In estimating the cost for the initial preparation of Form ADV Part 2, we estimated that small, medium, and large advisers would require 15, 97.5, and 1989 hours respectively to prepare Form ADV Parts 1 and 2, for investment advisers overall, and the per adviser annual hour burden for meeting their Form ADV Parts 1 and 2 requirements is 36.24 hours. *See* Brochure Adopting Release, *supra* footnote 576, at 75 FR at 49257. In comparison, as discussed above, the relationship summary is limited to two pages in length for standalone investment advisers and four pages in length for dual registrants in paper format (or equivalent in electronic format). While we recognize that different firms may require different numbers of hours to prepare and file the relationship summary, we believe that a first year average of 20 hours for investment advisers with relationship summary obligations is an appropriate estimate for purposes of calculating an aggregate burden for the industry, for purposes of the PRA analysis, particularly given our experience with the burdens for Form ADV Parts 1 and 2.

[1222] We believe that much of the information required in the relationship summary overlaps with total burden of preparing and filing the relationship summary will be 164,700 hours.[1223]

As with the Commission's prior Paperwork Reduction Act estimates for Form ADV, we believe that most of the paperwork burden will be incurred in advisers' initial preparation and filing of the relationship summary, and that over time this burden will decrease substantially because the paperwork burden will be limited to updating information.[1224] The estimated initial burden associated with preparing and filing the relationship summary will be amortized over the estimated period that advisers will use the relationship summary, *i.e.,* over a three-year period.[1225] The annual hour burden of preparing and filing the relationship summary will therefore be 54,900.[1226] In addition, based on IARD system data, the Commission estimates that 1,227 new investment advisers will file Form ADV with us annually; of these, 656 will be required to prepare and file the relationship summary.[1227] Therefore, the aggregate initial burden for newly registered advisers to prepare and file the relationship summary will be 13,120[1228] and, amortized over three years, 4,373 on an annual basis.[1229] In sum, the annual hour burden for existing and newly registered investment advisers to prepare and file a relationship summary will be 59,273 hours,[1230] or approximately 6.67 hours per adviser,[1231] for an annual monetized cost of $16,181,529, or $1,965 per adviser.[1232]

b. Estimated External Costs for Investment Advisers Preparing the Relationship Summary

The currently approved total annual collection of information burden estimate for Form ADV anticipates that there will be external costs, including (i) a one-time initial cost for outside legal and compliance consulting fees in connection with the initial preparation of Part 2 of Form ADV, and (ii) the cost for investment advisers to private funds to report the fair value of their private fund assets.[1233] We do not anticipate that the amendments to add a new Part 3 will affect the per adviser cost burden for those existing requirements but anticipate that some advisers may incur a one-time initial cost for outside legal and consulting fees in connection with the initial preparation of the relationship summary. We do not anticipate external costs to investment advisers in the form of website set-up, maintenance, or licensing fees because they will not be required to establish a website for the sole purpose of posting their relationship summary if they do not already have a website. We also do not expect other ongoing external costs for the relationship summary.

In the Proposing Release, we estimated that an external service provider would spend 3 hours helping an adviser prepare an initial relationship summary. While we received no specific comments on our estimate regarding external costs in the Proposing release, one commenter suggested that there would be additional implementation costs such as legal advice, but that these costs are difficult to quantify.[1234] Another argued that that the current burden estimates for Form ADV did not take into consideration the time spent on learning about the complexities of what is needed to comply with similar requirements.[1235] Based on the concerns expressed by these commenters and the changes we are making to the relationship summary, we are increasing the estimate relative to the proposal from 3 to 5 hours. While we recognize that different firms may require different amounts of external assistance in preparing the relationship summary, we believe that this is an appropriate average number for estimating an aggregate amount for the industry purposes of the PRA analysis, particularly given our experience with the burdens for Form ADV.[1236]

Although advisers that will be subject to the relationship summary requirement may vary widely in terms of the size, complexity, and nature of their advisory business, we believe that the strict page limits will make it unlikely that the amount of time, and thus cost, required for outside legal and compliance review will vary substantially among those advisers who elect to obtain outside assistance.

Most of the information required in the relationship summary is readily available to investment advisers from Form ADV Part 2A, and the narrative descriptions are concise, brief, and at a summary level. As a result, we continue to anticipate, as discussed in the proposal, that only 25% of investment advisers will seek the help of outside legal services and 50% of investment advisers will seek the help of compliance consulting services in connection with the initial preparation of the relationship summary.[1237] We estimate that the initial per existing adviser cost for legal services related to

that required by Form ADV Part 2 and therefore should be readily available to investment advisers because of their existing disclosure obligations. Accordingly, although these new requirements will cause an increase in the information collected, the increased burden should largely be attributable to data entry and not data collection.

[1223] 20.0 hours × 8,235 investment advisers = 164,700 total aggregate initial hours.

[1224] We discuss the burden for advisers making annual updating amendments to Form ADV in Section V.A.2.c below.

[1225] *See* 2016 Form ADV Paperwork Reduction Analysis, *supra* footnote 1209. Amortizing the 20 hour burden imposed by the relationship summary over a three-year period will result in an average annual burden of 6.67 hours per year for each of the 8,235 investment advisers with relationship summary obligations.

[1226] 20.0 hours × 8,235 investment advisers/3 = 54,900 total annual aggregate hours.

[1227] The number of new investment advisers is calculated by looking at the number of new advisers in 2017 and 2018 and then determining the number each year that serviced retail investors. (644 for 2017 + 668 for 2018)/2 = 656.

[1228] 656 new RIAs required to prepare relationship summary × 20.0 hours = 13,120 hours for new RIAs to prepare relationship summary.

[1229] 656 × 20.0 hours/3 = 4,373.

[1230] (164,700 + 13,120)/3 years = 59,273 annual hour burden for existing and new advisers to prepare and file relationship summary.

[1231] 59,273 hours/(8,235 existing advisers + 656 new advisers) = 6.67 hours per year.

[1232] 59,273 is the total aggregate initial hour burden for preparing and filing a relationship summary. We believe that performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the Securities Industry Financial Markets Association's Management & Professional Earnings in the Securities Industry 2013 ("SIFMA Management and Professional Earnings Report"), modified by Commission staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 (professionals) or 2.93 (office) to account for bonuses, firm size, employee benefits, and overhead, suggest that costs for these positions are $237 and $309 per hour, respectively. (59,273 hours × 50% × $237) + (59,273 hours × 50% × $309 = $16,181,529). $16,181,529/8,235 investment advisers = $1,965 per investment adviser. The SIFMA Management and Professional Earnings Report was updated in 2019 to reflect inflation. The numbers in the report are higher than the numbers we used in the Proposing Release and, along with the higher hourly burden, result in higher cost estimates in this release, relative to the proposal.

[1233] *See* 2016 Form ADV Paperwork Reduction Analysis, *supra* footnote 1209, at 81 FR 60452. The estimated external costs of outside legal and consulting services for the relationship summary are in addition to the estimated hour burden discussed above.

[1234] *See* NSCP Letter.

[1235] *See* Marotta Letter.

[1236] In estimating the external cost for the initial preparation of Form ADV Part 2, we estimated that small, medium, and large advisers would require 8, 11, and 26 hours of outside assistance, respectively, to prepare Form ADV Part 2. *See* Brochure Adopting Release, *supra* footnote 576, at 75 FR at 49257. In comparison, as discussed above, the relationship summary is limited to two pages in length for standalone investment advisers and four pages in length for dual registrants in paper format (or equivalent in electronic format).

[1237] *See* Proposing Release, *supra* footnote 5 at Section V.A. We did not receive comments on these estimates. While we recognize that the instructions have changed, we continue to believe that only 25% of advisers will seek help of outside legal services and 50% of advisers will seek compliance consulting services, and that these estimates are appropriate for purposes of the PRA analysis, particularly given our experience with the external burdens for Form ADV Parts 1 and 2.

the preparation of the relationship summary will be $2,485.[1238] We estimate that the initial per existing adviser cost for compliance consulting services related to the preparation of the relationship summary will be $3,705.[1239] Thus, the incremental external cost burden for existing investment advisers is estimated to be $20,371,331, or $6,790,444 annually when amortized over a three-year period.[1240] In addition, we estimate that 1,227 new advisers will register with us annually, 656 of which will be required to prepare a relationship summary. For these 656 new advisers, we estimate that they will require $1,622,780 in external costs to prepare the relationship summary, or $540,927 amortized over three years.[1241] In summary, the annual external legal and compliance consulting cost for existing and new advisers relating to obligations to prepare the relationship summary is estimated to total $7,331,370, or $825 per adviser.[1242]

c. Amendments to the Relationship Summary and Filing of Amendments

The current approved information collection burden for Form ADV also includes the hour burden associated with annual and other amendments to Form ADV, among other requirements. In the Proposing Release, we estimated that the relationship summary would increase the annual burden associated with Form ADV by 0.5 hours[1243] due to amendments to the relationship summary, for those advisers required to prepare and file a relationship summary. We did not receive comments regarding hour burdens associated with preparing and filing amendments to the relationship summary. As discussed in section II.C.4 above, in a change from the proposal, we are adding a requirement that firms preparing updated relationship summaries to existing clients also highlight the most recent changes by, for example, marking the revised text or including a summary of material changes.[1244] To account for this change, we are increasing the annual burden to 1 hour per year to amend and file a relationship summary.[1245]

We do not expect amendments to be frequent, but based on the historical frequency of amendments made on Form ADV Parts 1 and 2, we estimate that on average, each adviser preparing a relationship summary will likely amend and file the disclosure an average of 1.71 times per year.[1246] We therefore estimate that for making and filing amendments to their relationship summaries, advisers will incur an estimated total paperwork burden of 14,082 hours per year,[1247] or approximately 1.58 hours per adviser,[1248] for an annual monetized cost of $3,844,386, or $467 per adviser.[1249]

Although advisers will be required to amend the relationship summary within 30 days whenever any information becomes materially inaccurate, we expect that amendments will require relatively minimal wording changes, given the relationship summary's page limitation and summary nature. We believe that investment advisers will be more knowledgeable about the information to include in the amended relationship summaries than outside legal or compliance consultants and will be able to make these revisions in-house. Therefore, we do not estimate that investment advisers will need to incur ongoing external costs for the preparation and review of relationship summary amendments.

d. Incremental Increase to Form ADV Hourly and External Cost Burdens Attributable to Form ADV Part 3 Amendments

For existing and newly-registered advisers with relationship summary obligations, the additional burden attributable to amendments to Form ADV to add Part 3: Form CRS, (including the initial preparation and filing of the relationship summary and amendments thereto) totals 73,355 hours,[1250] or 8.25 hours per adviser,[1251] and a monetized cost of $20,025,915, or $2,252 per adviser.[1252] The incremental external legal and compliance cost is estimated to be $7,331,370.[1253]

[1238] External legal fees are in addition to the projected hour per adviser burden discussed above. Data from the SIFMA Management and Professional Earnings Report suggest that outside legal services cost approximately $497 per hour. $497 per hour for legal services × 5 hours per adviser = $2,485. The hourly cost estimate of $497 is based on an inflation-adjusted figure and our consultation with advisers and law firms who regularly assist them in compliance matters.

[1239] External compliance consulting fees are in addition to the projected hour per adviser burden discussed above. Data from the SIFMA Management and Professional Earnings Report, modified to account for an 1,800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, and adjusted for inflation, suggest that outside management consulting services cost approximately $741 per hour. $741 per hour for outside consulting services × 5 hours per adviser = $3,705.

[1240] 25% × 8,235 existing advisers × $2,485 for legal services = $5,115,994 for legal services. 50% × 8,235 existing advisers × $3,705 for compliance consulting services = $15,255,338. $5,115,994 + $15,255,338 = $20,371,331 in external legal and compliance consulting costs for existing advisers. $20,371,333/3 = $6,790,444 annually.

[1241] 25% × 656 new advisers × $2,485 for legal services = $407,540. 50% × 656 new advisers × $3,705 for compliance consulting services = $1,215,240. $407,540 + $1,215,240 = $1,622,780 in external legal and compliance consulting costs for new advisers. $1,622,780/3 = $540,927.annually in external legal and compliance consulting costs for newly registered advisers.

[1242] $6,790,444 in annual external legal and compliance consulting costs for existing advisers + $540,927 annually for new advisers = $7,331,370 annually for existing and new advisers. $7,331,370/(8,235 existing advisers + 656 new advisers) = $825 per adviser.

[1243] We have previously estimated that investment advisers would incur 0.5 hours to prepare an interim (other-than-annual) amendment to Form ADV. *See* 2016 Form ADV Paperwork Reduction Analysis, *supra* footnote 1209, at 81 FR at 60452.

[1244] Additionally, we are requiring that the additional disclosure showing the revised text or summarizing the material changes be attached as an exhibit to the unmarked relationship summary.

[1245] We believe that the time estimated to prepare and file an amendment to the relationship summary is closer to the amount of time to prepare an interim-other-than-annual amendment to Form ADV. *See, e.g.*, Brochure Adopting Release, *supra* footnote 576, at 75 FR at 49257.

[1246] Based on IARD data as of December 31, 2018, 8,235 investment advisers with retail clients filed 14,118 other-than-annual amendments to Form ADV. 14,118 other-than-annual amendments/8,235 investment advisers = 1.71 amendments per investment adviser. We estimated in the Proposing Release that advisers with relationship summary obligations will amend and file disclosures on average of 1.8 times per year, based on IARD system data as of December 31, 2017. *See* Proposing Release, *supra* footnote 5 at Section V.A.

[1247] 8,235 investment advisers amending relationship summaries × 1.71 amendments per year × 1 hour = 14,082 hours.

[1248] 14,082 hours/(8,235 existing advisers + 656 new advisers) = 1.58 hours per year.

[1249] 14,082 is the total aggregate initial hour burden for amending relationship summaries. We believe that performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Professional Earnings Report suggest that costs for these positions are $237 and $309 per hour, respectively. (14,082 hours × 50% × $237 + 14,082 hours × 50% × $309 = $3,844,386. $3,844,386/8,235 investment advisers = $467 per investment adviser.

[1250] 59,273 hours for initial preparation and filing of the relationship summary + 14,082 hours for amendments to the relationship summary = 73,355 total aggregate annual hour burden attributable to the Form ADV amendments to add Part 3: Form CRS.

[1251] 73,355 hours/(8,235 existing advisers + 656 newly registered advisers) = 8.25 hours per adviser.

[1252] 73,355 total aggregate annual hour burden for preparing, filing, and amending a relationship summary. We believe that performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Professional Earnings Report suggest that costs for these positions are $237 and $309 per hour, respectively. 73,355 hours × 50% × $237 = $8,692,568. 73,355 hours × 50% × $309 = $11,333,348. $8,692,568 + $11,333,348 = $20,025,915. $20,025,915/(8,235 existing registered advisers + 656 newly registered advisers) = $2,252 per adviser.

[1253] *See supra* footnote 1242.

3. Total Revised Burden Estimates for Form ADV

a. Revised Hourly and Monetized Value of Hourly Burdens

As discussed above, the currently approved total aggregate annual hour burden for all registered advisers completing, amending, and filing Form ADV (Part 1 and Part 2) with the Commission is 363,082 hours, or a blended average per adviser burden of 23.77 hours, with a monetized cost of $92,404,369, or $6,051 per adviser. This includes the total annual hour burden for registered advisers of 351,386 hours, or 29.22 hours per registered adviser, and 11,696 hours for exempt reporting advisers, or 3.60 hours per exempt reporting adviser. For purposes of updating the total information collection based on the amendments to Form ADV, we consider three categories of respondents, as noted above: (i) Existing and newly-registered advisers preparing and filing a relationship summary, (ii) registered advisers with no obligation to prepare and file a relationship summary, and (iii) exempt reporting advisers. One commenter said that the current Form ADV requirements are a burden to smaller firms and that the currently approved burdens for Form ADV Parts 1 and 2 are too low.[1254] We disagree. We recognize that the burden for some advisers will exceed our estimate and the burden for others will be less due to the nature of their business, but we continue to believe that on average our estimates are appropriate for purposes of the PRA analysis. For example, the current burden estimates for Form ADV Parts 1 and 2 range from 15 hours for smaller advisers to 1989 hours for larger advisers.[1255]

For existing and newly-registered advisers preparing and filing a relationship summary, including amendments to the disclosure, the total annual collection of information burden for preparing all of Form ADV, updated to reflect the amendments to Form ADV, equals 37.47 hours per adviser, with 8.25 hours attributable to the adopted amendments.[1256] On an aggregate basis, this totals 333,146 hours for existing and newly registered advisers, with a monetized value of $90,978,858.[1257]

As noted above, we estimate 5,064 of existing registered advisers will not have retail investors; therefore, they will not be obligated to prepare and file relationship summaries, so their annual per adviser hour burden will remain unchanged.[1258] To that end, using the currently approved total annual hour estimate of 29.22 hours per registered investment adviser to prepare and amend Form ADV, we estimate that the updated annual hourly burden for all existing and newly-registered investment advisers not required to prepare a relationship summary will be 164,655,[1259] with a monetized value of $44,950,816.[1260] The revised total annual collection of information burden for exempt reporting advisers, using the currently approved estimate of 3.60 hours per exempt reporting adviser, will be 16,996 hours,[1261] for a monetized cost of $4,639,908, or $983 per exempt reporting adviser.[1262]

In summary, factoring in the amendments to Form ADV to add Part 3, the revised annual aggregate burden for Form ADV for all registered advisers and exempt reporting advisers will be 514,797,[1263] for a monetized cost of $140,569,582.[1264] This results in an annual blended average per adviser burden for Form ADV of 29.28 hours[1265] and $7,996 per adviser.[1266] This is an increase of 151,715 hours,[1267] or $48,165,213[1268] in the monetized value of the hour burden, from the currently approved annual aggregate burden estimates, increases which are attributable primarily to the larger registered investment adviser and exempt reporting adviser population since the most recent approval, adjustments for inflation, and the amendments to Form ADV to add Part 3.

b. Revised Estimated External Costs for Form ADV

The currently approved total annual collection of information burden estimate for Form ADV anticipates that there will be external costs, including (i) a one-time initial cost for outside legal and compliance consulting fees in connection with the initial preparation of Part 2 of Form ADV, and (ii) the cost for investment advisers to private funds to report the fair value of their private fund assets.[1269] The currently approved annual cost burden for Form ADV is $13,683,500, $3,600,000 of which is attributable to external costs incurred by new advisers to prepare Form ADV Part 2, and $10,083,500 of which is attributable to obtaining the fair value of certain private fund assets.[1270] We do

[1254] *See* Marotta Letter.

[1255] *See supra* footnote 1221.

[1256] 29.22 hours + 8.25 hours for increase in burden attributable to initial preparation and filing of, and amendments to, relationship summary = 37.47 hours total.

[1257] 37.47 hours × (8,235 existing RIAs required to prepare a relationship summary + 656 newly registered RIAs required to prepare a relationship summary) = 333,146 total aggregate annual hour burden for preparing, filing and amending a relationship summary. We believe that performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Professional Earnings Report suggest that costs for these positions are $237 and $309 per hour, respectively. 333,146 hours × 0.5 × $237 = $39,477,801. 333,146 hours × 0.5 × $309 = $51,471,057. $39,477,801 + $51,471,057 = $90,948,858.

[1258] 13,299 registered investment advisers—8,235 registered investment advisers with retail investors = 5,064 registered investment advisers without retail investors.

[1259] 29.22 hours × (5,064 existing and 571 newly-registered investment advisers without retail investors) = approximately 164,655 total annual hour burden for RIAs not preparing a relationship summary.

[1260] We believe that performance of this function for registered advisers will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Professional Earnings Report suggest that costs for these positions are $237 and $309 per hour, respectively. 164,655 hours × 50% × $237 = $19,511,618. 164,655 hours × 50% × $309 = $25,439,198. $19,511,618 + $25,439,198 = $44,950,816.

[1261] 3.60 hours × 4,280 exempt reporting advisers currently + 441 new exempt reporting advisers = 16,996 hours.

[1262] As with preparation of the Form ADV for registered advisers, we believe that performance of this function for exempt reporting advisers will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Professional Earnings Report suggest that costs for these positions are $237 and $309 per hour, respectively. 16,996 hours × 0.5 × $237 = $2,014,026. 16,996 hours × 0.5 × $309 = $2,625,882. $2,014,026 + $2,625,882 = $4,639,908. $4,639,908/(4,280 exempt reporting advisers currently + 441 new exempt reporting advisers) = $983 per exempt reporting adviser.

[1263] 333,146 annual hour burden for RIAs preparing relationship summary + 164,655 annual hour burden for RIAs not preparing relationship summary + 16,996 annual hour burden for exempt reporting advisers = 514,797 total updated Form ADV annual hour burden.

[1264] $90,948,858 for RIAs preparing relationship summary + $44,950,816 for RIAs not preparing relationship summary + $4,639,908 for exempt reporting advisers = $140,539,582 total updated Form ADV annual monetized hourly burden.

[1265] 514,797/(13,299 registered investment advisers + 4,280 exempt reporting advisers) = 29.28 hours per adviser.

[1266] $140,569,582/13,299 registered investment advisers + 4,280 exempt reporting advisers) = $7,995 per adviser.

[1267] 514,797 hours estimated—363,082 hours currently approved = 151,715 hour increase in aggregate annual hourly burden.

[1268] $140,569,582 monetized hourly burden—$92,404,369 = $48,135,213 increase in aggregate annual monetized hourly burden.

[1269] *See* 2016 Form ADV Paperwork Reduction Analysis, *supra* footnote 1209, at 81 FR 60452. We do not anticipate that the amendments we are adopting to add Form ADV Part 3 will affect those per adviser cost burden estimates for outside legal and compliance consulting fees. The estimated external costs of outside legal and compliance consulting services for the relationship summary are in addition to the estimated hour burden discussed above.

[1270] *See* 2016 Form ADV Paperwork Reduction Analysis, *supra* footnote 1209, at 81 FR at 60452–

Continued

not expect any change in the annual external costs relating to new advisers preparing Form ADV Part 2. Due to the slightly higher number of registered advisers with private funds, however, the aggregate cost of obtaining the fair value of private fund assets is likely to be higher. We estimate that 6% of registered advisers have at least one private fund client that may not be audited. Based on IARD system data as of December 31, 2018, 4,806 registered advisers advise private funds. We therefore estimate that approximately 288 registered advisers may incur costs of $37,625 each on an annual basis, for an aggregate annual total cost of $10,836,000.[1271]

In summary, taking into account (i) a one-time initial cost for outside legal and compliance consulting fees in connection with the initial preparation of Part 2 of Form ADV, (ii) the cost for investment advisers to private funds to report the fair value of their private fund assets, and (iii) the incremental external legal or compliance costs for the preparation of the relationship summary, we estimate the annual aggregate external cost burden of the Form ADV information collection will be $21,767,370, or $1,637 per registered adviser.[1272] This represents an $8,083,870 increase from the current external costs estimate for the information collection.[1273]

B. Rule 204–2 Under the Advisers Act

Under section 204 of the Advisers Act, investment advisers registered or required to register with the Commission under section 203 of the Advisers Act must make and keep for prescribed periods such records (as defined in section 3(a)(37) of the Exchange Act), furnish copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 204–2 sets forth the requirements for maintaining and preserving specified books and records.

The amendments to rule 204–2 will require registered advisers to retain copies of each relationship summary. Investment advisers will also be required to maintain each amendment to the relationship summary as well as to make and preserve a record of dates that each relationship summary and each amendment was delivered to any client or to any prospective client who subsequently becomes a client. These records will be required to be maintained in the same manner, and for the same period of time, as other books and records required to be maintained for the Form ADV Part 2A brochure under the Advisers Act rule 204–2(a)(14)(i), to allow regulators to access the relationship summary during an examination.[1274]

As discussed above in Section II.E several commenters suggested that our estimated burdens for the relationship summary recordkeeping obligations were too low.[1275] Some commenters argued that keeping records of when a relationship summary was given to prospective retail clients would be unnecessarily burdensome or not feasible, and was not adequately considered in the Commission's burden estimates.[1276] One of these commenters said that it would be difficult for firms to integrate pre-relationship delivery dates into their operational systems and procedures, and that there is no way to track when a disclosure is accessed on a website.[1277]

Based on our experience with similar requirements for Form ADV Part 2A brochures, we disagree with commenters that retaining records of when a relationship summary was given to prospective retail clients would be significantly more burdensome for investment advisers than our proposed estimate of 0.2 hours. While we recognize that this recordkeeping requirement will impose some additional burden on investment advisers that must prepare and deliver relationship summaries, advisers are already required to keep similar records for the delivery of the Form ADV Part 2A brochures and the currently approved burden for that requirement is 1.5 hours. Accordingly, based on our experience, advisers already maintain this information with respect to their brochures and should be able to update their systems to also include the relationship summary. We also do not expect that investment advisers will incur additional external costs to make and keep these records because we believe that advisers will create and retain them in a manner similar to their current recordkeeping practices for the Form ADV Part 2A brochure.

This collection of information is found at 17 CFR 275.204–2 and is mandatory. The Commission staff uses the collection of information in its examination and oversight program. Requiring maintenance of these disclosures as part of the firm's books and records will facilitate the Commission's ability to inspect for and enforce compliance with firms' obligations with respect to the relationship summary. The information generally is kept confidential.[1278]

The likely respondents to this collection of information are all of the approximately 13,299 advisers currently registered with the Commission. We estimate that based on updated IARD data as of December 31, 2018, 8,235 existing advisers will be subject to the amended provisions of rule 204–2 to preserve the relationship summary as a result of the adopted amendments.

1. Changes in Burden Estimates and New Burden Estimates

The currently approved annual aggregate burden for rule 204–2 is 2,199,791 hours, with a total annual aggregate monetized cost burden of approximately $130,316,112, based on an estimate of 12,024 registered advisers, or 183 hours per registered

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53. The $10,083,500 is based on 4,469 registered advisers reporting private fund activity as of May 16, 2016.

[1271] 6% × 4,806 = 288 advisers needing to obtain the fair value of certain private fund assets. 288 advisers × $37,625 = $10,836,000.

[1272] $3,600,000 for preparation of Form ADV Part 2 + $10,836,000 for registered investment advisers to fair value their private fund assets + $7,331,370 (*see supra* footnote 1242) to prepare relationship summary = $21,767,370 in total external costs for Form ADV. $21,767,370/13,299 total registered advisers as of December 31, 2018 = $1,637 per registered adviser.

[1273] $21,767,370—$13,683,500 = $8,083,870.

[1274] Specifically, investment advisers will be required to maintain and preserve records of the relationship summary in an easily accessible place for not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser. *See* Advisers Act rule 204–2(e)(1).

[1275] *See, e.g.,* CCMC Letter; SIFMA Letter. *See also* NSCP Letter (estimating 80–500 hours to prepare, deliver, and file the relationship summary, including recordkeeping policies and procedures).

[1276] *See, e.g.,* CCMC Letter; SIFMA Letter; Committee of Annuity Insurers Letter; Edward Jones Letter. A few others stated that creating recordkeeping policies and procedures relating to how professionals respond to "key questions" would be burdensome and extremely difficult. *See, e.g.,* LPL Financial Letter. Although the final instructions require "conversation starter" questions that are similar to the proposed "key questions," we are not increasing the burden as urged by commenters. As discussed in Section V.A.2.a. above, we increased the burden estimates for the initial preparation of the relationship summary, acknowledging, among other things, that certain advisers that provide automated investment advisory services will incur additional burdens to develop written answers to the conversation starters and make those available on their websites with a hyperlink to the appropriate page in the relationship summary for these documents (*i.e.,* robo-advisers). However, we do not expect these advisers to incur additional recordkeeping burdens under amendments to rule 204–2 because we are not establishing new or separate recordkeeping obligations related to the conversation starters or the answers provided by firms in response to the conversation starters. *See supra* footnotes 814–816.

[1277] *See* SIFMA Letter.

[1278] *See* section 210(b) of the Advisers Act.

adviser.[1279] We estimate that the requirements to make and keep copies of each relationship summary under the amendments to rule 204–2 will result in an increase in the collection of information burden estimate by 0.2 hours [1280] for each of the estimated 8,235 registered advisers with relationship summary obligations, resulting in a total of 183.2 hours per adviser. This will yield an annual estimated aggregate burden of 1,508,652 hours under amended rule 204–2 for all registered advisers with relationship summary obligations,[1281] for a monetized cost of $95,588,191, or $11,607 per adviser.[1282] In addition, the 5,064 advisers not subject to the amendments will continue to be subject to an unchanged burden of 183 hours under rule 204–2, or a total aggregate annual hour burden of 926,712,[1283] for a monetized cost of $58,716,472, or $11,595 per adviser.[1284] The increase in the collection of information burden estimate by 0.2 hours as a result of the amendments to rule 204–2 will therefore result in an annual monetized cost of $12 per adviser.[1285] In summary, taking into account the estimated annual burden of registered advisers that will be required to maintain records of the relationship summary, as well as the estimated annual burden of registered advisers that do not have relationship summary obligations and whose information collection burden is unchanged, the revised annual aggregate burden for all respondents to rule 204–2, under the amendments, is estimated to be 2,435,364 total hours,[1286] for a monetized cost of $154,304,663.[1287]

2. Revised Annual Burden Estimates

As noted above, the approved annual aggregate burden for rule 204–2 is currently 2,199,791 hours based on an estimate of 12,024 registered advisers, or 183 hours per registered adviser.[1288] The revised annual aggregate hourly burden for rule 204–2 will be 2,435,364 [1289] hours, represented by a monetized cost of $154,304,664,[1290] based on an estimate of 8,235 registered advisers with the relationship summary obligation and 5,064 registered advisers without, as noted above. This represents an increase of 235,573 [1291] annual aggregate hours in the hour burden and an annual increase of $23,988,552 from the currently approved total aggregate monetized cost for rule 204–2.[1292] These increases are attributable to a larger registered investment adviser population since the most recent approval and adjustments for inflation, as well as the rule 204–2 amendments relating to the relationship summary as discussed in this release.

C. Rule 204–5 under the Advisers Act

New rule 204–5 will require an investment adviser to deliver an electronic or paper version of the relationship summary to each retail investor before or at the time the adviser enters into an investment advisory contract with the retail investor. The adviser also will make a one-time initial delivery of the relationship summary to all existing clients within a specified time period after the effective date of the rule. Also with respect to existing clients, the adviser will deliver the most recent relationship summary before or at the time of (i) opening any new account that is different from the retail investor's existing account(s); (ii) recommending that the retail investor roll over assets from a retirement account into a new or existing account or investment; or (iii) recommending or providing a new brokerage or investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in the existing account.[1293] The adviser will be required to post a current version of its relationship summary prominently on its public website (if it has one), and will be required to communicate any changes in an amended relationship summary to retail investors who are existing clients within 60 days, instead of 30 days as proposed, after the amendments are required to be made and without charge.[1294] The investment adviser also must deliver a current relationship summary to each retail investor within 30 days upon request. In a change from the proposal, an adviser must make a copy of the relationship summary available upon request without charge, and where a relationship summary is delivered in paper format, the adviser may link to additional information by including URL addresses, QR codes, or other means of facilitating access to such information.[1295] The adviser must also include a telephone number where retail investors can request up-to-date information and a copy of the relationship summary.[1296]

1279 *See* 2016 Form ADV Paperwork Reduction Analysis, *supra* footnote 1209, at 81 FR at 60454–55.

1280 In the Paperwork Reduction Act analysis for amendments to Form ADV adopted in 2016, we estimated that 1.5 hours would be required for each adviser to make and keep records relating to (i) the calculation of performance the adviser distributes to any person and (ii) all written communications received or sent relating to the adviser's performance. Because the burden of preparing the relationship summary is already included in the collection of information estimates for Form ADV, we estimate that recordkeeping burden for the relationship summary will be considerably less than 1.5 hours and estimate that 0.2 hours is appropriate.

1281 8,235 registered investment advisers required to prepare relationship summary × 183.2 hours = 1,508,652 hours.

1282 As with our estimates relating to the previous amendments to Advisers Act rule 204–2 (*see* 2016 Form ADV Paperwork Reduction Analysis, *supra* footnote 1209, at 81 FR at 60454–55), we expect that performance of this function will most likely be allocated between compliance clerks and general clerks, with compliance clerks performing 17% of the function and general clerks performing 83% of the function. Data from the SIFMA Office Salaries in the Securities Industry Report, modified to account for an 1,800-hour work year and multiplied by 2.93 to account for bonuses, firm size, employee benefits, and overhead, suggest that costs for these position are $70 and $62, respectively. (17% × 1,508,652 hours × $70) + (83% × 1,508,652 hours × $62) = $95,588,191. $95,588,191/8,235 advisers = $11,607 per adviser.

1283 5,064 registered investment advisers not required to prepare the relationship summary × 183 hours = 926,712.

1284 As with our estimates relating to the previous amendments to Advisers Act rule 204–2 (*see* 2016 Form ADV Paperwork Reduction Analysis, *supra* footnote 1209, at 81 FR at 60454–55, we expect that performance of this function will most likely be allocated between compliance clerks and general clerks, with compliance clerks performing 17% of the function and general clerks performing 83% of the function. Data from the SIFMA Office Salaries Report suggest that costs for these positions are $70 and $62, respectively. (17% × 926,712 hours × $70) + (83% × 926,712 hours × $62) = $58,716,473. $58,716,473/5,064 = $11,595 per adviser.

1285 $11607 aggregate burden per adviser subject to relationship summary – $11,595 aggregate burden per adviser not subject to the relationship summary = $12.

1286 8,235 registered investment advisers required to prepare relationship summary × 183.2 hours = 1,508,652 hours. 5,064 registered investment advisers not required to prepare the relationship summary × 183 hours = 926,712 hours. 1,508,652 hours + 26,712 hours = 2,435,364 hours.

1287 $95,588,191 + $58,716,473 = $154,304,664.

1288 2,199,791 hours/12,024 registered advisers = 183 hours per adviser.

1289 *See supra* footnote 1286.

1290 *See supra* footnote 1287.

1291 2,435,364 hours – 2,199,791 hours = 235,573 hours.

1292 $154,304,664 – $130,316,112 = $23,988,552.

1293 We are adopting these requirements instead of the proposed requirements that advisers deliver the relationship summary to existing retail investor clients before or at the time of opening a new account that is different from the retail investor's existing account or changes are made to the retail investor's existing account(s) that would "materially change" the nature or scope of the firm's relationship with the retail investor. *See* Proposing Release, *supra* footnote 5 at Section II.C.2.

1294 The communication can be made by delivering the relationship summary or by communicating the information through another disclosure that is delivered to the retail investor.

1295 Additionally, we are adopting the instruction that if a relationship summary is delivered in paper format as part of a package of documents, the firm must ensure that the relationship summary is the first among any documents that are delivered at that time, substantially as proposed. *See supra* footnote 701.

1296 This differs from the proposal, which required only firms that do not have a public website to include a toll-free number that retail

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As discussed further below, we received comments that our estimated burdens for delivery of the relationship summary were too low. Some of these comments focused on the administrative and operational burdens related to monitoring for changes that would "materially change" the nature and scope of the relationship and thereby require delivery to existing clients and customers.[1297] One commenter also argued that imposing different delivery requirements for the Form ADV, Part 2 brochure and the relationship summary would create substantial administrative burdens specifically for investment advisers.[1298] Other comments focused on the recordkeeping burdens related to the requirement to deliver the relationship summary to a new or prospective retail investor.[1299] As discussed further below, we made changes to the proposal to require more specific triggers for initial delivery and additional delivery to existing customers in order to replace the requirements in response to comments. We discuss below the specific separate delivery requirements and modifications.

New rule 204–5 contains a collection of information requirement. The collection of information is necessary to provide advisory clients, prospective clients and the Commission with information about the investment adviser and its business, conflicts of interest, and personnel. Clients will use the information contained in the relationship summary to determine whether to hire or retain an investment adviser and what type of accounts and services are appropriate for their needs. The Commission will use the information to determine eligibility for registration with us and to manage our regulatory and examination programs. This collection of information will be found at 17 CFR 275.204–5 and will be mandatory. Responses will not be kept confidential.

1. Respondents: Investment Advisers

The likely respondents to this information collection will be the approximately 8,235 investment advisers registered with the Commission that will be required to deliver a relationship summary per new rule 204–5. We also note that these figures include the 318 registered broker-dealers that are dually registered as investment advisers.[1300]

2. Initial and Annual Burdens

a. Posting of the Relationship Summary to Website

Under new rule 204–5, advisers will be required to post a current version of their relationship summary prominently on their public website (if they have one). In the Proposing Release, we estimated that each adviser will incur 0.5 hours to prepare the posted relationship summary, such as to ensure proper electronic formatting and to post the disclosure to the adviser's website, if the adviser has one.[1301] Although we did not receive any comments regarding burdens associated with posting of the relationship summary to a public website, we are increasing our estimate of the time from 0.5 to 1.5 hours based on the staff's experience.[1302] We do not anticipate that investment advisers will incur additional external costs to post the relationship summary to the adviser's website because advisers without a public website will not be required to establish or maintain one, and advisers with a public website have already incurred external costs to create and maintain their websites. Additionally, external costs for the preparation of the relationship summary are already included for the collection of information estimates for Form ADV, in Section A.2.b, above.

Based on IARD system data, 91.6% of investment advisers with individual clients report having at least one public website.[1303] Therefore, we estimate that 91.6% of the 8,235 existing and 656 newly registered investment advisers with relationship summary obligations will incur a total of 12,216 aggregate burden hours to post relationship summaries to their websites,[1304] with a monetized cost of $757,407.[1305] As with the initial preparation of the relationship summary, we amortize the estimated initial burden associated with posting the relationship summary over a three-year period.[1306] Therefore, the total annual aggregate hourly burden related to the initial posting of the relationship summary is estimated to be 4,072 hours, with a monetized cost of $252,469.[1307] We did not receive comments regarding burdens associated with posting of the relationship summary to a public website.

b. Delivery to Existing Clients

(1) One-Time Initial Delivery to Existing Clients

The burden for this new rule is based on each adviser with retail investors having, on average, an estimated 3,985 clients who are retail investors.[1308] Although advisers may either deliver the relationship summary separately, in a "bulk delivery" to clients, or as part of the delivery of information that advisers already provide, such as the annual Form ADV update, account statements or other periodic reports, we base our estimates here on a "bulk delivery" to existing clients. This is similar to the approach we took in estimating the delivery costs for amendments to rule 204–3 under the Advisers Act, which requires investment advisers to deliver their Form ADV Part 2A brochures and brochure supplements to their clients.[1309] As with the estimates for rule 204–3, we estimate that advisers will require approximately 0.02 hours to deliver the relationship summary to each client.[1310] We did not receive comments on the burdens specific to delivering the relationship summary to

investors may call to request documents. *See supra* footnote 609.

[1297] *See, e.g.*, Cambridge Letter; SIFMA Letter; LPL Financial Letter.

[1298] Pickard Djinis and Pisarri Letter.

[1299] *See supra* footnotes 803–808.

[1300] *See supra* footnote 863 and accompanying text.

[1301] Proposing Release, *supra* footnote, 5 at section V.C.2.a.

[1302] *See e.g.*, Optional internet Availability of Investment Company Shareholder Reports, Investment Company Act Release No. 33115 (June 5, 2018) [83 FR 29158 (Jun. 22, 2018)] (estimating that funds that already post shareholder reports on their websites will require a half hour burden per fund to comply with the annual compliance and posting requirements of rule 30e–3, and funds that do not already post shareholder reports to their websites will require one and half hours to post the required documents online). Posting of the relationship summary under rule 204–5 pertains to one document, which is similar to the shareholder report posting to which rule 30e–3 applies.

[1303] We estimated in the Proposing Release that 91.1 of investment advisers with individual clients report at least one public website, based on IARD system data as of December 31, 2017. *See* Proposing Release, *supra* footnote 5 at Section V.C.1.

[1304] 1.5 hours to prepare and post the relationship summary × 91.6% × (8,235 existing advisers + 656 newly-registered advisers with relationship summary obligations) = 12,216 hours.

[1305] Based on data from the SIFMA Office Salaries Report, we expect that requirement for investment advisers to post their relationship summaries to their websites will most likely be performed by a general clerk at an estimated cost of $62 per hour. 1.5 hours per adviser × $62 = $93 in monetized costs per adviser. $93 per adviser × 91.6% × (8,235 existing advisers + 656 newly registered advisers) = $757,407 total aggregate monetized cost.

[1306] *See* 2016 Form ADV Paperwork Reduction Analysis, *supra* footnote 1209.

[1307] 12,216 hours/3 years = 4,072 hours annually. $757,407/3 years = $252,469 in annualized monetized costs.

[1308] This estimate is based on IARD system data as of December 31, 2018.

[1309] *See* Brochure Adopting Release, *supra* footnote 576, at 75 FR at 49259.

[1310] This is the same estimate we made in the Form ADV Part 2 proposal and for which we received no comment. Brochure Adopting Release, *supra* footnote 576, at 75 FR at 49259 The burden for preparing relationship summaries is already incorporated into the burden estimate for Form ADV discussed above.

existing clients under new Rule 204–5. We estimate the total burden hours for 8,235 advisers for initial delivery of the relationship summary to existing clients to be 79.7 hours per adviser, or 708,613 total aggregate hours, for the first year after the rule is in effect,[1311] with a monetized cost of $4,941 [1312] per adviser or $43,930,431 in aggregate.[1313] Amortized over three years, the total annual hourly burden is estimated to be 26.57 hours per adviser, or 236,204 annual hours in aggregate,[1314] with annual monetized costs of $1,647 per adviser, or $14,643,477 in aggregate.[1315] We do not expect that investment advisers will incur external costs for the initial delivery of the relationship summary to existing clients because we estimate that advisers will make such deliveries along with another required delivery, such as an interim or annual update to the Form ADV Part 2A.

(2) Additional Delivery to Existing Clients

As discussed in Section II.C.3.c above, the proposed instructions would have required investment advisers to deliver the relationship summary to existing retail investor clients before or at the time firms open a new account that is different from the retail investor's existing account or changes are made to the retail investor's existing account(s) that would "materially change" the nature or scope of the firm's relationship with the retail investor. In response to comments seeking additional clarity on when the "materially change" requirement would apply, and expressing concerns that there will be additional supervisory, administrative, and operational processes required, and burdens imposed, we replaced the "materially change" requirement with more concrete delivery triggers that firms could more easily implement based on their existing systems and processes.[1316]

Investment advisers will be required to deliver the relationship summary to existing clients before or at the time they open a new account that is different from the retail investor's existing account(s), as proposed. In addition, in a change from the proposal, delivery will be required before or at the time the adviser (i) recommends that the retail investor roll over assets from a retirement account into a new or existing account or investment, or (ii) recommends or provides a new brokerage or investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in the existing account. We are adopting these two triggers instead of the proposed requirement to deliver the relationship summary before or at the time changes are made to the existing account that would "materially change" the nature and scope of the relationship to address commenters' requests for additional guidance or examples of what would constitute a "material change."[1317] Commenters also described administrative and operational burdens arising from this requirement and argued that our estimated burdens were too low.[1318] One commenter asserted that firms would be required to build entirely new operational and supervisory processes to identify asset movements that could trigger a delivery requirement.[1319] Another commenter noted the challenges of designing a system that distinguishes non-ordinary course events from routine account changes.[1320]

As discussed above, we replaced the "materially change" requirement with more specific triggers to be clearer about when a relationship summary must be delivered.[1321] While these specific triggers will still impose operational and supervisory burdens on firms, we believe that they are more easily identified and monitored, such that firms will not incur significant burdens as described by commenters to implement entirely new supervisory, administrative, and operational processes needed to monitor events that cause a material change. However, recognizing that some additional processes will be necessary to implement these delivery triggers, we are increasing our burden estimate from 0.02 to 0.04 hours. We now estimate that each adviser will incur 16 hours per year to deliver the relationship summary in these types of situations, and that delivery under these circumstances will take place among 10% of an adviser's retail investors annually.[1322] We will therefore estimate a total annual aggregate hours of 142,256,[1323] with a monetized cost of $992 per adviser [1324] and $8,818,872 in aggregate.[1325]

(3) Posting of Amended Relationship Summaries to websites and Communicating Changes to Amended Relationship Summaries, Including by Delivery

Investment advisers will be required to amend their relationship summaries within 30 days when any of the information becomes materially inaccurate. Investment advisers also will be required to communicate any changes in an amended relationship summary to existing clients who are retail investors within 60 days, instead of 30 days as proposed, after the updates are required to be made and without charge. We do not expect this change to increase the PRA estimates.[1326] The communication can be made by delivering the relationship summary or through another disclosure that is

[1311] (0.02 hours per client × 3,985 retail clients per adviser) = 79.7 hours per adviser. 79.7 hours per adviser × (8,235 existing advisers + 656 newly registered advisers) = 708,613 total aggregate hours.

[1312] Based on data from the SIFMA Office Salaries Report, we expect that initial delivery requirement to existing clients of rule 204–5 will most likely be performed by a general clerk at an estimated cost of $62 per hour. 79.7 hours per adviser × $62 = $4,941 in monetized costs per adviser. We estimate that advisers will not incur any incremental postage costs because we estimate that they will make such deliveries with another mailing the adviser was already delivering to clients, such as interim or annual updates to the Form ADV, or will deliver the relationship summary electronically.

[1313] $4,941 in monetized costs per adviser × (8,235 existing advisers + 656 newly registered advisers) = $43,930,431 in total aggregate costs.

[1314] 79.7 initial hours per adviser/3 = 26.57 total annual hours per adviser. 708,613 initial aggregate hours/3 = 236,204 total annual aggregate hours.

[1315] $4,941 in monetized costs per adviser/3 = $1,647 annualized monetized cost per adviser. $43,930,431 initial aggregate monetized cost/3 = $14,643,477 in total annual aggregate monetized cost.

[1316] *See supra* footnotes 758–763 and accompanying text.

[1317] *See* Prudential Letter; TIAA Letter; Cambridge Letter; SIFMA Letter; LPL Financial Letter; Institute for Portfolio Alternatives Letter.

[1318] *See, e.g.,* SIFMA Letter; LPL Financial Letter.

[1319] *See* SIFMA Letter.

[1320] *See* LPL Letter.

[1321] These more specific triggers are intended to address circumstances that the proposed "materially change" sought to address. *See supra* footnote 761 and accompanying text.

[1322] 10% of 3,985 retail clients per adviser × .04 hours to deliver the relationship summary = 16 hours per adviser.

[1323] 16 hours × (8,235 existing advisers + 656 new advisers) = 142,256 total aggregate hours.

[1324] Based on data from the SIFMA Office Salaries Report, we expect that delivery requirements of rule 204–5 will most likely be performed by a general clerk at an estimated cost of $62 per hour. 16 hours per adviser × $62 = $992 per adviser. We estimate that advisers will not incur any incremental postage costs in the delivery of the relationship summary to existing clients for changes in accounts, because we estimate that advisers will make such deliveries with another mailing the adviser was already delivering to clients, such as new account agreements and other documentation normally required in such circumstances.

[1325] $992 in monetized costs per adviser × (8,235 existing advisers + 656 newly registered advisers) = $8,819,872 in total aggregate costs.

[1326] As discussed in Section V.A.2.c., we have increased the burden estimates for preparing amendments to the relationship summary, acknowledging, among other things, that firms will incur additional burdens to prepare and file amendments as a result of the instructions that firms preparing amendments highlight the most recent changes, and that additional disclosure showing the revised text be attached as an exhibit to the unmarked relationship summary.

delivered to the retail investor. This requirement is a change from the proposed requirement but is substantively similar.[1327] Commenters did not comment on the estimated burden. We have determined not to change the burden relative to the proposal.

Based on the historical frequency of amendments made on Form ADV Parts 1 and 2, we estimate that on average, each adviser preparing a relationship summary will likely amend the disclosure an average of 1.71 times per year.[1328] We are not changing the 0.5 hours estimates to post the amendments to a public website, consistent with our estimates at proposal. Using the same percentage of investment advisers reporting public websites, 91.6% of 8,235 advisers will incur a total annual burden of 0.86 hours per adviser, or 6,487 hours in aggregate,[1329] to post the amended relationship summaries to their website. This translates into an annual monetized cost of $53.32 per adviser, or $402,207 in the aggregate for existing registered advisers with relationship summary obligations.[1330]

For this requirement, we estimate that 50% of advisers will choose to deliver the relationship summary to communicate the updated information, and that the delivery will be made along with other disclosures already required to be delivered. We did not receive comments on this estimate. We believe that it is likely that the other 50% of advisers will incorporate all of the updated information in their Form ADV Part 2, like the summary of material changes or other disclosures, which they are already obligated to deliver in order to avoid having to deliver two documents. We estimate a burden of 561,162 hours,[1331] or 136.29 hours per adviser,[1332] at a monetized cost of $34,792,044 in aggregate,[1333] or $8,450 per adviser,[1334] for the 50% of advisers that choose to deliver amended relationship summaries in order to communicate updated information.[1335]

In a change from the proposal,[1336] we are also adopting two requirements not included in the proposal. First, all firms will be required to make available a copy of the relationship summary upon request without charge. Second, in a relationship summary that is delivered in paper format, firms may link to additional information by including URL addresses, QR codes, or other means of facilitating access to such information.[1337] We believe that these new requirements will increase the burden relative to the proposal for some firms that do not currently fulfill these types of disclosure requests, including, for example, additional costs associated with tracking delivery preferences related to making copies of the relationship summary available upon request, and printing and mailing costs for copies that are delivered in paper. We estimate that the 8,235 advisers with relationship summary obligations, on average, will require 0.5 hours each annually to comply with this requirement. Therefore, we estimate that the 8,235 advisers will incur a total of 4,118 aggregate burden hours to make copies of the relationship summary available upon request,[1338] with a monetized cost per adviser of $31, or $255,285 in aggregate monetized cost.[1339] We acknowledge that the burden may be more or less than 0.5 hours for some advisers, but we believe that, on average, 0.5 hours is an appropriate estimate for calculating an aggregate burden for the industry for this collection of information.

We do not expect investment advisers to incur external costs in delivering amended relationship summaries or communicating the information in another way because we estimate that they will make this delivery with, or as part of, other disclosures required to be delivered, such as an interim or annual update to Form ADV. We did not receive comments on this assumption in the proposal.

c. Delivery to New Clients or Prospective New Clients

Data from the IARD system indicate that of the 13,299 advisers registered with the Commission, 8,235 have retail investors, and on average, each has 3,985 clients who are retail investors.[1340] As proposed, we estimate that the client base for investment advisers will grow by approximately 4.5% annually.[1341] Based on our experience with Form ADV Part 2, we estimate the annual hour burden for initial delivery of a relationship summary will be the same by paper or electronic format, at 0.02 hours for each

[1327] The proposed instructions would have required firms to communicate updated information by delivering the amended relationship summary or by communicating the information another way. The revised instruction will eliminate the wording "another way" and will clarify that the communication can be made through another disclosure that is delivered to the retail investor. *See supra* footnote 767.

[1328] We estimated in the Proposing Release that each adviser preparing a relationship summary will likely amend the disclosure an average 1.81 times based on IARD system data as of December 31, 2017. See Proposing Release, supra footnote 5 at section V.C.2.b.iii. We are updating the average number to 1.71 times per year based on IARD system data as of December 31, 2018.

[1329] 0.5 hours to post the amendment × 1.71 amendments annually = 0.86 hours per adviser annually to post amendments to the website. 0.86 × 8,235 existing advisers amending the relationship summary × 91.6% of advisers with public websites = 6,487 aggregate annual hours to post amendments of the relationship summary.

[1330] Based on data from the SIFMA Office Salaries Report, we expect that the posting requirements of rule 204–5 will most likely be performed by a general clerk at an estimated cost of $62 per hour. 0.86 hours per adviser × $62 = $53.32 per adviser. $53.32 per adviser × 91.6% × 8,235 existing advisers = $402,207 in annual monetized costs.

[1331] 8,235 advisers amending the relationship summary × 3,985 retail clients per adviser × 50% delivering the amended relationship summary to communicate updated information × 0.02 hours per delivery × 1.71 amendments annually = 561,162 hours to deliver amended relationship summaries.

[1332] 3,985 retail clients per adviser × 0.02 hours per delivery × 1.71 amendments annually = 136.29 hours per adviser.

[1333] Based on data from the SIFMA Office Salaries Report, we expect that delivery requirements of rule 204–5 will most likely be performed by a general clerk at an estimated cost of $62 per hour. 561,162 hours × $62 = $34,792,044. We estimate that advisers will not incur any incremental postage costs to deliver the relationship summary for communicating updated information by delivering the relationship summary, because we estimate that advisers will make the delivery along with other documents already required to be delivered, such as an interim or annual update to Form ADV, or will deliver the relationship summary electronically.

[1334] Based on data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, we expect that delivery requirements of rule 204–5 will most likely be performed by a general clerk at an estimated cost of $62 per hour. 136.29 hours per adviser × $62 per hour = $8,450 per adviser.

[1335] For the other 50% of advisers that may choose to communicate updated information in another disclosure, we estimate no added burden because these advisers will be communicating the information in other disclosures they are already delivering like the Form ADV Part 2 brochure or summary of material changes.

[1336] *See supra* footnotes 699–701 and accompanying text.

[1337] We are adopting the instruction that if a relationship summary is delivered in paper format as part of a package of documents, it should be the first among any documents that are delivered at the same time, as proposed. *See supra* footnote 701.

[1338] 0.5 hours to make paper copies of the relationship summary available upon request × 8,235 advisers with relationship summary obligations = 4,118 hours.

[1339] Based on data from the SIFMA Office Salaries Report, we expect that the requirement for advisers to make paper copies of the relationship summary available upon request will most likely be performed by a general clerk at an estimated cost of $62 per hour. 0.5 hours per adviser × $62 = $31 in monetized costs per adviser. $31 per adviser × 8,235 advisers with relationship summary obligations = $255,285 total aggregate monetized cost.

[1340] This average is based on advisers' responses to Item 5 of Part 1A of Form ADV as of December 31, 2018.

[1341] In the Proposing Release, we determined this estimate based on IARD system data. *See* Proposing Release, *supra* footnote 5 at section V.C.c. The number of retail clients reported by RIAs changed by 6.7% between December 2015 and 2016, and by 2.3% between December 2016 and 2017. (6.7% + 2.3%)/2 = 4.5% average annual rate of change over the past two years. We did not receive comments on this estimate.

relationship summary,[1342] or 3.6 annual hours per adviser.[1343] Therefore, we estimate that the aggregate annual hour burden for initial delivery of the relationship summary to new clients will be 29,646 hours,[1344] at a monetized cost of $1,838,052, or $223 per adviser.[1345]

As in the Proposing Release, we continue to estimate that investment advisers will not incur external costs to deliver the relationship summary to new or prospective clients because they will make the delivery along with other documentation normally provided in such circumstances, such as Form ADV Part 2, or will deliver the relationship summary electronically. We did not receive comments regarding the burdens for delivering the relationship summary to prospective clients that eventually become clients.

d. Total New Initial and Annual Burdens

All together, we estimate the total collection of information burden for new rule 204–5 to be 983,945 annual aggregate hours per year,[1346] or 120 hours per respondent,[1347] for a total annual aggregate monetized cost of $61,003,406,[1348] or $7,408[1349] per adviser.

D. Form CRS and Rule 17a–14 under the Exchange Act

New rule 17a–14 under the Exchange Act [17 CFR 240.17a–14] and Form CRS [17 CFR 249.640] will require a broker-dealer that offers services to retail investors to prepare and file with the Commission, post to the broker-dealer's website (if it has one), and deliver to retail investors a relationship summary, as discussed in greater detail in Section II above. Broker-dealers will deliver the relationship summary to both existing customers and new or prospective customers who are retail investors. In a change from the proposal, broker-dealers will file the relationship summary through Web CRD® instead of EDGAR. We are also requiring that all relationship summaries be filed with machine-readable headings, in a change from the proposal, as well as in a text-searchable format as proposed.

New rule 17a–14 under the Exchange Act [17 CFR 240.17a–14] and Form CRS [17 CFR 249.640] contain a collection of information requirement. We will use the information to manage our regulatory and examination programs. Clients can use the information required in the relationship summary to determine whether to hire or retain a broker-dealer, as well as what types of accounts and services are appropriate for their needs. The collection of information is necessary to provide broker-dealer customers, prospective customers, and the Commission with information about the broker-dealer and its business, conflicts of interest and personnel. This collection of information will be found at 17 CFR 249.640 and will be mandatory. Responses will not be kept confidential.

As discussed in Sections I and II of this release, we received comments that addressed whether the relationship summary is necessary for broker-dealers, and whether we could further minimize the burden of the proposed collections of information. One commenter specifically addressed the accuracy of our burden estimates for the proposed collections of information, suggesting that our estimates were too low because compliance professionals estimated it would take 80–500 hours to prepare, deliver, and file the relationship summary, depending on the firm's size and business model.[1350] Others commented more broadly that the implementation costs of the relationship summary would be higher than we estimated in the Proposing Release.[1351] We have considered these comments and are increasing our PRA burden estimates from 15 hours to 40 hours for broker-dealers to prepare and file the relationship summary. We also modified several substantive requirements to mitigate some of these estimated increased costs relative to the proposal.

1. Respondents: Broker-Dealers

The respondents to this information collection will be the broker-dealers registered with the Commission that will be required to prepare, file, and deliver a relationship summary in accordance with new rule 17a–14 under the Exchange Act [17 CFR 240.17a–14]. As of December 31, 2018, there were 2,766 broker-dealers registered with the Commission that reported sales to retail customer investors,[1352] and therefore likely will be required to prepare and deliver the relationship summary.[1353] We also note that these include 318 broker-dealers that are dually registered as investment advisers.[1354] We did not receive comments related to the methodology used for estimating the number of broker-dealers that will be subject to these requirements. We are maintaining the methodology we used in the Proposing Release and are updating our estimates to reflect the

[1342] This is the same as the estimate for the burden to deliver the brochure required by Form ADV Part 2. *See* Brochure Adopting Release, *supra* footnote 576.

[1343] 3,985 clients per adviser with retail clients × 4.5% = 179 new clients per adviser. 179 new clients per adviser × 0.02 hours per delivery = 3.6 hours per adviser for delivery of a relationship summary to new or prospective new clients.

[1344] 3.6 hours per adviser for delivery obligation to new or prospective clients × 8,235 advisers = 29,646 hours.

[1345] Based on data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, we expect that delivery requirements of rule 204–5 will most likely be performed by a general clerk at an estimated cost of $62 per hour. 29,646 hours × $62 = $1,838,052. We estimate that advisers will not incur any incremental postage costs to deliver the relationship summary to new or prospective clients because we estimate that advisers will make the delivery along with other documentation normally provided in such circumstances, such as Form ADV Part 2. $1,838,052/8,235 investment advisers = $223 per adviser.

[1346] 4,072 annual hours for posting initial relationship summaries to adviser websites + 236,204 annual hours for initial delivery to existing clients + 142,256 hours for delivery to existing clients based on material changes to accounts or scope of relationship + 6,487 annual hours to post amended relationship summary to website + 561,162 hours for delivery to existing clients to communicate updated information in amended relationship summaries + 29,646 hours for delivery to new or prospective clients + 4,118 hours to make paper copies of the relationship summary available upon demand = 983,945 annual total hours for investment advisers to post and deliver the relationship summary under proposed rule 204–5.

[1347] 983,945 hours (initial and other deliveries)/ 8,235 advisers = 120 hours per adviser.

[1348] $252,469 for posting initial relationship summaries to adviser websites + $14,643,477 for initial delivery to existing clients + $8,819,872 for delivery to existing clients based on material changes to accounts or scope of relationship + $402,207 to post amended relationship summary to website + $34,792,044 for delivery to existing clients to communicate updated information in amended relationship summaries + $1,838,052 for delivery to new or prospective clients + $255,285 for making paper copies of the relationship summary available upon demand = $61,003,406 in total annual aggregate monetized cost for investment advisers to post and deliver the relationship summary under proposed rule 204–5.

[1349] $61,003,406/8,235 advisers = $7,408 per adviser.

[1350] *See* NSCP Letter.

[1351] Some commenters argued that the cost to implement Form CRS and Regulation Best Interest would be high. *See, e.g.,* Raymond James Letter; CCMC Letter (investor polling results); SIFMA Letter.

[1352] *See supra* footnote 867 and accompanying text. Retail sales activity is identified from Form BR (*see supra* footnote 861, which categorizes retail activity broadly (by marking the "sales" box) or narrowly (by marking the "retail" or "institutional" boxes as types of sales activity). We use the broad definition of sales as we believe that many firms will just mark "sales" if they have both retail and institutional activity. However, this may capture some broker-dealers that do not have retail activity, although we are unable to estimate that frequency.

[1353] For purposes of Form CRS, a "retail investor" will be defined as: a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes.

[1354] *See supra* footnote 863 and accompanying text.

number of broker-dealers since the last burden estimate.

Some of the burden for dual registrants to prepare and deliver the relationship summary and post it to a website is already accounted for in the estimated burdens for investment advisers under the amendments to Form ADV and new rule 204–5, discussed in Sections V.A.2.a and V. C.2 above. However, dually registered broker-dealers will incur burdens related to their business as an investment adviser that standalone broker-dealers will not incur, such as the requirement to file the relationship summary using both IARD and Web CRD®, and to deliver to both investment advisory clients and brokerage customers, to the extent those groups of retail investors do not overlap. In addition, dual registrants may provide different services, charge different fees, and have different conflicts on the advisory and broker-dealer sides such that the burden of preparing the relationship summary on the broker-dealer side may not be substantially reflected in the burden for preparing the relationship summary on the advisory side. Therefore, although treating dually registered broker-dealers in this way may be over-inclusive, we base our burden estimates for rule 17a–14 and the relationship summary on 2,766 broker-dealers with relationship summary obligations, including those dually registered as broker-dealers.[1355]

2. Initial and Annual Burdens

a. Initial Preparation, Filing, and Posting of Relationship Summary

As discussed above in Section II, firms will be required to prepare and file a relationship summary summarizing specific aspects of their brokerage services that they offer to retail investors. Unlike investment advisers, which already prepare Form ADV Part 2A brochures and have information readily available to prepare the relationship summary, broker-dealers will be required for the first time to prepare a disclosure that contains all the information required by the relationship summary.

In the Proposing Release, we estimated that the initial first year burden for preparing and filing the relationship summary for broker-dealers would be 15 hours per registered broker-dealer and an additional 0.5 hours to prepare the relationship summary for posting on its website, if it has one. Several commenters said that our estimated burdens were too low.[1356] One commenter specifically argued that preparing, delivering, and filing the relationship summary would take from 80 to 500 hours, based on input from compliance professionals, and noted there would be additional costs that are hard to quantify, including human relations and information technology programming.[1357] Commenters also said the relationship summary would result in additional compliance burdens, including training.[1358]

We are revising our estimate of the time that it would take each broker-dealer to prepare and file the relationship summary in the first year from 15 to 40 hours in light of these comments and the changes we are making to the proposed relationship summary. For example, in the Proposing Release, we estimated that it would take firms a shorter amount of time to prepare the relationship summary than a more narrative disclosure due to the standardized nature and prescribed language of the relationship summary. As discussed above, the final instructions require less prescribed wording relative to the proposal and require broker-dealers to draft their own summaries for most of the sections. In addition and in a change from the proposal, we now are requiring that all relationship summaries be filed with machine-readable headings, as well as text-searchable format as proposed. We acknowledge that these changes will increase cost burdens relative to the proposal because broker-dealers have to develop their own wording and design, as well as implement machine-readable headings to comply with these requirements.

The relationship summary will also require more layered disclosures relative to the proposal and will encourage the use of electronic formatting and graphical, text, online features to facilitate access to other disclosures that provide additional detail. Although broker-dealers are currently required to disclose certain information about their services and accounts to their retail investors,[1359] broker-dealers are not currently required to disclose in one place all of the information required by the relationship summary or to file a narrative disclosure document with the Commission comparable to investment advisers' Form ADV Part 2A. Broker-dealers will bear the cost of drafting a new relationship summary and cross-referencing or hyperlinking to additional information. The higher estimated burden estimate also reflects our acknowledgement that it will take firms longer to draft certain disclosures than we estimated in the Proposing Release, such as answers to "conversation starters" that broker-dealers providing services only online without a particular individual with whom a retail investor can discuss these questions must include on their website. We believe these factors and the changes we made to the proposal will increase the burden to prepare a relationship summary relative to the proposal.

We are also changing the filing system for broker-dealers as compared to the proposal. Broker-dealers will file Form CRS through Web CRD® instead of EDGAR as proposed, but we believe that this change will reduce the estimated burden for filing with the Commission, relative to the proposal. Broker-dealers already submit registration filings on Web CRD® so they will not incur additional costs to access the system.[1360]

We are estimating the same hourly burden for standalone broker-dealers and broker-dealers that are dually registered as investment advisers because we are counting dually registered firms in the burden calculation for the Advisers Act rule that requires the relationship summary for investment advisers.[1361] We recognize that the burden for some broker-dealers will exceed our estimate and the burden for others will be less because broker-dealers vary in the size

[1355] The burden estimates for dual registrants to prepare and file the relationship summary is accounted for in the burden estimates for Form ADV and under Exchange Act rule 17a–14. For example, a dual registrant that prepares an initial relationship summary that covers both its advisory business and broker-dealer business has an estimated burden of 60 hours amortized (20 hours to prepare and file relationship summary related to the advisory business + 40 hours to prepare and file relationship summary related to the broker-dealer business).

[1356] *See, e.g.,* NSCP Letter; *see also* CCMC Letter (costs to implement the proposal were underestimated and greater than 40% of firms surveyed anticipate having to spend a moderate or substantial amount to implement Regulation Best Interest and Form CRS); Raymond James Letter (noting the significant implementation costs of Regulation Best Interest and Form CRS for the industry); SIFMA Letter (stating that implementation costs of Regulation Best Interest and Form CRS would be significant).

[1357] *See* NSCP Letter.

[1358] *See* NSCP Letter (stating that a minimum of two hours of firm level training or two hours of training per independent registered representative or adviser will be required prior to Form CRS implementation).

[1359] *See, e.g.,* Exchange Act rule 10b–10 (requiring a broker-dealer effecting transactions in securities to provide written notice to the customer of certain information specific to the transaction at or before completion of the transaction, including the capacity in which the broker-dealer is acting (*i.e.,* agent or principal) and any third-party remuneration it has received or will receive).

[1360] This reduction in the filing burden is offset by the increased burden to prepare the relationship summary, resulting in a higher total burden.

[1361] *See supra* footnote 1220.

and complexity of their business models, but we do not believe that the range could be as high as suggested by some commenters.[1362] Unlike investment advisers, which already prepare Form ADV Part 2A brochures and have information readily available to prepare the relationship summary, broker-dealers will be required for the first time to prepare disclosure that contains all the information required by the relationship summary.

We recognize that the burden on some broker-dealers might be significant, especially in the initial preparation and filing of the relationship summary and thus will require additional burdens than what we estimated in the Proposing Release. Accordingly, we are increasing the estimate from 15 to 40 hours in the first year for a broker-dealer's initial preparation and filing of the relationship summary, which is higher than the estimated burden for investment advisers.[1363] We estimate that the total burden for broker-dealers to prepare and file the relationship summary will be 110,640 hours,[1364] for a monetized value of $30,204,720.[1365] The initial burden will be amortized over three years to arrive at an annual burden for broker-dealers to prepare and file the relationship summary. Therefore, the total annual aggregate hour burden for registered broker-dealers to prepare and file the relationship summary will be 36,880 hours, or 13.33 hours per broker-dealer,[1366] for an annual monetized cost of $10,068,240, or $3,640 per broker-dealer.[1367]

As proposed, broker-dealers will be required to post a current version of their relationship summary prominently on their public website (if they have one). In the Proposing Release, we estimated that each broker-dealer will incur 0.5 hours to prepare the posted relationship summary, such as to ensure proper electronic formatting and to post a current version of the relationship summary on the broker-dealer's website, if it has one. Although we did not receive any comments regarding burdens associated with posting of the relationship summary to a public website, we are increasing our estimate of the time from 0.5 to 1.5 hours based upon the staff's experience.[1368] We believe that the amount of time needed to prepare the relationship summary for posting, including ensuring proper formatting and posting it on the website, will not vary significantly from the time needed by investment advisers. We do not anticipate that broker-dealers will incur additional external costs to post the relationship summary to the broker-dealer's website because broker-dealers without a public website will not be required to establish or maintain one, and broker-dealers with a public website have already incurred external costs to create and maintain their websites. As with investment advisers, we estimate that each broker-dealer will incur 1.5 hours to prepare the relationship summary for posting to its website. We estimate that the initial burden of posting the relationship summary to their websites, if they have one, will be 4,149 hours,[1369] for a monetized value of $257,238.[1370] The initial burden will be amortized over three years to arrive at an annual burden for broker-dealers to post the relationship summary to a public website. Therefore, the total annual aggregate hour burden for broker-dealers to post the relationship summary will be 1,383 hours, or 0.5 hours per broker-dealer,[1371] for an annual monetized cost of $87,746, or $31 per broker-dealer.[1372]

To arrive at an annual burden for preparing, filing, and posting the relationship summary, as for investment advisers, the initial burden will be amortized over a three-year period for broker-dealers. Therefore, the total annual aggregate hour burden for registered broker-dealers to prepare, file, and post a relationship summary to their website, if they have one, will be 38,263 hours, or 13.83 hours per broker-dealer,[1373] for an annual monetized cost of $10,153,986, or $3,671 per broker-dealer.[1374]

b. Estimated External Costs for Initial Preparation of Relationship Summary

Under new rule 17a–14, broker-dealers will be required to prepare and file a relationship summary, as well as post it to their website if they have one. We do not anticipate external costs to broker-dealers in the form of website set-up, maintenance, or licensing fees because they will not be required to establish a website for the sole purpose of posting their relationship summary if they do not already have a website. We do anticipate that most broker-dealers will incur a one-time initial cost for outside legal and consulting fees in connection with the initial preparation of the relationship summary.

We estimated in the Proposing Release that an external service provider would spend 3 hours helping a broker-dealer prepare an initial relationship summary. While we received no specific comments on our estimate regarding external costs in the Proposing Release, one commenter suggested that there would be additional implementation costs such as legal advice, but that these costs are difficult to quantify.[1375] Based on the concerns expressed by this commenter and the changes we are making to the relationship summary, for example, requiring less prescribed wording, we are increasing the estimate relative to the proposal from 3 to 5 hours. While we recognize that different firms may require different amounts of external assistance in preparing the relationship summary, we believe that this is an appropriate average number for estimating an aggregate amount for

[1362] *See* NSCP Letter (estimating that the time required to prepare, deliver, and file Form CRS would be anywhere from 80 to 500 hours).

[1363] *See infra* footnote 1366. Amortizing the 40 hour burden imposed by the relationship summary over a three-year period will result in an average annual burden of 13.33 hours per year for each of the 2,766 broker-dealers with relationship summary obligations.

[1364] 2,766 × 40.0 hours/3 = 36,880 total hours.

[1365] We expect that performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Professional Earnings Report suggest that costs for these positions are $237 and $309 per hour, respectively. (0.5 × 110,640 hours × $237) + (0.5 × 110,640 hours × $309) = $30,204,720.

[1366] 110,640 hours for preparing and filing/3 years = 36,880 total aggregate annual hour burden to prepare and file relationship summary. 36,880 hours/2,766 broker-dealers with retail accounts = 13.33 hours annually per broker-dealer.

[1367] $30,204,720 total initial aggregate monetized cost for preparation and filing/3 = $10,068,240 total annual monetized cost for preparation and filing the relationship summary. $10,068,240/2,766 broker-dealers subject to relationship summary obligations = $3,640 per broker-dealer.

[1368] *See supra* footnote 1302.

[1369] 1.5 hours × 2,766 broker-dealers = 4,149 hours to prepare and post relationship summary to the website.

[1370] Based on data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, we expect that performance of this function will most likely be performed by a general clerk at an estimated cost of $62 per hour. 4,149 hours × $62 = $257,238 total aggregate monetized cost.

[1371] 4,149 hours for posting to website/3 years = 1,383 total aggregate annual burden to prepare and file relationship summary. 1,383 hours/2,766 broker-dealers with retail account = 0.5 hours annually per broker-dealer.

[1372] $257,238 total initial aggregate monetized cost for posting to website/3 = $85,746 total annual monetized cost for posting the relationship summary. $87,746/2,766 broker-dealers with retail accounts = $31 per broker-dealer.

[1373] 110,640 hours for preparing and filing + 4,149 hours for posting = 114,789 hours. 114,789/3 years = 38,263 total aggregate annual hour burden to prepare and file relationship summary. 38,263 hours/2,766 broker-dealers with retail accounts = 13.83 hours annually per broker-dealer.

[1374] $30,204,720 total initial aggregate monetized cost for preparation and filing + $257,238 for posting to the website/3 = $10,153,986 total annual monetized cost for preparation, filing and posting the relationship summary. $10,153,968/2,766 broker-dealers subject to relationship summary obligations = $3,671 per broker-dealer.

[1375] *See* NSCP Letter.

the industry purposes of the PRA analysis, particularly given our experience with the burdens for Form ADV.[1376]

Although broker-dealers that will be subject to the relationship summary requirement may vary widely in terms of the size, complexity, and nature of their business, we believe that the strict page limits will make it unlikely that the amount of time, and thus cost, required for outside legal and compliance review will vary substantially among those broker-dealers who elect to obtain outside assistance.

Most of the information required in the relationship summary is readily available to broker-dealers because the information required pertains largely to the broker-dealer's own business practices, and thus the information is likely more readily available to the broker-dealer than to an external legal or compliance consultant. However, because broker-dealers are drafting a narrative disclosure for the first time, we anticipate that 50% of broker-dealers will seek the help of outside legal services and 50% of broker-dealers will seek the help of compliance consulting services in connection with the initial preparation of the relationship summary. We estimate that the initial per broker-dealer cost for legal services related to the preparation of the relationship summary will be $2,485.[1377] We estimate that the initial per broker-dealer cost for compliance consulting services related to the preparation of the relationship summary will be $3,705.[1378] Accordingly, we estimate that 1,383 broker-dealers will use outside legal services, for a total initial aggregate cost burden of $3,436,755,[1379] and 1,383 broker-dealers will use outside compliance consulting services, for a total initial aggregate cost burden of $5,124,015,[1380] resulting in a total initial aggregate cost burden among all respondents of $8,560,770, or $3,095 per broker-dealer, for outside legal and compliance consulting fees related to preparation of the relationship summary.[1381] Annually, this represents $2,853,590, or $1,032 per broker-dealer, when amortized over a three-year period.[1382]

c. Amendments to the Relationship Summary and Filing and Posting of Amendments

As with our estimates above for investment advisers, we do not expect broker-dealers to amend their relationship summaries frequently. In the Proposing Release, we estimated that broker-dealers required to prepare and file a relationship summary would require 0.5 hours to amend and file the updated relationship summary, and 0.5 hours to post it to their website. We did not receive comments regarding hour burdens associated with preparing and filing amendments to the relationship summary. As discussed in section II.C.4 above, in a change from the proposal, we are adding a requirement that broker-dealers delivering updated relationship summaries to customers also highlight the most recent changes by, for example, marking the revised text or including a summary of material changes. To account for this change, we are increasing the annual burden to 1 hour per year for preparing and filing amendments to the relationship summary. We are not changing the proposed 0.5 hours estimate to post the amendments to a public website.

Based on staff experience, we believe that many broker-dealers will update their relationship summary at a minimum once a year, after conducting an annual supervisory review, for example.[1383] We also estimate that on average, each broker-dealer preparing a relationship summary may amend the disclosure once more during the year, due to emerging issues. Therefore, we estimate that broker-dealers will update their relationship summary, on average, twice a year. Thus, we estimate that broker-dealers will incur a total annual aggregate hourly burden of 5,532 hours per year to prepare and file amendments per year, and 2,766 hours per year to post to their websites an estimated total of 5,532 amendments per year.[1384] We therefore estimate that for making and filing amendments to their relationship summaries, broker-dealers will incur an annual aggregate monetized cost of $1,510,236, or approximately $546 per broker-dealer to prepare and file amendments,[1385] and an annual aggregate monetized cost of $171,492, or approximately $62 per broker-dealer to post the amendments.[1386] In total, the aggregate annual monetized cost for broker-dealers to make, file, and post amendments will be $1,681,728, or approximately $608 per broker dealer.[1387]

We do not expect ongoing external legal or compliance consulting costs for the relationship summary.[1388] Although broker-dealers will be required to amend the relationship summary within 30 days whenever any information becomes materially inaccurate, we expect that the amendments will require relatively minimal wording changes, given the relationship summary's page limitation and summary nature. We believe that broker-dealers will be more knowledgeable about the information to include in the amendments than outside legal or compliance consultants and will be able to make these revisions in-house. Therefore, we do not expect that broker-dealers will need to incur ongoing external costs for the

[1376] *See supra* footnote 1221.

[1377] External legal fees are in addition to the projected hour per broker-dealer burden discussed above. Data from the SIFMA Management and Professional Earnings Report suggest that outside legal services cost approximately $497 per hour. $497 per hour for legal services × 5 hours per broker-dealer = $2,485. The hourly cost estimate of $497 is adjusted for inflation and based on our consultation with broker-dealers and law firms who regularly assist them in compliance matters.

[1378] External compliance consulting fees are in addition to the projected hour per broker-dealer burden discussed above. Data from the SIFMA Management and Professional Earnings Report suggest that outside management consulting services cost approximately $741 per hour. $741 per hour for outside consulting services × 5 hours per broker-dealer = $3,705.

[1379] 50% × 2,766 SEC registered broker-dealers = 1,383 broker-dealers. $2,485 for legal services × 1,383 broker-dealers = $3,436,755.

[1380] 50% × 2,766 SEC registered broker-dealers = 1,383 broker-dealers. $3,705 for compliance consulting services × 1,383 broker-dealers = $5,124,015.

[1381] $3,436,755 + $5,124,015 = $8,560,770. $8,560,770/2,766 broker-dealers = $3,095 per broker-dealer.

[1382] $8,560,770 initial aggregate monetized cost/3 years = $2,853,590 annually. $3,095 initial monetized cost per broker-dealer/3 years = $1,032.

[1383] FINRA rules set an annual supervisory review as a minimum threshold for broker-dealers, for example in FINRA Rules 3110 (requiring an annual review of the businesses in which the broker-dealer engages), 3120 (requiring an annual report detailing a broker-dealer's system of supervisory controls, including compliance efforts in the areas of antifraud and sales practices); and 3130 (requiring each broker-dealer's CEO or equivalent officer to certify annually to the reasonable design of the policies and procedures for compliance with relevant regulatory requirements).

[1384] 2,766 broker-dealers amending relationship summaries × 2 amendments per year = 5,532 amendments per year. 5,532 amendments × 1 hour to amend and file = 5,532 hours. 2,766 broker-dealers × (0.5 hours to post amendments to website × 2 amendments a year) = 2,766 hours.

[1385] 5,532 total aggregate initial hour burden for amending relationship summaries. We believe that performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Professional Earnings Report suggest that costs for these positions are $237 and $309 per hour, respectively. (5,532 hours × 50% × $237 + 5,532 hours × 50% × $309 = $1,510,236. $1,510,236/2,677 investment advisers = $546 per investment broker-dealer.

[1386] Based on data from the SIFMA Office Salaries Report, we expect that the posting will most likely be performed by a general clerk at an estimated cost of $62 per hour. 2,766 aggregate hours to post amendment × $62 = $171,492. $171,492/2,766 broker-dealers = $62 in annual monetized costs.

[1387] $1,510,236 to prepare and file amendment + $171,492 to post the amendments = $1,681,728. $1,681,728/2,766 = $608.

[1388] *But see* NNCP Letter.

preparation and review of relationship summary amendments.

d. Delivery of the Relationship Summary

Rule 17a–14 under the Exchange Act will require a broker-dealer to deliver the relationship summary, with respect to a retail investor that is a new or prospective customer, before or at the earliest of: (i) A recommendation of an account type, a securities transaction or an investment strategy involving securities; (ii) placing an order for the retail investor; or (iii) the opening of a brokerage account for the retail investor. Broker-dealers also will make a one-time, initial delivery of the relationship summary to all existing customers within a specified time period after the effective date of the rule. Also with respect to existing customers, broker-dealers will deliver the most recent relationship summary before or at the time of (i) opening a new account that is different from the retail investor's existing account(s); or (ii) recommending that the retail investor roll over assets from a retirement account into a new or existing account or investment; or (iii) recommending or providing a new brokerage or investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in the existing account.

As discussed above in Section II.C.3.a, broker-dealers will be required to post a current version of the relationship summary prominently on their public websites (if they have one), and will be required to communicate any changes in an amended relationship summary to retail investors who are existing clients or customers within 60 days, instead of 30 days as proposed, after the amendments are required to be made and without charge.[1389] Broker-dealers also must deliver a current relationship summary to each retail investor within 30 days upon request. In a change from the proposal, a broker-dealer must make available a copy of the relationship summary upon request without charge, and where a relationship summary is delivered in paper format, the broker-dealer may link to additional information by including URL addresses, QR codes, or other means of facilitating access to such information.[1390] The broker-dealer must also include a telephone number where retail investors can request up-to-date information and request a copy of the relationship summary.[1391]

As discussed further below, we received comments that our estimated burdens for delivery of the relationship summary were too low.[1392] Some of these comments were focused on the delivery burdens related to the requirement to deliver a relationship summary to existing retail investors when changes are made to the existing account that would "materially change" the nature and scope of the relationship.[1393] Other comments focused on the recordkeeping burdens related to the requirement to deliver the relationship summary to a new or prospective retail investor.[1394] As discussed further below, we made changes to the proposal to require more specific triggers for initial delivery and additional delivery to existing customers in order to replace the requirements in response to comments. We discuss below the specific separate delivery requirements and modifications.

(1) One-Time Initial Delivery to Existing Customers

We estimate the burden for broker-dealers to make a one-time initial delivery of the relationship summary to existing customers based on an estimate of the number of accounts held by these broker-dealers. Based on FOCUS data, we estimate that the 2,766 broker-dealers that report retail activity have approximately 139 million customer accounts, and that approximately 73.5%, or 102.165 million, of those accounts belong to retail customers.[1395] We estimate that, under the adopted rule, broker-dealers will send their relationship summary along with other required disclosures, such as periodic account statements, in order to comply with initial delivery requirements for the relationship summary.

As with investment advisers, we estimate that a broker-dealer will require no more than 0.02 hours to deliver the relationship summary to each existing retail investor under rule 17a–14. We did not receive comments on the burdens specific to delivering the relationship summary to existing clients. We will therefore estimate broker-dealers to incur an aggregate initial burden of 2,043,300 hours, or approximately 739 hours per broker-dealer for the first year after the rule is in effect.[1396] We expect the aggregate monetized cost for broker-dealers to make a one-time initial delivery of relationship summaries to existing customers to be $126,684,600.[1397] Amortized over three years, the total annual hourly burden is estimated to be 681,100 hours, or approximately 246 hours per broker-dealer,[1398] with annual monetized costs of $42,228,200 and $15,267, respectively.[1399] We do not expect that broker-dealers will incur external costs for the initial delivery of the relationship summary to existing clients because we estimate that they will make such deliveries along with another required delivery, such as periodic account statements.

(2) Additional Delivery to Existing Customers

As discussed in Section II.C.3.c above, broker-dealers will be required to deliver the relationship summary to existing customers when opening a new account that is different from the retail investor's existing account(s), as proposed. In addition, in a change from the proposal, delivery will be required before or at the time the broker-dealer (i)

[1389] The communication can be made by delivering the relationship summary or by communicating the information through another disclosure that is delivered to the retail investor.

[1390] Additionally, we are adopting the instruction that if a relationship summary is delivered in paper format as part of a package of documents, the firm must ensure that the relationship summary is the first among any documents that are delivered at that time, substantially as proposed. *See supra footnotes* 678–679.

[1391] This differs from the proposal, which required only firms that do not have a public website to include a toll-free number that retail investors may call to request documents. *See supra* footnote 609.

[1392] *See, e.g.,* SIFMA Letter.

[1393] *See, e.g.,* Cambridge Letter; SIFMA Letter; LPL Financial Letter.

[1394] *See infra* footnote 1427.

[1395] *See supra* footnotes 857–865 and accompanying text. 2,766 broker-dealers (including dually registered firms) report 139 million customer accounts. Approximately 73.5% of registered broker-dealers report retail customer activity; *see supra* footnote 861. Therefore, 73.5% × 139 million accounts = 102.165 million accounts. This number likely overstates the number of deliveries to be made due to the double-counting of deliveries to be made by dual registrants to a certain extent, and the fact that one customer may own more than one account.

[1396] (0.02 hours per customer account × 102.165 million customer accounts) = 2,043,300 hours. The burden for preparing updated relationship summaries is already incorporated into the burden estimate for Form CRS discussed above. 2,043,300 hours/2,766 broker-dealers = approximately 739 hours per broker-dealer.

[1397] Based on data from SIFMA's Office Salaries Report, we expect that initial delivery requirement to existing clients of rule 17a–14 will most likely be performed by a general clerk at an estimated cost of $62 per hour. 2,043,300 hours × $62 = $126,684,600. We estimate that broker-dealers will not incur any incremental postage costs because we estimate that they will make such deliveries with another mailing the broker-dealer was already delivering to clients, such as periodic account statements.

[1398] 2,043,300 initial aggregate hours/3 = 681,100 total annual aggregate hours. 739 initial hours per broker-dealer/3 = 246 total annual hours per broker-dealer.

[1399] $126,684,600 initial aggregate monetized cost/3 = $42,228,200 annual aggregate monetized cost. $42,228,200/2,766 broker-dealers = $15,267 annual monetized cost per broker-dealer.

recommends that the retail investor roll over assets from a retirement account into a new or existing account or investment, or (ii) recommends or provides a new brokerage or investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in the existing account. We are adopting these two triggers instead of the proposed requirement to deliver the relationship summary before or at the time changes are made to the existing account that would "materially change" the nature and scope of the relationship to address commenters' requests for additional guidance or examples of what would constitute a "material change." [1400] Commenters also described administrative and operational burdens arising from this requirement and argued that our estimated burdens were too low.[1401] One commenter asserted that firms would be required to build entirely new operational and supervisory processes to identify asset movements that could trigger a delivery requirement.[1402] Another noted the challenges of designing a system that distinguishes non-ordinary course events from routine account changes.[1403]

As discussed above, we replaced the "materially change" requirement with more specific triggers to be clearer about when a relationship summary must be delivered.[1404] While these specific triggers will still impose operational and supervisory burdens on broker-dealers, we believe that they are more easily identified and monitored, such that firms will not incur significant burdens as described by commenters to implement entirely new supervisory, administrative, and operational processes needed to monitor events that cause a material change. However, recognizing that some additional processes will be necessary to implement these delivery triggers, we are increasing our burden estimate from 0.02 to 0.04 hours. We now estimate that each broker-dealer will incur 149 hours per year to deliver the relationship summary in these types of situations, and that delivery under these circumstances will take place among 10% of broker-dealer's retail investors annually. We will therefore estimate broker-dealers to incur a total annual aggregate burden of 408,660 hours, or 148 hours per broker-dealer,[1405] at an annual aggregate monetized cost of $25,336,920, or approximately $9,160 per broker-dealer.[1406]

(3) Communicating Changes to Amended Relationship Summaries, Including by Delivery

As discussed above, broker-dealers will be required to amend their relationship summaries within 30 days when any of the information becomes materially inaccurate. They must also communicate any changes in any new version of the relationship summary to retail investors who are existing customers within 60 days, instead of 30 days as proposed, after the updates are required to be made and without charge. We do not expect this change to increase the PRA estimates.[1407] The communication can be made by delivering the relationship summary or by communicating the information through another disclosure to the retail investor. This requirement is a change from the proposed requirement but is substantively similar, and commenters did not comment on the estimated burden.[1408] We have determined not to change the burden relative to the proposal.

Consistent with our discussion on broker-dealers' amendments to the relationship summary we are assuming that the broker-dealers with relationship summaries will amend them twice each year. We also estimate that 50% will choose to deliver the relationship summary to communicate the updated information. We did not receive comments on this estimate. As with investment advisers, we believe that it is likely that the other 50% of broker-dealers will incorporate all of the updated information in other disclosures, which they are already obligated to deliver in order to avoid having to deliver two documents. We estimate that broker-dealers will require 0.02 hours to make a delivery to each customer.[1409] Therefore, the estimated burden for those broker-dealers choosing to deliver an amended relationship summary to meet this communication requirement will be approximately 2,043,300 hours, or 739 hours per broker-dealer,[1410] translating into a monetized cost of $126,684,600 in aggregate, or $45,801 per broker-dealer.[1411]

In a change from the proposal, we are also adopting two requirements not included in the proposal. First, all firms will be required to make available a copy of the relationship summary upon request without charge. Second, in a relationship summary that is delivered in paper format, firms may link to additional information by including URL addresses, QR codes, or other means of facilitating access to such information. We believe that these new requirements will increase the burden relative to the proposal for some broker-dealers that do not currently fulfill these types of disclosure requests, including, for example, additional costs associated with tracking customer delivery

[1400] *See supra* footnotes 758–763 and accompanying text.

[1401] *See, e.g.*, LPL Financial Letter (stating that proposed re-delivery triggering events would not be easily identifiable and would present operational challenges and compliance costs).

[1402] *See* SIFMA Letter.

[1403] *See* LPL Financial Letter.

[1404] *See supra* footnote 761 and accompanying text.

[1405] 10% of 102.165 million customers × 0.04 hours = 408,660 hours. 408,660 hours/2,766 broker-dealers = 148 hours per broker-dealer.

[1406] Based on data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, we expect that delivery requirements of rule 17a–14 will most likely be performed by a general clerk at an estimated cost of $62 per hour. 408,660 hours × $62 = $25,336,920. $25,336,920/2,766 broker-dealers = $9,160 per broker-dealer. We estimate that broker-dealers will not incur any incremental postage costs in these deliveries of the relationship summary to existing customers, because we estimate that broker-dealers will make such deliveries with another mailing the broker-dealer was already delivering to clients, such as periodic account statements, or new account agreements and other similar documentation.

[1407] As discussed in Section V.D.2.c., we have increased the burden estimates for preparing amendments to the relationship summary, acknowledging, among other things, that firms will incur additional burdens to prepare and file amendments as a result of the instructions that firms preparing amendments highlight the most recent changes, and that additional disclosure showing the revised text be attached as an exhibit to the unmarked relationship summary.

[1408] The proposed instructions would have required firms to communicate updated information by delivering the amended relationship summary or by communicating the information another way. The revised instruction will eliminate the wording "another way" and will clarify that the communication can be made through another disclosure that is delivered to the retail investor. *See supra* footnotes 775–778 and accompanying text.

[1409] For the other 50% of broker-dealers that may choose to communicate updated information in another disclosure, we estimate no added burden because these broker-dealers are communicating the information in other disclosures they are already delivering.

[1410] 2 amendments per year × 102.165 million customer accounts × 50% delivering the amended relationship summary to communicate updated information × 0.02 hours per delivery = 2,043,300 hours to deliver amended relationship summaries. 2,043,300 hours/2,766 broker-dealers = 739 hours per broker-dealer.

[1411] Based on data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, we expect that delivery requirements of rule 17a–14 will most likely be performed by a general clerk at an estimated cost of $62 per hour. 2,043,300 hours × $62 = $126,684,600. $126,684,600/2,766 broker-dealers = $45,801 per broker-dealer. We estimate that broker-dealers will not incur any incremental postage costs to deliver these relationship summaries, because we estimate that advisers will make the delivery along with other documentation they normally would provide, such as account opening documents.

preferences related to making copies of the relationship summary available upon request, and printing and mailing costs for copies delivered in paper. We estimate that the 2,766 broker-dealers with relationship summary obligations, on average, will require 0.5 hours each annually to comply with this requirement. Therefore, we estimate that the 2,766 broker-dealers with relationship summary obligations will incur a total of 1,383 aggregate burden hours to make copies of the relationship summary available upon request,[1412] with a monetized cost per adviser of $31, or $85,746 in aggregate monetized cost.[1413] We acknowledge that the burden may be more or less than 0.5 hours for some broker-dealers, but we believe that, on average, 0.5 hours is an appropriate estimate for calculating an aggregate burden for the industry for this collection of information.

We do not expect broker-dealers to incur external costs in delivering amended relationship summaries or communicating the information in another way because we estimate that they will make these deliveries with, or as part of other disclosures required to be delivered. We did not receive comments on this assumption in the proposal.

e. Delivery to New Customers or Prospective New Customers

To estimate the delivery burden for broker-dealers' new or prospective new customers, as discussed above, we estimate that the 2,766 standalone broker-dealers with retail activity have approximately 102.165 million retail customer accounts.[1414] We did not receive comments on the burdens specific to delivering the relationship summary to new and prospective retail investors under rule 17a–14. Based on FOCUS data over the past five years, we estimate that broker-dealers grow their customer base and enter into new agreements with, on average, 11% more new retail investors each year.[1415] We estimate the hour burden for initial delivery of a relationship summary will be the same by paper or electronic format, at 0.02 hours for each relationship summary, as we have estimated above. Therefore, the aggregate annual hour burden for initial delivery of the relationship summary by broker-dealers to new or prospective new customers will be 224,763 hours, or 81.3 hours per broker-dealer,[1416] at a monetized cost of $13,935,306 at an aggregate level, or $5,038 per broker-dealer.[1417]

f. Total New Initial and Annual Burdens

As discussed above, we estimate the total annual collection of information burden for new rule 17a–14 in connection with obligations relating to the relationship summary, including (i) initial preparation, filing, and posting to a website; (ii) amendments to the relationship summary for material updates and related filing and website posting burdens; (iii) one-time initial delivery to existing customers; (iv) additional delivery to existing customers; (v) delivery of amended relationship summaries; (vi) delivery to new and prospective customers; and (vii) making copies available upon request. Given these requirements, we estimate the total annual aggregate hourly burden to be approximately 3,408,533 hours per year, or 1,232 hours on a per broker-dealer basis.[1418] This translates into an aggregate annual monetized cost of $219,110,726, or $79,216 per broker-dealer per year.[1419] In addition, we estimate that broker-dealers will incur external legal and compliance costs in the initial preparation of the relationship summary of approximately $8,560,770 in aggregate, or $3,095 per broker-dealer, translating into $2,853,590 annually, or $1,032 per broker-dealer, when amortized over a three year period.[1420]

E. Recordkeeping Obligations Under Exchange Act Rule 17a–3 [1421]

The final requirement to make a record indicating the date that a relationship summary was provided to each retail investor, including any relationship summary provided before such retail investor opens an account, will contain a collection of information that will be found at 17 CFR 240.17a–3(a)(24) and will be mandatory. The Commission staff will use this collection of information in its examination and oversight program, and the information generally is kept confidential.[1422] The likely respondents to this collection of information requirement are the approximately 2,766 broker-dealers currently registered with the Commission that offer services to retail investors, as defined above.[1423]

Exchange Act section 17(a)(1) requires registered broker-dealers to make and keep for prescribed periods such records as the Commission deems "necessary or appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of" the Exchange Act." [1424] Exchange Act rules 17a–3 and 17a–4 specify minimum requirements with respect to the records

[1412] 0.5 hours to make paper copies of the relationship summary available upon request × 2,677 broker-dealers with relationship summary obligations = 1,383 hours.

[1413] Based on data from the SIFMA Office Salaries Report, we expect that the requirement for broker-dealers to make paper copies of the relationship summary available upon request will most likely be performed by a general clerk at an estimated cost of $62 per hour. 0.5 hours per broker-dealer × $62 = $31 in monetized costs per broker-dealer. $31 per broker-dealer × 2,766 broker-dealers with relationship summary obligations = $85,746 total aggregate monetized cost.

[1414] *See supra* footnotes 857–865 and accompanying text.

[1415] This represents the average annual rate of growth from 2014–2018 in the number of accounts for all broker-dealers reporting retail activity.

[1416] 102.165 million customer accounts × 11% increase = 11,238,150 new customers. 11,238,150 new customers × 0.02 hours per delivery = 224,763 total annual aggregate hours. 224,763/2,766 broker-dealers = 81.3 hours per broker-dealer for delivery to new customers.

[1417] Based on data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, we expect that these functions will most likely be performed by a general clerk at an estimated cost of $62 per hour. 224,763 hours × $62 = $13,935,306. $13,935,306/2,766 broker-dealers = $5,038 per broker-dealer for delivery to new customers. We estimate that broker-dealers will not incur any incremental postage costs to deliver the relationship summary to new or prospective clients because we estimate that broker-dealers will make the delivery along with other documentation, such as periodic account statements.

[1418] 36,880 hours per year for initial preparation and filing of relationship summary + 4,149 hours for posting to website + 8,298 hours per year for amendments, filing, and posting of amendments + 681,100 hours for one-time initial delivery to existing customers + 408,660 hours for delivery to existing customers making material changes to their accounts + 2,043,300 hours for delivery of amendments + 224,763 hours for delivery to new customers + 1,383 hours to make paper copies available upon demand = 3,408,533 total annual aggregate hours. 3,408,533 hours/2,766 broker-dealers = 1,232 hours per broker-dealer.

[1419] $10,068,240 per year for initial preparation, filing, and posting of relationship summary + $257,238 per year for posting to website + $514,476 per year for amendments, filing, and posting of amendments + $42,228,200 for one-time initial delivery to existing customers (amortized over three years) + $25,336,920 for delivery to existing customers making material changes to their accounts + $126,684,600 for delivery of amendments + $13,935,306 for delivery to new customers + $85,746 per year to make paper copies of the relationship summary available upon demand = $219,110,726 in total annual aggregate monetized cost. $219,110,726/2,766 broker-dealers = $79,216 per broker-dealer.

[1420] $3,436,755 total external legal costs + $5,124,015 total external compliance cost = $8,560,770 total external legal and compliance costs. $8,560,770 total external legal and compliance costs/2,766 broker-dealers = $3,095 per broker-dealer. $8,560,770 total external legal and compliance costs/3 = $2,853,590 annually. $3,095/3 = $1,032 per year.

[1421] In a concurrent release, we are adopting additional burden adjustments to Exchange Act rules 17a–3 and 17a–4. *See* Regulation Best Interest Release, *supra* footnote 47.

[1422] *See* section 24(b) of the Exchange Act.

[1423] *See supra* footnotes 857–865 and accompanying text.

[1424] *See* section 17(a) of the Exchange Act.

that broker-dealers must make, and how long those records and other documents must be maintained, respectively.

The amendments to Exchange Act rule 17a–3 will require SEC-registered broker-dealers to make a record indicating the date that a relationship summary was provided to each retail investor and to each prospective retail investor who subsequently becomes a retail investor. We are adopting these amendments as proposed. In the Proposing Release, we estimated that the adoption of new paragraph (a)(24) of rule 17a–3 would result in an incremental burden increase of 0.1 hours annually for each of the estimated 2,766 SEC-registered broker-dealers that will be required to record the dates that the initial relationship summary and each new version thereof, is provided to an existing or prospective retail investor.[1425]

As discussed above in Section II.E, several commenters suggested that our estimated burdens for the relationship summary recordkeeping obligations were too low.[1426] Some commenters argued that keeping records of when a relationship summary was given to prospective retail clients would be unnecessarily burdensome or not feasible, and was not adequately considered in the Commission's burden estimates.[1427] One of these commenters said that it would be difficult for firms to integrate pre-relationship delivery dates into their operational systems and procedures, and that there is no way to track when a disclosure is accessed on a website.[1428]

After consideration of comments, and because broker-dealers do not currently maintain similar records like the relationship summary, we are revising our estimate of the time that it would take each broker-dealer to create the records required by new paragraph (a)(24) of rule 17a–3 as adopted from 0.1 hours to 0.5 hours. The incremental hour burden for broker-dealers to create the records required by new paragraph (a)(24) of rule 17a–3 as adopted will therefore be 1,383 hours,[1429] for a monetized cost of $87,627 in aggregate, or $32 per broker-dealer.[1430] We also do not expect that broker-dealers will incur external costs for the requirement to make records because we believe that broker-dealers will make such records in a manner similar to their current recordkeeping practices, including those that apply to communications and correspondence with retail investors.

F. Record Retention Obligations Under Exchange Act Rule 17a–4

Exchange Act section 17(a)(1) requires registered broker-dealers to make and keep for prescribed periods such records as the Commission deems "necessary or appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of" the Exchange Act."[1431] Exchange Act rule 17a–4 specifies minimum requirements with respect to how long records created under Exchange Act rule 17a–3 and other documents must be kept. We are adopting amendments to rule 17a–4 as proposed that will require broker-dealers to retain copies of each version of the relationship summary provided to current or prospective retail investors, and to preserve the record of dates that each version of the relationship summary was delivered to any existing retail investor or to any new or prospective retail investor customer, pursuant to the new requirements under new paragraph (a)(24) under rule 17a–3, as adopted, discussed above. These records as well as a copy of each version of a firm's relationship summary will be required to be maintained in an easily accessible place for at least six years after such record or relationship summary is created. This collection of information will be found at 17 CFR 240.17a–4 and will be mandatory. The Commission staff will use the collection of information in its examination and oversight program. Requiring maintenance of these disclosures as part of the broker-dealer's books and records will facilitate the Commission's ability to inspect for and enforce compliance with firms' obligations with respect to the relationship summary. The information generally is kept confidential.[1432]

The likely respondents to this collection of information requirement are the approximately 2,766 broker-dealers that report retail activity, as described above. We did not receive comments related to burdens associated with record retention obligations for broker-dealers. We do not expect that broker-dealers will incur external costs for the requirement to maintain and preserve a copy of each version of the relationship summary as well as the records required to be made pursuant to new paragraph (a)(24) of Exchange Act rule 17a–3 because broker-dealers are already required to maintain and retain similar records related to communication with retail investors.

1. Changes in Burden Estimates and New Burden Estimates

The approved annual aggregate burden for rule 17a–4 is currently 1,042,866 hours, with a total annual aggregate monetized cost burden of approximately $67.8 million, based on an estimate of 4,104 broker-dealers and 150 broker-dealers maintaining an internal broker-dealer system.[1433] The

[1425] We applied the same 0.2 hour estimate as with investment advisers, but divided equally between creating a record of the relationship summary and its deliveries and the maintenance of those records. As discussed above, we are increasing our estimates.

[1426] *See, e.g.,* CCMC Letter; SIFMA Letter; *see also* NSCP Letter (estimating 80–500 hours to prepare, deliver, and file Form CRS, including recordkeeping policies and procedures).

[1427] *See, e.g.,* CCMC Letter; SIFMA Letter; Committee of Annuity Insurers Letter; Edward Jones Letter. A few others stated that creating recordkeeping policies and procedures relating to how professionals respond to "key questions" would be burdensome and extremely difficult. *See, e.g.,* LPL Financial Letter. Although the final instructions require "conversation starter" questions that are similar to the proposed "key questions," we are not increasing the burden as urged by commenters. As discussed in Section V.D.2.a. above, we increased the burden estimates for the initial preparation of the relationship summary, acknowledging, among other things, that certain broker-dealers that provide services only online will incur additional burdens to develop written answers to the conversation starters and make those available on their websites with a hyperlink to the appropriate page in the relationship summary for these documents. However, we do not expect these broker-dealers to incur additional recordkeeping burdens under amendments to Exchange Act rule 17a–3 because we are not establishing new or separate recordkeeping obligations related to the conversation starters or the answers provided by firms in response to the conversation starters. *See supra* footnotes 814–816.

[1428] *See* SIFMA Letter.

[1429] 2,766 broker-dealers × 0.5 hours annually = 1,383 annual hours for recordkeeping.

[1430] As with our estimates relating to the proposed amendments to Advisers Act rule 204–2 (*see, e.g., supra* footnote 1284 and accompanying text), we expect that performance of this function will most likely be allocated between compliance clerks and general clerks, with compliance clerks performing 17% of the function and general clerks performing 83% of the function. Data from the SIFMA Office Salaries Report suggest that costs for these positions are $70 and $62, respectively. (17% × 1,383 hours × $70) + (83% × 1,383 hours × $62) = $87,627. $87,627/2,766 broker-dealers = $32 per broker-dealer.

[1431] *See* section 17(a) of the Exchange Act.

[1432] *See* section 24(b) of the Exchange Act.

[1433] (4,104 broker-dealers × 254 hours per broker-dealer) + (150 broker-dealers maintaining internal broker-dealer systems × 3 hours) = (1,042,416 hours + 450 hours) = 1,042,866 hours each year. The monetized cost was based on these functions being performed by a compliance clerk earning an average of $65 per hour, resulting in a total internal cost of compliance of (1,042,416 × $65) + (450 × $65) = $67,786. *See Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a–4* (Oct. 19, 2016), *available at https://www.reginfo.gov/public/do/DownloadDocument?objectID=68823501* (defining an internal broker-dealer system as "any facility that provides a mechanism for collecting, receiving, disseminating, or displaying system orders and facilitating agreement to the basic terms of a purchase or sale of a security between a customer and the sponsor, but excludes a national securities exchange, an exchange exempt from registration based on limited volume, and an alternative trading system.").

currently approved annual reporting and recordkeeping cost estimate to respondents is $20,520,000.[1434] We estimate that the adopted amendments will result in an increase in the collection of information burden estimate by 0.10 hour[1435] for each of the estimated 2,766 currently registered broker-dealers that report retail sales activity and will have relationship summary obligations.[1436] The incremental hour burden for broker-dealers will therefore be 277 hours,[1437] for a monetized cost of $19,390 in aggregate, or $7 per broker-dealer.[1438] This will yield an annual estimated aggregate burden of 702,841 hours for all broker-dealers with relationship summary obligations to comply with paragraph (e)(10) of Exchange Act rule 17a-4, as amended,[1439] for a monetized cost of approximately $49,198,870.[1440] In addition, the 998 broker-dealers not subject to the amendments[1441] will continue to be subject to an unchanged burden of 254 hours per broker-dealer, or 253,492 hours for these broker-dealers.[1442] In addition, those maintaining an internal broker-dealer system will continue to be subject to an unchanged burden of 450 hours annually, under paragraph (e)(10) of Exchange Act rule 17a–4, as amended. In summary, taking into account the estimated annual burden of broker-dealers that will be required to maintain records of the relationship summary, as well the estimated annual burden of broker-dealers that do not have relationship summary obligations and whose information collection burden is unchanged, the revised annual aggregate burden for all broker-dealer respondents to the recordkeeping requirements under rule 17a–4 is estimated to be 956,783 total annual aggregate hours,[1443] for a monetized cost of approximately $66,974,810 million.[1444]

2. Revised Annual Burden Estimates

As noted above, the approved annual aggregate burden for rule 17a–4 is currently 1,042,866 hours, with a total annual aggregate monetized cost burden of approximately $67.8 million, based on an estimate of 4,104 broker-dealers and 150 broker-dealers maintaining an internal broker-dealer system. The revised annual aggregate hourly burden for rule 17a–4 will be 956,783[1445] hours, represented by a monetized cost of approximately $66,974,810 million,[1446] based on an estimate of 2,766 broker-dealers with the relationship summary obligation and 998 broker-dealers without, as noted above. This represents a decrease of 85,633[1447] annual aggregate hours in the hour burden and an annual decrease of approximately $811,480 from the currently approved total aggregate monetized cost for rule 17a–4.[1448] These changes are attributable to the amendments to rule 17a–4 relating to the relationship summary as discussed in this release and the decline in the number of registered broker-dealer respondents. The revised annual reporting and recordkeeping cost to respondents is estimated at approximately $18,820,000, or a reduction of $1,700,000 million from the currently approved annual reporting and recordkeeping cost burden of $20,520,000.[1449]

VI. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis ("FRFA") in accordance with section 4(a) of the Regulatory Flexibility Act.[1450] It relates to: (i) New rule 204–5 under the Advisers Act and amendment to Form ADV (17 CFR 279.1), to add a new Part 3: Form CRS (relationship summary); (ii) amendments to rule 203–1 under the Advisers Act; (iii) amendments to rule 204–1 under the Advisers Act; (iv) amendments to rule 204–2 under the Advisers Act; (v) new rule 17a–14 under the Exchange Act and new Form CRS (17 CFR 249.640) (relationship summary); and (vi) amendments to rules 17a–3 and 17a–4 under the Exchange Act.[1451] We prepared an Initial Regulatory Flexibility Analysis ("IRFA") in the Proposing Release.[1452]

A. Need for and Objectives of the Amendments

Broker-dealers, investment advisers, and dually registered firms all provide important services for retail investors. As discussed above in Sections I and IV, research continues to show that retail investors are confused about services, fees, conflicts of interest, and the required standard of conduct for particular firms as well as the differences between broker-dealers and investment advisers. Lack of knowledge about important aspects of the market for financial advice, such as the services, fees, conflicts of interest, and the required standard of conduct for particular firms may harm retail investors by deterring them from seeking brokerage or investment advisory services even if they could potentially benefit from them, or by increasing the risk of a mismatch between the investors' preferences and expectations and the actual brokerage or advisory services they receive. Therefore, it is important to reduce retail investor confusion in the marketplace for brokerage and investment advisory services and to assist retail investors with the process of deciding whether to (i) establish an

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[1434] 4,104 broker-dealers × $5,000 annual recordkeeping cost per broker-dealer = $20,520,000.

[1435] In the Proposing Release, we applied the same 0.2 hour estimate as with investment advisers, but divided that burden equally between the rule 17a–3 requirement to create a record of the dates the relationship summary was delivered to current or prospective customers and the rule 17a–4 requirement to maintain those records as well as copies of each version of the relationship summary. As discussed above, we are increasing the burden estimates for the recordkeeping requirement from 0.1 hours to 0.5 hours in light of certain comments, however, we believe, on balance, that 0.1 hour estimate for the record retention requirement is a reasonable estimate for purposes of the PRA analysis.

[1436] *See supra* footnotes 857–865.

[1437] 2,766 broker-dealers × 0.1 hours annually = 277 annual hours for record retention.

[1438] Consistent with our prior paperwork reduction analyses for rule 17a–4, we expect that performance of this function will most likely be performed by compliance clerks. Data from the SIFMA Office Salaries Report suggest that costs for these positions are $70 per hour. 277 hours × $70 = $19,390. $19,390/2,766 broker-dealers = $7 per broker-dealer.

[1439] 2,766 broker-dealers required to prepare relationship summary × (254 hours + 0.1 hour) = 702,841 hours.

[1440] Consistent with our prior paperwork reduction analyses for rule 17a–4, we expect that performance of this function will most likely be performed by compliance clerks. Data from the SIFMA Office Salaries Report suggest that costs for these positions are $70 per hour. 702,841 hours × $70 = $49,198,870.

[1441] *See supra* footnotes 858–863 and accompanying text.

[1442] 998 broker-dealers × 254 hours = 253,492 hours for broker-dealers not preparing a relationship summary.

[1443] 702,841 + 253,492 + 450 = 956,783 total aggregate hours.

[1444] Consistent with our prior paperwork reduction analyses for rule 17a–4, we expect that performance of this function will most likely be performed by compliance clerks. Data from the SIFMA Office Salaries Report suggest that costs for these positions are $70 per hour. 956,783 hours × $70 = $66,974,810.

[1445] *See supra* footnote 1443.

[1446] *See supra* footnote 1444.

[1447] 1,042,416 hours − 956,783 hours = 85,633 hours.

[1448] $67,786,290 − $66,974,810 = $811,480.

[1449] 3,764 registered broker-dealers as of December 31, 2018 × $5,000 per broker-dealer in record maintenance costs = $18,820,000. $20,520,000 − $18,820,000 = $1,700,000.

[1450] 5 U.S.C. 604(a).

[1451] The Commission is also amending 17 CFR 200.800 to display the control number assigned to information collection requirements for "Form CRS and rule 17a–14 under the Exchange Act" by OMB pursuant to the PRA. Because the Commission is not publishing the amendments to 17 CFR 200.800 in a notice of proposed rulemaking, no analysis is required under the Regulatory Flexibility Act. (*See* 5 U.S.C. 601(2) (for purposes of the Regulatory Flexibility Act, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking).)

[1452] *See* Proposing Release, *supra* footnote 5.

investment advisory or brokerage relationship, (ii) engage a particular firm or financial professional, or (iii) terminate or switch a relationship or specific service. Moreover, it is important to ensure that retail investors receive the information they need to clearly understand the relationships and services a firm offers, as well as the fees, costs, conflicts, standard of conduct, and disciplinary history of firms and financial professionals they are considering, and where to find additional information, to ameliorate this potential harm.

As discussed above in Section I above, the Commission considered ways to address retail investor confusion and engaged in broad outreach to investors and other market participants to solicit feedback on the proposal, including comment letters, a "feedback form," investor roundtables, and RAND investor testing.

After carefully considering the comments we received, we are adopting disclosure requirements that are designed to ameliorate the potential harm of retail investor confusion and to assist retail investors with the process of deciding whether to (i) establish an investment advisory or brokerage relationship, (ii) engage a particular firm or financial professional, or (iii) terminate or switch a relationship or specific service.

As discussed in Section II above, we are adopting new rules and rule amendments to require broker-dealers and investment advisers to deliver a relationship summary to retail investors. The relationship summary will be short with narrative information presented in a prescribed order with the following sections: (i) Introduction; (ii) relationships and services; (iii) fees, costs, conflicts, and standard of conduct; (iv) disciplinary history; and (v) where to find additional information. As discussed in Section II.C.3.c above, the relationship summary will be in addition to, and not in lieu of, current disclosure and reporting requirements for broker-dealers and investment advisers.

To promote effective communication, firms will be required to write their relationship summary in plain English and they are encouraged to use charts, graphs, tables, and other graphics or text features to respond to the required disclosures. We are limiting the length of the relationship summary to keep the disclosures focused.[1453] The purpose of the relationship summary is to summarize information about a particular broker-dealer or investment adviser in a format that allows for comparability among firms, encourages retail investors to ask questions, and highlights additional sources of information.

As discussed in Section II above, we are adopting filing, delivery, and updating requirements for the relationship summary. We also are adopting amendments to the recordkeeping requirements under the Advisers Act rule 204–2 and Exchange Act rules 17a–3 and 17a–4 to address the new relationship summary.[1454]

All of these requirements are discussed in detail in Section II above. The costs and burdens of these requirements on small advisers and small broker-dealers are discussed below as well as above in our Economic Analysis and Paperwork Reduction Act Analysis, which discuss the costs and burdens on all investment advisers and broker-dealers.[1455]

B. Significant Issues Raised by Public Comments

The Commission is sensitive to the burdens that the new rules and rule amendments may have on small entities. In the Proposing Release, we requested comment on matters discussed in the IRFA. In particular, we sought comments on the number of small entities subject to the new relationship summary, and the new rules and rule amendments as well as the potential impacts on small entities. We sought comments on whether the proposal could have an effect on small entities that had not been considered. We also requested that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of such impact.

The Commission did not receive comments specifically addressing the IRFA. However, as discussed in the Economic Analysis and Paperwork Reduction Act Analysis above, we received comments regarding the potential costs and burdens of the proposal on investment advisers and broker-dealers, including those that are small entities.[1456]

With regard to comment letters addressing small firms in particular, the Commission received comment letters concerning the impact of ongoing delivery requirements on small firms.[1457] As discussed in Sections II.C.3.c and II.C.4, firms must comply with ongoing delivery requirements to (i) particular retail investors under certain circumstances [1458] and (ii) all retail investors who are existing clients or customers when a relationship summary is updated. The commenters appeared to be discussing both types of ongoing delivery requirements. Specifically, a commenter stated that to comply with ongoing delivery requirements, firms would need to implement a process that would include additional costs for delivery, especially for small firms who are more likely to conduct such delivery in hard copy.[1459] Another commenter stated that the existing Form ADV brochure delivery requirements and the ongoing delivery requirements of the relationship summary would impose unjustifiable administrative burdens on advisers, the majority of whom the commenter considers to be small businesses.[1460] The commenter defined the term "small business" as an investment adviser who has ten or fewer non-clerical employees.[1461] As discussed in Section VI.C.1 below, the definition of small entities for purposes of the Advisers Act and the Regulatory Flexibility Act concerns assets under management and total assets, not the number of employees.[1462] Therefore, we are unable to assess whether the businesses the commenter is discussing fall under the definition of small entity for purposes of the Advisers Act and the Regulatory Flexibility Act.[1463] As discussed in Section VI.C.1 below, the new requirements will not affect most investment advisers that are small entities because they are generally registered with one or more state securities authorities and not with the Commission.

We agree that the ongoing delivery requirements will impose added costs, as discussed above in the Economic Analysis and Paperwork Reduction Act

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[1453] Specifically, the relationship summary for standalone broker-dealers and standalone investment advisers must not exceed two pages in paper format (or equivalent in electronic format). Dual registrants will have the flexibility to decide whether to prepare separate or combined relationship summaries. For dual registrants that prepare combined relationship summaries, they must not exceed four pages in paper format (or equivalent in electronic format).

[1454] 17 CFR 275.204–2; 17 CFR 240.17a–3; 17 CFR 240.17a–4.

[1455] *See supra* Sections IV and V.

[1456] *See supra* Sections IV.D.2 and V.

[1457] *See* NSCP Letter; Pickard Djinis and Pisarri Letter.

[1458] As discussed in Section II.C.3.c, firms must deliver the most recent relationship summary to a retail investor who is an existing client or customer upon certain triggers. Also, firms must deliver the relationship summary to a retail investor within 30 days upon the retail investor's request.

[1459] *See* NSCP Letter.

[1460] *See* Pickard Djinis and Pisarri Letter.

[1461] *Id.*

[1462] *See* 17 CFR 275.0–7.

[1463] *Id.*

Analysis,[1464] but the costs may not necessarily be higher for small firms. To the extent that small firms are more likely to have fewer retail investors than larger firms, the ongoing delivery requirements should impose lower variable costs on small firms than on larger firms. Therefore, the ongoing delivery requirements should impose lower variable costs on small firms, who have fewer retail investors, than on larger firms who have more retail investors. Also, firms have the flexibility to communicate any changes in the relationship summary by either delivering the relationship summary or by communicating the information through another disclosure that is delivered to the retail investor, which should mitigate the costs to all firms, including small firms.[1465] The additional hours per investment adviser and broker-dealer, the monetized cost per investment adviser and broker-dealer, and the incremental external legal and compliance cost for investment advisers and broker-dealers, attributable to ongoing delivery requirements are estimated above in the Paperwork Reduction Analysis.[1466] To the extent that the ongoing delivery requirements impose added costs to small investment advisers, we disagree that existing Form ADV brochure delivery requirements and the ongoing delivery requirements of the relationship summary would impose administrative burdens on small investment advisers that are unjustifiable. As discussed in Section II.C.3.c above, the relationship summary and the existing Form ADV brochure serve different purposes. The relationship summary is designed to provide a high-level overview to retail investors while the Form ADV brochure is designed to present more detailed disclosures.

The Commission is not adopting different ongoing delivery requirements for small entities. For the reasons discussed in Section VI.E below, establishing different compliance or reporting requirements for small investment advisers and small broker-dealers will be inappropriate under these circumstances. Moreover, retail investors considering and receiving services should receive current information from all firms, not just larger firms, to help them make a decision about continuing to receive services and to let them know when there have been changes to this information. They should also understand their available options during certain decision points when firms are required to deliver another relationship summary.[1467] Additionally, it is important and beneficial for retail investors to receive a relationship summary within 30 days upon request to ensure that retail investors receive the relationship summary as needed. As a result, we believe that the benefits to retail investors justify the potential cost of ongoing delivery.

C. Small Entities Subject to the Rule and Rule Amendments

The amendments will affect many, but not all, broker-dealers and investment advisers registered with the Commission, including some small entities.

1. Investment Advisers

Under Commission rules, for the purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[1468] As discussed in Section V.A.1 above, the Commission estimates that based on IARD data as of December 31, 2018, approximately 8,235 investment advisers will be subject to new rule 204–5 under the Advisers Act, Form CRS (required by new Part 3 of Form ADV) (the relationship summary), the amendments to rules 203–1, 204–1, and rule 204–2 under the Advisers Act.[1469] Our new rules and amendments will not affect most investment advisers that are small entities ("small advisers") because they are generally registered with one or more state securities authorities and not with the Commission. Under section 203A of the Advisers Act, most small advisers are prohibited from registering with the Commission and are regulated by state regulators.[1470] Based on IARD data, we estimate that as of December 31, 2018, approximately 561 SEC-registered advisers are small entities under the Regulatory Flexibility Act.[1471] Of these, 183 have individual high net worth and individual non-high net worth clients, and will therefore be subject to the new requirements under the Advisers Act.[1472]

2. Broker-Dealers

For purposes of Commission rulemaking in connection with the Regulatory Flexibility Act, a broker-dealer will be deemed a small entity if it: (i) Had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to rule 17a–5(d) under the Exchange Act,[1473] or, if not required to file such statements, had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (ii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1474]

As discussed in Section V.D.1 above, the Commission estimates that as of December 31, 2018, approximately 2,766 broker-dealers will be subject to the new Form CRS (relationship summary) requirements and new Exchange Act rule 17a–14, as well as

[1464] *See supra* Sections IV and V.

[1465] *See supra* Sections II.C.4 and IV.D.2.

[1466] *See supra* Sections V.C.2 and V.D.2.

[1467] As discussed in Section II.C.3.c, firms must deliver the most recent relationship summary to a retail investor who is an existing client or customer before or at the time the firm: (i) Opens a new account that is different from the retail investor's existing account(s); (ii) recommends that the retail investor roll over assets from a retirement account into a new or existing account or investment; or (iii) recommends or provides a new brokerage or investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in an existing account.

[1468] *See* 17 CFR 275.0–7.

[1469] *See supra* footnote 1204 and accompanying text.

[1470] 15 U.S.C. 80b–3a.

[1471] Based on SEC-registered investment adviser responses to Items 5.F. and 12 of Form ADV.

[1472] Based on SEC-registered investment adviser responses to Items 5.D.(a)(1), 5.D.(a)(3), 5.D.(b)(1), 5.D.(b)(2), 5.F. and 12 of Form ADV. These responses indicate that the investment adviser has clients that are high net worth individuals and/or individuals (other than high net worth individuals), or that the investment adviser has regulatory assets under management attributable to clients that are high net worth individuals and/or individuals (other than high net worth individuals), and that the investment adviser is a small entity. Of these small advisers, two are dually registered as a broker-dealer and an investment adviser and may offer services to retail investors as both a broker-dealer and an investment adviser (*e.g.*, "dual registrants" for purposes of the relationship summary). *See supra* footnote 63. As discussed in Section II.C.2, dual registrants must file the relationship summary using both IARD and Web CRD®. In this FRFA, dual registrants are counted in both the total number of small advisers and small broker-dealers that would be subject to the new requirements. We believe that counting these firms twice is appropriate because of their additional burdens of complying with the rules with respect to both their advisory and brokerage businesses.

[1473] 17 CFR 240.17a–5(d).

[1474] *See* 17 CFR 240.0–10(c).

amendments to Exchange Act rules 17a–3 and 17a–4.[1475] Further, based on FOCUS Report data, the Commission estimates that as of December 31, 2018, approximately 985 broker-dealers may be deemed small entities under the Regulatory Flexibility Act. Of these, approximately 756 have retail business, and will be subject to the new requirements.[1476]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The new requirements impose certain reporting and compliance requirements on certain investment advisers and broker-dealers, including those that are small entities, requiring them to create and update relationship summaries, and comply with certain filing, delivery, and recordkeeping requirements. The new requirements are summarized in this FRFA (Section VI.A above). All of these requirements are also discussed in detail, in Section II above, and these requirements as well as the costs and burdens on investment advisers and broker-dealers, including those that are small entities, are discussed above in Sections IV and V (the Economic Analysis and Paperwork Reduction Act Analysis) and below.

1. Initial Preparation and Filing of the Relationship Summary

Requiring each firm that offers services to retail investors to prepare and file a relationship summary will impose additional costs on may firms, including some small advisers and small broker-dealers. Investment advisers must file their relationship summary as Form ADV Part 3 (Form CRS) electronically through IARD. Broker-dealers must file their relationship summary as Form CRS electronically through Web CRD®. All relationship summaries must be filed using text-searchable format with machine-readable headings.

Investment Advisers. Our Paperwork Reduction Analysis and Economic Analysis discuss the costs and burdens of preparing and filing the relationship summary for investment advisers, including small advisers.[1477] In addition, as discussed in our Paperwork Reduction Analysis, above, we anticipate that some advisers may incur a one-time initial cost for external legal and compliance consulting fees in connection with the initial preparation of the relationship summary.[1478]

Generally, all advisers, including small advisers that advise retail investors are currently required to prepare and distribute Part 2A of Form ADV (the firm brochure). Because advisers already provide disclosures about their services, fees, costs, conflicts, and disciplinary history in their firm brochures,[1479] they will be able to use some of this information to respond to the disclosure requirements of the relationship summary. They will, however, have to draft a completely new disclosure to comply with the new format of the relationship summary. As discussed above, approximately 183 small advisers currently registered with us will be subject to the new requirements.[1480] As discussed above in our Paperwork Reduction Act Analysis, the new initial preparation and filing requirements will impose an annual burden of approximately 6.67 annual hours per adviser, or 1,221 annual hours in aggregate for small advisers.[1481] We therefore expect the annual monetized costs to small advisers associated with these amendments to be $1,965 per adviser, or $359,595 in aggregate for small advisers.[1482] We expect the incremental external legal and compliance cost for small advisers to be estimated at $825 per adviser, or $150,975 in aggregate for small advisers.[1483]

Broker-Dealers. Our Paperwork Reduction Analysis and Economic Analysis discuss the costs and burdens of preparing and filing the relationship summary for broker-dealers, including small broker-dealers.[1484] In addition, as discussed in our Paperwork Reduction Analysis, above, we anticipate that some broker-dealers may incur a one-time initial cost for external legal and compliance consulting fees in connection with the initial preparation of the relationship summary.[1485] As discussed in Sections IV.D.2 and V.D.2, broker-dealers are not currently required to deliver to their retail investors a comprehensive written document comparable to investment advisers' Form ADV Part 2A. Therefore, broker-dealers may incur comparatively greater compliance costs than investment advisers. As discussed above, approximately 756 small broker-dealers will be subject to the new requirements.[1486] As discussed above in our Paperwork Reduction Act Analysis, the new initial preparation and filing requirements will impose an annual burden of approximately 13.33 annual hours per broker-dealer, or 10,077 annual hours in aggregate for small broker-dealers.[1487] We therefore expect the annual monetized costs to small broker-dealers associated with these amendments to be $3,640 per broker-dealer, or $2,751,840 in aggregate for small broker-dealers.[1488] We expect the incremental external legal and compliance cost for small broker-dealers to be estimated at $1,032 per broker-dealer, or $780,192 in aggregate for small broker-dealers.[1489]

Costs Generally. The costs associated with preparing the new relationship summaries will be limited for investment advisers and broker-dealers, including small entities, for several reasons. First, the disclosure document is concise, no more than two pages for a standalone investment adviser and standalone broker-dealer and four pages for a dual registrant in length or equivalent limit if in electronic format. Second, although the relationship summary will require more narrative responses, the disclosure will still involve some degree of standardization across firms, requiring firms to use standardized headings in a prescribed order. Third, firms will be prohibited

[1475] *See supra* footnote 1352 and accompanying text.

[1476] *See supra* footnote 1352 (discussing how we identify retail sales activity from Form BR).

[1477] *See supra* Sections V.A and IV.D.2.

[1478] *See supra* Section V.A.

[1479] *See supra* footnote 904.

[1480] *See supra* Section VI.C.1.

[1481] *See supra* Section V.A.2. As discussed in the Paperwork Reduction Act Analysis, we expect each investment adviser to spend approximately 20 hours preparing and filing the relationship summary, which as amortized over three years is approximately 6.67 hours. 6.67 hours per adviser for preparing and filing the relationship summary × 183 small advisers = approximately 1,221 hours in aggregate for small advisers.

[1482] *See supra* Sections V.A.2. Monetized cost of $1,965 per adviser for the initial preparation and filing of the relationship summary × 183 small advisers = $359,595 monetized cost in aggregate for small advisers. As discussed in the Paperwork Reduction Act Analysis, we believe that performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager.

[1483] *See supra* Section V.A.2.b. $825 in external legal and compliance costs per adviser × 183 small advisers = $150,975 in aggregate for small advisers.

[1484] *See supra* Sections V.D and IV.D.2.

[1485] *See supra* Section V.D.

[1486] *See supra* Section VI.C.2.

[1487] *See supra* Section V.D.2. As discussed in the Paperwork Reduction Act Analysis, we expect each broker-dealer to spend approximately 40 hours preparing and filing the relationship summary, which as amortized over three years is approximately 13.33 hours. 13.33 hours per broker-dealer for preparing and filing the relationship summary × 756 small broker-dealers = approximately 10,077 hours in aggregate for small broker-dealers.

[1488] *See supra* Section V.D.2. Monetized cost of $3,640 per broker-dealer for the initial preparation and filing of the relationship summary × 756 small broker-dealers = $2,751,840 monetized cost in aggregate for small broker-dealers. As discussed in the Paperwork Reduction Act Analysis, we believe that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager.

[1489] *See supra* Section V.D.2.b. 756 small broker-dealers × $1,032 in external legal and compliance costs on average per broker-dealer = $780,192.

from including disclosures in the relationship summary other than the disclosure that is required or permitted by the Instructions and applicable items.

The compliance costs could, however, be different across firms with relatively smaller or larger numbers of retail investors as customers or clients. For example, as discussed in Section IV.D.2 above, to the extent that developing the relationship summary entails a fixed cost, firms with fewer retail investors as customers or clients may be at disadvantage relative to firms with more retail investors as customers or clients because the former would amortize these costs over a smaller retail investor base. Therefore, to the extent that small firms are more likely to have fewer retail investors than larger firms, small firms may be at a disadvantage relative to larger firms. On the other hand, smaller firms are likely to have fewer types of fees, costs, and conflicts to report compared to larger firms, potentially making it less burdensome for them to summarize the required information.

As discussed in Section IV.D.2 above, small advisers and small broker-dealers may disproportionately incur costs associated with electronic and graphical formatting, particularly if they do not have an existing web presence. However, because the final instructions encourage, but do not require electronic and graphical formatting, firms would only bear these costs if they expected these features to provide benefits that justify these costs. Similarly, small advisers and small broker dealers may disproportionally incur costs associated with the requirement to file their relationship summaries with machine-readable headings and text-searchable format. However, costs for firms, including small entities, could be minimal to the extent they implement structured headings in PDF formatted documents by creating a bookmark for each of the headings.[1490]

2. Delivery and Updating Requirements Related to the Relationship Summary

As discussed in Section II.C above, firms must follow certain delivery and updating requirements. Investment advisers must deliver a relationship summary to each retail investor before or at the time the firm enters into an investment advisory contract with the retail investor, even if the agreement is oral. Broker-dealers must deliver a relationship summary to each retail investor, before or at the earliest of: (i) A recommendation of an account type, a securities transaction, or an investment strategy involving securities; (ii) placing an order for the retail investor; or (iii) the opening of a brokerage account for the retail investor. Dual registrants must deliver the relationship summary at the earlier of the delivery requirements for the investment adviser or broker-dealer.

As discussed in Section II.C above, firms must update, file amendments to, and re-deliver the relationship summary under certain circumstances. Specifically, firms must update the relationship summary and file it within 30 days whenever any information in the relationship summary becomes materially inaccurate. The filing must include an exhibit highlighting changes. Firms must communicate any changes in the updated relationship summary to retail investors who are existing clients or customers within 60 days after the updates are required to be made and without charge.[1491] Additionally, firms must deliver the relationship summary to a retail investor within 30 days upon the retail investor's request and re-deliver the relationship summary to existing clients and customers under certain circumstances.[1492]

As discussed in Sections II.C above, we are adopting requirements concerning electronic posting and manner of delivery. Firms must post the current version of the relationship summary prominently on their public website, if they have one. Firms must include a telephone number where retail investors can request up-to-date information and request a copy of the relationship summary. Firms must make a copy of the relationship summary available upon request without charge. If the relationship summary is delivered electronically, it must be presented prominently in the electronic medium. If the relationship summary is delivered in paper format as part of a package of documents, firms must ensure that the relationship summary is the first among any documents that are delivered at that time. The additional hours per adviser and broker-dealer, the monetized cost per adviser and broker-dealer, and the incremental external legal and compliance cost for small entity investment advisers and broker-dealers, attributable to these requirements are estimated above in the Paperwork Reduction Analysis.[1493]

3. Recordkeeping Requirements Related to the Relationship Summary

As discussed in Section II.E above, we are adopting amendments to the recordkeeping requirements under Advisers Act rule 204–2 and Exchange Act rules 17a–3 and 17a–4 to address the new relationship summary.[1494] The amendments to Advisers Act rule 204–2 will require investment advisers who are registered or required to be registered to make and keep true, accurate and current, a copy of each relationship summary and each amendment or revision to the relationship summary, as well as a record of the dates that each relationship summary, and each amendment or revision thereto, was given to any client or to any prospective client who subsequently becomes a client. Investment advisers must maintain and preserve their respective records in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser.[1495] The amendments to Exchange Act rule 17a–3 will require broker-dealers to make and keep current a record of the date that each relationship summary was provided to each retail investor, including any relationship summary that was provided before such retail investor opens an account. The amendments to Exchange Act rule 17a–4 will require broker-dealers to maintain and preserve in an easily accessible place all record dates described above as well as a copy of each relationship summary until at least six years after such record or relationship summary is created.

These amendments are designed to update recordkeeping rules in light of the new relationship summary, and, for investment advisers, they mirror the current recordkeeping requirements for the Form ADV brochure and brochure supplement.[1496] As discussed in Section II.E above, the recordkeeping requirements will facilitate the Commission's ability to inspect for and enforce compliance with the

[1490] *See supra* Section II.C.2.

[1491] Firms can make the communication by delivering the amended relationship summary or by communicating the information through another disclosure that is delivered to the retail investor.

[1492] Specifically, firms must deliver the most recent relationship summary to a retail investor who is an existing client or customer before or at the time the firm: (i) Opens a new account that is different from the retail investor's existing account(s); (ii) recommends that the retail investor roll over assets from a retirement account into a new or existing account or investment; or (iii) recommends or provides a new brokerage or investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in an existing account.

[1493] *See supra* Section V.

[1494] 17 CFR 275.204–2; 17 CFR 240.17a–3; 17 CFR 240.17a–4.

[1495] *See* 17 CFR 275.204–2(e)(1).

[1496] *See* 17 CFR 275.204–2(a)(14)(i) and 17 CFR 275.204–2(e)(1).

relationship summary requirements and also may facilitate firms' ability to monitor for compliance with delivery requirements.

As discussed in the Paperwork Reduction Act Analysis in Section V.B above, the amendments to Advisers Act rule 204–2 will impose an annual burden of approximately 0.2 annual hours per adviser, or 37 annual hours in aggregate for small advisers.[1497] We therefore expect the annual monetized costs to small advisers associated with these amendments to be $12 per adviser,[1498] or $2,196 in aggregate for small advisers.[1499] We do not expect investment advisers to incur any external costs with respect to the amendments to Advisers Act rule 204–2.[1500]

As discussed in the Paperwork Reduction Act Analysis in Sections V.E and V.F, the amendments to Exchange Act rules 17a–3 and 17a–4 will impose an annual burden of approximately 0.6 annual hours per broker-dealer, or 454 annual hours in the aggregate for small broker-dealers.[1501] We therefore expect the annual monetized cost to small broker-dealers associated with these amendments to be $39 per broker-dealer,[1502] or $29,484 in aggregate for small broker-dealers.[1503] We do not expect broker-dealers to incur any external costs with respect to the amendments to Exchange Act rules 17a–3 and 17a–4.[1504]

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. We considered the following alternatives for small entities in relation to the new requirements: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the new requirements, or any part thereof, for such small entities.[1505]

Regarding the first alternative, the Commission believes that establishing different compliance or reporting requirements for small advisers and small broker-dealers will be inappropriate under these circumstances. We considered adopting tiered compliance dates so that smaller investment advisers and smaller broker-dealers would have had more time to comply. This would have been an alternative to the proposal, which did not include such tiered compliance. However, as adopted, instead of providing more time to smaller investment advisers and smaller broker-dealers only, we are extending the compliance dates for all firms. As discussed in Section II.D above, we believe the final compliance dates provide adequate notice and opportunity for all firms to comply with the new requirements.

Because the protections of the Advisers Act and Exchange Act are intended to apply equally to retail investor clients and customers of both large and small firms, it will be inconsistent with the purposes of the Advisers Act and the Exchange Act to specify differences for small entities under the new requirements. As discussed above, we believe that the new requirements will result in multiple benefits to all retail investors, including alerting retail investors to certain information to consider when deciding whether to (i) establish an investment advisory or brokerage relationship, (ii) engage a particular firm or financial professional, or (iii) terminate or switch a relationship or specific service.[1506] In addition, the content of the relationship summary will facilitate comparisons across firms.[1507] We believe that these benefits should apply to retail investors that engage smaller firms as well as retail investors that engage larger firms. To establish different disclosure requirements for small entities will diminish this investor protection for clients and customers of small entities.

As discussed above in Section II.C above, we are requiring that investment advisers and broker-dealers file their relationship summaries with the Commission.[1508] As discussed in Section II.C.2, there are several reasons we are requiring the relationship summaries to be filed with the Commission. First, the public will benefit by being able to use a central location to find any firm's relationship summary,[1509] which may facilitate simpler comparisons across firms. Second, some firms may not maintain a website, and therefore their relationship summaries will not otherwise be accessible to the public. Third, by having firms file the relationship summaries with the Commission, Commission staff can more easily monitor the filings for compliance. These benefits of filing are important for retail investors who are clients and customers of both large and small firms. Furthermore, almost all advisers, including small advisers, have internet access and use the internet for various purposes so using the internet to file electronically should not increase costs for those advisers.[1510] All relationship

[1497] 0.2 hours × 183 small advisers = 37 hours, when rounded up to the nearest hour.

[1498] As discussed in, the Paperwork Reduction Analysis, we believe the performance of this function will most likely be allocated between compliance clerks and general clerks, with compliance clerks performing 17% of the function and general clerks performing 83% of the function. *See supra* Section V.B.

[1499] $12 per adviser × 183 small advisers = approximately $2,196 in aggregate for small advisers.

[1500] *See supra* Section V.B.

[1501] As discussed in Section V.E, amendments to Exchange Act rule 17a–3 will impose a burden of approximately 0.5 annual hours per broker-dealer. As discussed in Section V.F, amendments to Exchange Act rule 17a–4 will impose a burden of approximately 0.1 annual hours per broker-dealer. Therefore, together, amendments to Exchange Act rules 17a–3 and 17a–4 will impose a burden of approximately 0.6 hours annually. 0.6 hours × 756 small broker-dealers = approximately 454 annual hours in aggregate for small broker-dealers.

[1502] $32 per broker dealer for amendments to Exchange Act rule 17a–3 + $7 per broker-dealer for amendments to Exchange Act rule 17a–4 = $39 per broker-dealer. As discussed in the Paperwork Reduction Act Analysis, we believe that the performance of the functions associated with the amendments to Exchange Act rule 17a–3 will most likely be allocated between compliance clerks and general clerks. Also as discussed in the Paperwork Reduction Act Analysis, we believe that the performance of the functions associated with the amendments to Exchange Act rule 17a–4 will be performed by compliance clerks. *See supra* Sections V.E and V.F.

[1503] $32 per broker dealer for amendments to Exchange Act rule 17a–3 + $7 per broker-dealer for amendments to Exchange Act rule 17a–4 = $39 per broker-dealer. $39 × 756 small broker-dealers = $29,484. *See supra* Sections V.E and V.F.

[1504] *See supra* Sections V.E and V.F.

[1505] As discussed in the Economic Analysis in Section IV.D.4, the Commission considered the following alternatives as they affect all firms, including small entities: (i) Requiring a new, separate disclosure versus amending existing disclosure requirements; (ii) alternatives concerning the form and format of the relationship summary; (iii) alternatives concerning the disclosures concerning the summary of fees, costs, conflicts, and standard of conduct; (iv) alternatives concerning filing and delivery; and (v) alternatives to compliance deadlines, including transition provisions.

[1506] *See supra* Sections IV and VI.A.

[1507] *See supra* Sections I and IV.

[1508] Investment advisers must file their relationship summaries with the Commission electronically through IARD in the same manner as they currently file Form ADV Parts 1 and 2. Broker-dealers must file their relationship summaries with the Commission electronically through Web CRD®. Dual registrants must file the relationship summary using both IARD and Web CRD®.

[1509] The filed relationship summaries will be accessible through the Commission's investor education website *Investor.gov*. *See supra* footnote 661 and accompanying text.

[1510] Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV, Investment summaries must be filed using a text-searchable format with machine-readable headings. There are several reasons we are requiring firms to file their relationship summaries with machine-readable headings and text-searchable format, including that this formatting will facilitate the aggregation and comparison of responses to specific items across different relationship summaries and is consistent with the Commission's ongoing efforts to modernize our forms by taking advantage of technological advances, both in the manner in which information is reported to the Commission and how it is provided to investors and other users, as discussed above.[1511] These benefits are important for filings by all firms and would be significantly reduced by allowing different requirements for small entities. Costs for firms, including small entities, could be minimal to the extent they implement structured headings in PDF formatted documents by creating a bookmark for each of the headings.[1512]

The requirement for investment advisers and broker-dealers to post their relationship summary on their public websites, if they have a public website, in a location and format that is easily accessible for retail investors, already incorporates the flexibility to permit different compliance and reporting requirements for small entities, if applicable. To the extent that broker-dealers and investment advisers that are small entities are less likely to have public websites and do not have them, they will not be required to post the relationship summary on their websites.[1513] In other ways, as well, the requirements incorporate flexibility for small broker-dealers and small advisers to comply with the requirements. For instance, we are requiring firms to communicate the information in an updated relationship summary to retail investors who are existing clients or customers within 60 days after the updates are required to be made and without charge.[1514] Firms can communicate this information by delivering the amended relationship summary or by communicating the information through another disclosure that is delivered to the retail investor. This requirement provides firms the ability to disclose changes without requiring them to duplicate disclosures and incur additional costs.

We believe it will be inappropriate to establish different recordkeeping requirements for small entities, because the recordkeeping requirements will facilitate the Commission's ability to inspect for and enforce compliance with firms' obligations with respect to the relationship summary, which is important for retail investor clients and customers of both large and small firms. Also, the Commission is not adopting different ongoing delivery requirements for small entities for the reasons discussed in Section VI.B above.

Regarding the second alternative, we clarified and simplified certain requirements for all entities, as an alternative to the proposal.[1515] However, we believe the final requirements are clear and that further clarification, consolidation, or simplification of the compliance and reporting requirements separately for small entities is not necessary. For the same reasons discussed above in this section concerning the first alternative, we believe that further clarifying, consolidating, or simplifying the requirements only for small entities will be inappropriate under these circumstances.

Regarding the third alternative, we considered using performance rather than design standards. Performance standards would allow for increased flexibility in the methods firms can use to achieve the objectives of the requirements. Design standards would specify the behavior or manner of compliance that regulated entities must adopt. We revised the combination of performance and design standards of the requirements, as an alternative to the proposal.[1516] The Commission believes that the final relationship summary and the related new rules and amendments appropriately use a combination of performance and design standards for all firms, including those that are small entities.

The Commission is adopting certain performance standards as an alternative to design standards so firms will have some flexibility in how they complete the relationship summary. Instead of requiring extensive prescribed language, as proposed, prescribed wording will be limited and, instead, firms will complete most of the relationship summary using their own words.[1517] Although this increases costs to firms, including small firms, as discussed above,[1518] firms will now have the flexibility to create disclosures that are more accurately tailored to their business, and therefore more understandable and relevant to retail investors.[1519] In addition, we are encouraging, but not requiring, firms to use charts, graphs, tables, and other graphics or text features to respond to the required disclosures.[1520] In an alternative to the proposal, which required dual registrants to file a single relationship summary, dual registrants will have the flexibility to decide whether to prepare separate or combined relationship summaries.[1521] In another alternative to the proposal, which required firms to provide a toll-free telephone number under certain circumstances, we are not requiring the telephone number to be toll-free.[1522] As discussed in Section II.B.5 above, firms must include a telephone number where retail investors can request up-to-date information and request a copy of the relationship summary. Although we are adopting a requirement to provide a telephone number, we are not requiring the telephone number to be toll-free. If firms, including small firms, do not already have a toll-free telephone number, they will not be required to obtain one to comply with the requirements of the relationship summary. Firms will have the flexibility to decide whether the telephone number

Advisers Act Release No. 1862 (Apr. 5, 2000) [65 FR 20524 (Apr. 17, 2000)], at n.304 and accompanying text. However, an adviser that is a small business may be eligible for a continuing hardship exemption for Form ADV filings, which includes the relationship summary, if it can demonstrate that filing electronically would impose an undue hardship. *See* General Instruction 17 to Form ADV.

[1511] *See supra* Section II.C.2.

[1512] *See supra* Section II.C.2.

[1513] Firms must provide a telephone number in their relationship summary that retail investors can call to obtain up-to-date information and request a copy of the relationship summary. *See supra* Section II.B.5.

[1514] *See supra* Section II.C.4.

[1515] *See supra* Sections I and II. For example, we have clarified re-delivery requirements by replacing the proposed standard of "materially change the nature and scope of the relationship" with two more specific and easily identifiable triggers that we believe would not implicate the same operational or supervisory burdens described by commenters to meet the proposed requirement. As another example, in a change from the proposal, we eliminated the proposed requirement that standalone broker-dealers and standalone investment advisers include a separate section using prescribed wording that generally describes how the services of investment advisers and broker-dealers, respectively, differ from the firm's services. Instead, we adopted a simpler approach so firms will be required to simply state that free and simple tools are available to research firms and financial professionals at *Investor.gov/CRS*, which also provides educational materials about broker-dealers, investment advisers, and investing.

[1516] *See supra* Sections I and II. For example, in the final requirements we require less prescribed wording, and provide more flexibility in certain formatting and filing requirements. *See supra* Sections II.A.1 (discussing limited prescribed wording) and II.A.5 (discussing more flexible formatting and filing requirements for dual registrants).

[1517] *See supra* Section II.A.1.

[1518] *See supra* Sections V.A and V.D.

[1519] *See supra* Section II.A.1.

[1520] *See supra* Section II.A.3.

[1521] *See supra* Section II.A.5.

[1522] *See supra* Section II.B.5.

they provide in their relationship summary will be toll-free.

In conjunction with the performance standards, the Commission is adopting certain design standards. For example, with respect to delivery requirements, as discussed in Section II.C.3.c above, in an alternative to the proposal, we replaced a performance standard with a design standard to clarify requirements and reduce operational and supervisory burdens. Specifically, we proposed a performance standard that would have required a firm to deliver a relationship summary to an existing client or customer when changes are made to the existing account that would "materially change the nature and scope of the relationship." This requirement would have required analysis about facts and circumstances and commenters expressed concern that it would impose operational and supervisory burdens. In response, we replaced the standard of "materially change the nature and scope of the relationship" with two, more specific and easily identifiable, triggers that we believe would not implicate the same operational or supervisory burdens described by commenters to meet the proposed requirement. Therefore, the final requirements set forth specific triggers that require re-delivery of the relationship summary in situations that the proposed "material changes" language sought to address, but are presented as a design standard rather than a performance standard and, as a result, are designed to ease burdens for all firms, including small entities.

The relationship summary includes design standards to more easily allow for comparability among firms. These requirements specify the headings and sequence of the topics; prohibit disclosure other than the disclosure that is required or permitted; limit the length of the relationship summary; and require limited prescribed language in certain sections. The Commission considered alternative performance standards such as unlimited page numbers and not prohibiting disclosure other than the disclosure that is required or permitted. However, as discussed in Section II.A.1 above, we believe that retail investors will benefit from receiving a relationship summary that contains high-level information, with the ability to access more detailed information. We also believe that the relationship summary should present information that is responsive and relevant to the topics covered by the final instructions. We believe that allowing only the mandatory or permissible information will promote consistency of information presented to investors, and allow investors to focus on relevant information that is helpful in deciding among firms. We believe that the design standards that we are adopting will provide comparative information in a user-friendly format that helps retail investors with informed decision making.

We believe that this approach of using both performance and design standards balances the need to provide firms flexibility in making the presentation of information consistent with their particular business model while ensuring that all retail investors receive certain information in a manner that promotes comparability.

Regarding the fourth alternative, we believe that, similar to the first alternative, it would be inconsistent with the purposes of the Advisers Act and the Exchange Act to exempt small advisers and broker-dealers from the new requirements, or any part thereof. Because the protections of the Advisers Act and Exchange Act are intended to apply equally to retail investors that are clients and customers of both large and small firms, it would be inconsistent with the purposes of the Advisers Act and Exchange Act to specify differences for small entities under the final requirements. As discussed above, we believe that the new requirements will result in multiple benefits to all retail investors, including alerting retail investors to certain information to consider when deciding whether to (i) establish an investment advisory or brokerage relationship, (ii) engage a particular firm or financial professional, or (iii) terminate or switch a relationship or specific service.[1523] In addition, the content of the relationship summary will facilitate comparisons across firms.[1524] We believe that providing this information at the prescribed timeframes is appropriate and in the public interest and will improve investor protection by helping retail investors to make a more informed choice among the types of firms and services available to them. Because we view investor confusion about brokerage and advisory services as an issue for many retail investors who are clients and customers of advisers and broker-dealers, it will be inconsistent with the purpose of the relationship summary to specify different requirements for small entities.[1525]

VII. Statutory Authority

The Commission is adopting amendments to rule 203–1 under the Advisers Act pursuant to authority set forth in sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)].

The Commission is adopting amendments to rule 204–1 under the Advisers Act pursuant to authority set forth in sections 203(c)(1) and 204 of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1) and 80b–4].

The Commission is adopting new rule 204–5 under the Advisers Act pursuant to authority set forth in sections 204, 206A, 206(4), 211(a), and 211(h) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–4, 80b–6a, 80b–6(4), 80b–11(a), 80b–11(h)], and section 913(f) of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").

The Commission is adopting amendments to rule 279.1, Form ADV, under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934 [15 U.S.C. 78w(a) and 78bb(e)(2)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 7sss(a)], section 38(a) of the Investment Company Act of 1940 [15 U.S.C. 80a–37(a)], and sections 203(c)(1), 204, 206A, 211(a) and 211(h), and of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(c)(1), 80b–4, 80b–6a, 80b–11(a) and 80b-11(h)], and section 913(f) of Title IX of the Dodd-Frank Act.

The Commission is adopting amendments to rule 204–2 under the Advisers Act pursuant to authority set forth in sections 204 and 211 of the Advisers Act [15 U.S.C. 80b–4 and 80b–11].

The Commission is adopting new rule 17a–14 under the Exchange Act, Form CRS, and amendments to rules 17a–3 and 17a–4 under the Exchange Act pursuant to the authority set forth in the Exchange Act sections 3, 10, 15, 15(c)(6), 15(*l*), 17, 23 and 36 thereof 15 U.S.C. 78c, 78j, 78o, 78o(c)(6), 78o(*l*), 78q, 78w and 78mm, and section 913(f) of Title IX of the Dodd-Frank Act.

The Commission is adopting amendments to rule 800 under the Organization; Conduct and Ethics; and Information and Requests pursuant to the authority set forth in PRA sections 3506 and 3507 [44 U.S.C. 3506, 3507].

Text of the Rule and Form

List of Subjects in

CFR Part 200

Administrative practice and procedure, Organization and functions (Government agencies).

[1523] *See supra* Sections IV and VI.A.

[1524] *See supra* Sections I and IV.

[1525] *See supra* Sections I and IV (discussing investor confusion).

17 CFR Parts 240 and 249

Brokers, Reporting and recordkeeping requirements, Sales practice and disclosure requirements, Securities.

17 CFR Parts 275 and 279

Investment advisers, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart N—Commission Information Collection Requirements Under the Paperwork Reduction Act: OMB Control Numbers

■ 1. The authority citation for part 200 subpart N continues to read as follows:

Authority: 44 U.S.C. 3506; 44 U.S.C. 3507.

■ 2. In § 200.800, the table in paragraph (b) is amended by adding an entry in numerical order by part and section number for "Form CRS" to read as follows:

§ 200.800 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

Information collection requirement	17 CFR part or section where identified and described	Current OMB control No.
* * * * *	*	*
Form CRS	249.640	3235–0766
* * * * *	*	*

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The general authority citation for part 240 continues to read as follows and sectional authority for 240.17a-14 is added to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78n–1, 78*o*, 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.;* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1887 (2010); and secs. 503 and 602, Pub. L. 112–106, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.17a–14 is also issued under Public Law 111–203, sec. 913, 124 Stat. 1376 (2010).

* * * * *

■ 4. Section 240.17a–3 is amended by adding paragraph (a)(24) to read as follows:

§ 240.17a–3 Records to be made by certain exchange members, brokers and dealers.

(a) * * *

(24) A record of the date that each Form CRS was provided to each retail investor, including any Form CRS provided before such retail investor opens an account.

* * * * *

■ 5. Section 240.17a–4 is amended by adding paragraph (e)(10) to read as follows:

§ 240.17a–4 Records to be preserved by certain exchange members, brokers and dealers.

* * * * *

(e) * * *

(10) All records required pursuant to § 240.17a–3(a)(24), as well as a copy of each Form CRS, until at least six years after such record or Form CRS is created.

* * * * *

■ 6. Section 240.17a–14 is added to read as follows:

§ 240.17a–14 Form CRS, for preparation, filing and delivery of Form CRS.

(a) *Scope of section.* This section shall apply to every broker or dealer registered with the Commission pursuant to section 15 of the Act that offers services to a retail investor.

(b) *Form CRS.* You must:

(1) Prepare Form CRS 17 CFR 249.640, by following the instructions in the form.

(2) File your current Form CRS electronically with the Commission through the Central Registration Depository ("Web CRD®") operated by the Financial Industry Regulatory Authority, Inc., and thereafter, file an amended Form CRS in accordance with the instructions in Form CRS.

(3) Amend your Form CRS as required by the instructions in the form.

(c) *Delivery of Form CRS.* You must:

(1) Deliver to each retail investor your current Form CRS before or at the earliest of:

(i) A recommendation of an account type, a securities transaction; or an investment strategy involving securities;

(ii) Placing an order for the retail investor; or

(iii) The opening of a brokerage account for the retail investor.

(2) Deliver to each retail investor who is an existing customer your current Form CRS before or at the time you:

(i) Open a new account that is different from the retail investor's existing account(s);

(ii) Recommend that the retail investor roll over assets from a retirement account into a new or existing account or investment; or

(iii) Recommend or provide a new brokerage service or investment that does not necessarily involve the opening of a new account and would not be held in an existing account.

(3) Post the current Form CRS prominently on your public website, if you have one, in a location and format that is easily accessible for retail investors.

(4) Communicate any changes made to Form CRS to each retail investor who is an existing customer within 60 days after the amendments are required to be made and without charge. The communication can be made by delivering the amended Form CRS or by communicating the information through another disclosure that is delivered to the retail investor.

(5) Deliver a current Form CRS to each retail investor within 30 days upon request.

(d) *Other disclosure obligations.* Delivering a Form CRS in compliance with this section does not relieve you of any other disclosure obligations arising under the federal securities laws and regulations or other laws or regulations (including the rules of a self-regulatory organization).

(e) *Definitions.* For purposes of this section:

(1) *Current Form CRS* means the most recent version of the Form CRS.

(2) *Retail investor* means a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes.

(f) *Transition rule.* (1) If you are registered with the Commission prior to June 30, 2020, pursuant to Section 15 of the Act, you must file your initial Form CRS with the Commission in accordance with section (b)(2) of this section, beginning on May 1, 2020, and by no later than June 30, 2020.

(2) On or after June 30, 2020, if you file an application for registration with the Commission or have an application for registration pending with the Commission as a broker or dealer pursuant to Section 15 of the Act, you must begin to comply with this section by the date on which your registration application becomes effective pursuant to Section 15 of the Act, including by filing your Form CRS in accordance with paragraph (b)(2) of this section.

(3) Within 30 days after the date by which you are first required by paragraph (f) of this section to electronically file your initial Form CRS with the Commission, you must deliver to each of your existing customers who is a retail investor your current Form CRS.

(4) As of the date by which you are first required to electronically file your Form CRS with the Commission pursuant to this section, you must begin using your Form CRS as required to comply with paragraph (c) of this rule.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 7. The authority citation for part 249 is amended by revising the general authority and adding sectional authority for 249.640 to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112–106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112–106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114–94, 129 Stat. 1312 (2015), unless otherwise noted.

* * * * *

Section 249.640 is also issued under Public Law 111–203, sec. 913, 124 Stat. 1376 (2010).

* * * * *

■ 8. Section 249.641 is added to subpart G read as follows:

§ 249.641 Form CRS, Relationship Summary for Brokers and Dealers Providing Services to Retail Investors, pursuant to § 240.17a–14 of this chapter.

This form shall be prepared and filed by brokers and dealers registered with the Securities and Exchange Commission pursuant to Section 15 of the Act that offer services to a retail investor pursuant to § 240.17a–14 of this chapter.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 9. The general authority citation for part 275 continues to read as follows and sectional authorities for 275.204–5 and 275.211h–1 are added to read as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

Section 275.204–5 is also issued under sec. 913, Public Law 111–203, sec. 124 Stat. 1827–28 (2010).

Section 275.211h–1 is also issued under sec. 913, Public Law 111–203, sec. 124 Stat. 1827–28 (2010).

* * * * *

■ 10. Amend § 275.203–1 by revising paragraph (a) to read as follows:

§ 275.203–1 Application for investment adviser registration.

(a) *Form ADV.* (1) To apply for registration with the Commission as an investment adviser, you must complete Form ADV (17 CFR 279.1) by following the instructions in the form and you must file Part 1A of Form ADV, the firm brochure(s) required by Part 2A of Form ADV and Form CRS required by Part 3 of Form ADV electronically with the Investment Adviser Registration Depository (IARD) unless you have received a hardship exemption under § 275.203–3. You are not required to file with the Commission the brochure supplements required by Part 2B of Form ADV.

Note 1 to paragraph (a)(1): Information on how to file with the IARD is available on the Commission's website at *http://www.sec.gov/iard.* If you are not required to deliver a brochure or Form CRS to any clients, you are not required to prepare or file a brochure or Form CRS, as applicable, with the Commission. If you are not required to deliver a brochure supplement to any clients for any particular supervised person, you are not required to prepare a brochure supplement for that supervised person.

(2)(i) On or after June 30, 2020, the Commission will not accept any initial application for registration as an investment adviser that does not include a Form CRS that satisfies the requirements of Part 3 of Form ADV.

(ii) Beginning on May 1, 2020, any initial application for registration as an investment adviser filed prior to June 30, 2020, must include a Form CRS that satisfies the requirements of Part 3 of Form ADV by no later than June 30, 2020.

* * * * *

■ 11. Amend § 275.204–1 by revising paragraphs (a) and (b) and adding paragraph (e) to read as follows:

§ 275.204–1 Amendments to Form ADV.

(a) *When amendment is required.* You must amend your Form ADV (17 CFR 279.1):

(1) Parts 1 and 2:

(i) At least annually, within 90 days of the end of your fiscal year; and

(ii) More frequently, if required by the instructions to Form ADV.

(2) Part 3 at the frequency required by the instructions to Form ADV.

(b) *Electronic filing of amendments.* (1) Subject to paragraph (c) of this section, you must file all amendments to Part 1A, Part 2A, and Part 3 of Form ADV electronically with the IARD, unless you have received a continuing hardship exemption under § 275.203–3. You are not required to file with the Commission amendments to brochure supplements required by Part 2B of Form ADV.

(2) If you have received a continuing hardship exemption under § 275.203–3, you must, when you are required to amend your Form ADV, file a completed Part 1A, Part 2A and Part 3 of Form ADV on paper with the SEC by mailing it to FINRA.

* * * * *

(e) *Transition to Filing Form CRS.* If you are registered with the Commission or have an application for registration pending with the Commission prior to June 30, 2020, you must amend your Form ADV by electronically filing with IARD your initial Form CRS that satisfies the requirements of Part 3 of Form ADV (as amended effective September 30, 2019) beginning on May 1, 2020 and by no later than June 30, 2020.

Note 1 to paragraphs (e): This note applies to paragraphs (a), (b), and (e) of this section. Information on how to file with the IARD is available on our website at *http://www.sec.gov/iard.* For the annual updating amendment: Summaries of material changes that are not included in the adviser's brochure must be filed with the Commission as an exhibit to Part 2A in the same electronic file; and if you are not required to prepare a brochure, a summary of material changes, an annual updating amendment to your brochure, or Form CRS you are not required to file them with the Commission. See the instructions for Part 2A and Part 3 of Form ADV.

* * * * *

■ 12. Section 275.204–2 is amended by revising paragraph (a)(14)(i) as follows:

§ 275.204–2 Books and records to be maintained by investment advisers.

(a) * * *

(14)(i) A copy of each brochure, brochure supplement and Form CRS, and each amendment or revision to the brochure, brochure supplement and Form CRS, that satisfies the requirements of Part 2 or Part 3 of Form ADV, as applicable [17 CFR 279.1]; any summary of material changes that satisfies the requirements of Part 2 of Form ADV but is not contained in the brochure; and a record of the dates that each brochure, brochure supplement and Form CRS, each amendment or revision thereto, and each summary of material changes not contained in a brochure given to any client or to any prospective client who subsequently becomes a client.

* * * * *

■ 13. Section 275.204–5 is added to read as follows:

§ 275.204–5 Delivery of Form CRS.

(a) *General requirements.* If you are registered under the Act as an investment adviser, you must deliver Form CRS, required by Part 3 of Form ADV [17 CFR 279.1], to each retail investor.

(b) *Delivery requirements.* You (or a supervised person acting on your behalf) must:

(1) Deliver to each retail investor your current Form CRS before or at the time you enter into an investment advisory contract with that retail investor.

(2) Deliver to each retail investor who is an existing client your current Form CRS before or at the time you:

(i) Open a new account that is different from the retail investor's existing account(s);

(ii) Recommend that the retail investor roll over assets from a retirement account into a new or existing account or investment; or

(iii) Recommend or provide a new investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in an existing account.

(3) Post the current Form CRS prominently on your website, if you have one, in a location and format that is easily accessible for retail investors.

(4) Communicate any changes made to Form CRS to each retail investor who is an existing client within 60 days after the amendments are required to be made and without charge. The communication can be made by delivering the amended Form CRS or by communicating the information through another disclosure that is delivered to the retail investor.

(5) Deliver a current Form CRS to each retail investor within 30 days upon request.

(c) *Other disclosure obligations.* Delivering Form CRS in compliance with this section does not relieve you of any other disclosure obligations you have to your retail investors under any Federal or State laws or regulations.

(d) *Definitions.* For purposes of this section:

(1) *Current Form CRS* means the most recent version of the Form CRS.

(2) *Retail investor* means a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes.

(3) *Supervised person* means any of your officers, partners or directors (or other persons occupying a similar status or performing similar functions) or employees, or any other person who provides investment advice on your behalf.

(e) *Transition rule.* (1) Within 30 days after the date by which you are first required by § 275.204–1(b)(3) to electronically file your Form CRS with the Commission, you must deliver to each of your existing clients who is a retail investor your current Form CRS as required by Part 3 of Form ADV.

(2) As of the date by which you are first required to electronically file your Form CRS with the Commission, you must begin using your Form CRS as required by Part 3 of Form ADV to comply with the requirements of paragraph (b) of this section.

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

■ 14. The authority citation for part 279 is revised to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b–1, *et seq.,* Pub. L. 111–203, 124 Stat. 1376.

Note: The following amendment does not appear in the Code of Federal Regulations.

■ 15. Form ADV [referenced in § 279.1] is amended by:

a. In the instructions to the form, revising the section entitled "Form ADV: General Instructions." The revised version of Form ADV: General Instructions is attached as Appendix A;

b. In the instructions to the form, adding the section entitled "Form ADV, Part 3: Instructions to Form CRS." The new version of Form ADV, Part 3: Instructions to Form CRS is attached as Appendix B.

Dated: June 5, 2019.

By the Commission.

Vanessa A. Countryman,

Acting Secretary.

Note: The appendices will not appear in the Code of Federal Regulations.

Appendices

BILLING CODE 8011–01–P

OMB APPROVAL	
OMB Number:	3235-0049
Expires:	[Date]
Estimated average burden hours per response	[xx.xx]

APPENDIX A

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND**
- **REPORT FORM BY EXEMPT REPORTING ADVISERS**

Form ADV: General Instructions

Read these instructions carefully before filing Form ADV. Failure to follow these instructions, properly complete the form, or pay all required fees may result in your application or report being delayed or rejected.

In these instructions and in Form ADV, "you" means the investment adviser (*i.e.*, the advisory firm).

If you are a "separately identifiable department or division" (SID) of a bank, "you" means the SID, rather than your bank, unless the instructions or the form provide otherwise.

If you are a *private fund* adviser filing an *umbrella registration*, "you" means the *filing adviser* and each *relying adviser*, unless the instructions or the form provide otherwise. The information in Items 1, 2, 3 and 10 (including corresponding schedules) should be provided for the *filing adviser* only.

Terms that appear in *italics* are defined in the Glossary of Terms to Form ADV.

1. Where can I get more information on Form ADV, electronic filing, and the IARD?

The SEC provides information about its rules and the Advisers Act on its website: <http://www.sec.gov/iard>.

NASAA provides information about state investment adviser laws and state rules, and how to contact a *state securities authority*, on its website: <http://www.nasaa.org>.

FINRA provides information about the IARD and electronic filing on the IARD website: <http://www.iard.com>.

2. What is Form ADV used for?

Investment advisers use Form ADV to:

- Register with the Securities and Exchange Commission
- Register with one or more *state securities authorities*

- Amend those registrations;

- Report to the SEC as an *exempt reporting adviser*
- Report to one or more *state securities authorities* as an *exempt reporting adviser*
- Amend those reports; and
- Submit a final report as an *exempt reporting adviser*

3. How is Form ADV organized?

Form ADV contains five parts:

- Part 1A asks a number of questions about you, your business practices, the *persons* who own and *control* you, and the *persons* who provide investment advice on your behalf.
  - All advisers registering with the SEC or any of the *state securities authorities* must complete Part 1A.
  - *Exempt reporting advisers* (that are not also registering with any *state securities authority*) must complete only the following Items of Part 1A: 1, 2, 3, 6, 7, 10, and 11, as well as corresponding schedules. *Exempt reporting advisers* that are registering with any *state securities authority* must complete all of Form ADV.

  Part 1A also contains several supplemental schedules. The items of Part 1A let you know which schedules you must complete.
  - Schedule A asks for information about your direct owners and executive officers.
  - Schedule B asks for information about your indirect owners.
  - Schedule C is used by paper filers to update the information required by Schedules A and B (see Instruction 18).
  - Schedule D asks for additional information for certain items in Part 1A.
  - Schedule R asks for additional information about *relying advisers*.
  - Disclosure Reporting Pages (or DRPs) are schedules that ask for details about disciplinary events involving you or your *advisory affiliates*.

- Part 1B asks additional questions required by *state securities authorities*. Part 1B contains three additional DRPs. If you are applying for SEC registration or are registered only with the SEC, you do not have to complete Part 1B. (If you are filing electronically and you do not have to complete Part 1B, you will not see Part 1B).

- Part 2A requires advisers to create narrative *brochures* containing information about the advisory firm. The requirements in Part 2A apply to all investment advisers registered with or applying for registration with the SEC, but do not apply to *exempt reporting advisers*. Every application for registration must include a narrative brochure prepared in accordance with the requirements of Part 2A of Form ADV. See Advisers Act Rule 203-1.

- Part 2B requires advisers to create *brochure supplements* containing information about certain *supervised persons*. The requirements in Part 2B apply to all investment advisers registered with or applying for registration with the SEC, but do not apply to *exempt reporting advisers*.

- Part 3 requires advisers to create relationship *summary* (Form CRS) containing information for *retail investors*. The requirements in Part 3 apply to all investment advisers registered or applying for registration with the SEC, but do not apply to *exempt reporting advisers*. Every adviser that has *retail investors* to whom it must deliver a *relationship summary* must include in the application for registration a *relationship summary* prepared in accordance with the requirements of Part 3 of Form ADV. See Advisers Act Rule 203-1.

4. When am I required to update my Form ADV?

- SEC- and State-Registered Advisers:
  - *Annual updating amendments*: You must amend your Form ADV each year by filing an *annual updating amendment* within 90 days after the end of your fiscal year. When you submit your *annual updating amendment*, you must update your responses to all items in Part 1A, 1B, 2A and 2B (as applicable), including corresponding sections of Schedules A, B, C, and D and all sections of Schedule R for each *relying adviser*. You must submit your summary of material changes required by Item 2 of Part 2A either in the *brochure* (cover page or the page immediately thereafter) or as an exhibit to your *brochure*. You may, but are not required, to submit amended versions of the *relationship summary* required by Part 3 as part of your *annual updating amendment.*
  - Other-than-annual amendments: In addition to your *annual updating amendment*,
    - If you are registered with the SEC or a *state securities authority*, you must amend Part 1A, 1B, 2A and 2B (as applicable) of your Form ADV, including corresponding sections of Schedules A, B, C, D, and R, by filing additional amendments (other-than-annual amendments) promptly, if:
      - you are adding or removing a *relying adviser* as part of your *umbrella registration;*
      - information you provided in response to Items 1 (except 1.O. and Section 1.F. of Schedule D), 3, 9 (except 9.A.(2), 9.B.(2), 9.E., and 9.F.), or 11 of Part 1A or Items 1, 2.A. through 2.F., or 2.I. of Part 1B or Sections 1 or 3 of Schedule R becomes inaccurate in any way;
      - information you provided in response to Items 4, 8, or 10 of Part 1A, or Item 2.G. of Part 1B, or Section 10 of Schedule R becomes materially inaccurate; or

- information you provided in your *brochure* becomes materially inaccurate (see note below for exceptions).

Notes: Part 1: If you are submitting an other-than-annual amendment, you are not required to update your responses to Items 2, 5, 6, 7, 9.A.(2), 9.B.(2), 9.E., 9.F., or 12 of Part 1A, Items 2.H. or 2.J. of Part 1B, Section 1.F. of Schedule D or Section 2 of Schedule R even if your responses to those items have become inaccurate.

Part 2: You must amend your *brochure supplements* (see Form ADV, Part 2B) promptly if any information in them becomes materially inaccurate. If you are submitting an other-than-annual amendment to your *brochure*, you are not required to update your summary of material changes as required by Item 2. You are not required to update your *brochure* between annual amendments solely because the amount of *client* assets you manage has changed or because your fee schedule has changed. However, if you are updating your *brochure* for a separate reason in between annual amendments, and the amount of *client* assets you manage listed in response to Item 4.E. or your fee schedule listed in response to Item 5.A. has become materially inaccurate, you should update that item(s) as part of the interim amendment.

- If you are an SEC-registered adviser, you are required to file your *brochure* amendments electronically through IARD. You are not required to file amendments to your *brochure supplements* with the SEC, but you must maintain a copy of them in your files.

- If you are a state-registered adviser, you are required to file your *brochure* amendments and *brochure supplement* amendments with the appropriate *state securities authorities* through IARD.

Part 3: If you are registered with the SEC, you must amend Part 3 of your Form ADV within 30 days whenever any information in your *relationship summary* becomes materially inaccurate by filing with the SEC an additional *other-than-annual amendment* or by including the *relationship summary* as part of an *annual updating amendment*. You must include an exhibit highlighting the most recent changes required by Form ADV, Part 3 (Form CRS), General Instruction 8.C.

- *Exempt reporting advisers*:

  - *Annual Updating Amendments*: You must amend your Form ADV each year by filing an *annual updating amendment* within 90 days after the end of your fiscal year. When you submit your *annual updating amendment*, you must update your responses to all required items, including corresponding sections of Schedules A, B, C, and D.

- Other-than-Annual Amendments: In addition to your *annual updating amendment*, you must amend your Form ADV, including corresponding sections of Schedules A, B, C, and D, by filing additional amendments (other-than-annual amendments) promptly if:
  - information you provided in response to Items 1 (except Item 1.O. and Section 1.F. of Schedule D), 3, or 11 becomes inaccurate in any way; or
  - information you provided in response to Item 10 becomes materially inaccurate.

Failure to update your Form ADV, as required by this instruction, is a violation of SEC rules or similar state rules and could lead to your registration being revoked.

5. What is SEC *umbrella registration* and how can I satisfy the requirements of filing an *umbrella registration?*

An *umbrella registration* is a single registration by a *filing adviser* and one or more *relying advisers* who advise only *private funds* and certain separately managed account *clients* that are *qualified clients* and collectively conduct a single advisory business. Absent other facts suggesting that the *filing adviser* and *relying adviser*(s) conduct different businesses, *umbrella registration* is available under the following circumstances:

i. The *filing adviser* and each *relying adviser* advise only *private funds* and *clients* in separately managed accounts that are *qualified clients* and are otherwise eligible to invest in the *private funds* advised by the *filing adviser* or a *relying adviser* and whose accounts pursue investment objectives and strategies that are substantially similar or otherwise related to those *private funds*.

ii. The *filing adviser* has its *principal office and place of business* in the United States and, therefore, all of the substantive provisions of the Advisers Act and the rules thereunder apply to the *filing adviser's* and each *relying adviser's* dealings with each of its *clients*, regardless of whether any *client* of the *filing adviser* or *relying adviser* providing the advice is a *United States person*.

iii. Each *relying adviser*, its *employees* and the *persons* acting on its behalf are subject to the *filing adviser's* supervision and *control* and, therefore, each *relying adviser*, its *employees* and the *persons* acting on its behalf are "persons associated with" the *filing adviser* (as defined in section 202(a)(17) of the Advisers Act).

iv. The advisory activities of each *relying adviser* are subject to the Advisers Act and the rules thereunder, and each *relying adviser* is subject to examination by the SEC.

v. The *filing adviser* and each *relying adviser* operate under a single code of ethics adopted in accordance with SEC rule 204A-1 and a single set of written policies and procedures adopted and implemented in accordance with SEC rule 206(4)-7 and administered by a single chief compliance officer in accordance with that rule.

To satisfy the requirements of Form ADV while using *umbrella registration* the *filing adviser* must sign, file, and update as required, a single Form ADV (Parts 1 and 2) that relates to, and includes all information concerning, the *filing adviser* and each *relying adviser* (*e.g.*, disciplinary information and ownership information), and must include this same information in any other reports or filings it must make under the Advisers Act or the rules thereunder (*e.g.*, Form PF). The *filing adviser* and each *relying adviser* must not be prohibited from registering with the SEC by section 203A of the Advisers Act (*i.e.*, the *filing adviser* and each *relying adviser* must individually qualify for SEC registration).

Unless otherwise specified, references to "you" in Form ADV refer to both the *filing adviser* and each *relying adviser*. The information in Items 1, 2, 3 and 10 (including corresponding schedules) should be provided for the *filing adviser* only. A separate Schedule R should be completed for each *relying adviser*. References to "you" in Schedule R refer to the *relying adviser* only.

A *filing adviser* applying for registration with the SEC should complete a Schedule R for each *relying adviser*. If you are a *filing adviser* registered with the SEC and would like to add or delete *relying advisers* from an *umbrella registration*, you should file an other-than-annual amendment and add or delete Schedule Rs as needed.

Note: *Umbrella registration* is not available to *exempt reporting advisers*.

6. Where do I sign my Form ADV application or amendment?

You must sign the appropriate Execution Page. There are three Execution Pages at the end of the form. Your initial application, your initial report (in the case of an *exempt reporting adviser*), and all amendments to Form ADV must include at least one Execution Page.

- If you are applying for or are amending your SEC registration, or if you are reporting as an *exempt reporting adviser* or amending your report, you must sign and submit either a:
  - Domestic Investment Adviser Execution Page, if you (the advisory firm) are a resident of the United States; or
  - *Non-Resident* Investment Adviser Execution Page, if you (the advisory firm) are not a resident of the United States.
- If you are applying for or are amending your registration with a *state securities authority*, you must sign and submit the State-Registered Investment Adviser Execution Page.

7. Who must sign my Form ADV or amendment?

The individual who signs the form depends upon your form of organization:

- For a sole proprietorship, the sole proprietor.
- For a partnership, a general partner.
- For a corporation, an authorized principal officer.
- For a "separately identifiable department or division" (SID) of a bank, a principal officer of your bank who is directly engaged in the management, direction, or supervision of your investment advisory activities.
- For all others, an authorized individual who participates in managing or directing your affairs.

The signature does not have to be notarized, and in the case of an electronic filing, should be a typed name.

8. How do I file my Form ADV?

Complete Form ADV electronically using the Investment Adviser Registration Depository (IARD) if:

- You are filing with the SEC (and submitting *notice filings* to any of the *state securities authorities*), or
- You are filing with a *state securities authority* that requires or permits advisers to submit Form ADV through the IARD.

  Note: SEC rules require advisers that are registered or applying for registration with the SEC, or that are reporting to the SEC as an *exempt reporting adviser*, to file electronically through the IARD system. See SEC rules 203-1 and 204-4.

To file electronically, go to the IARD website (<www.iard.com>), which contains detailed instructions for advisers to follow when filing through the IARD.

Complete Form ADV (Paper Version) on paper if:

- You are filing with the SEC or a *state securities authority* that requires electronic filing, but you have been granted a continuing hardship exemption. Hardship exemptions are described in Instruction 17.
- You are filing with a *state securities authority* that permits (but does not require) electronic filing and you do not file electronically.

9. How do I get started filing electronically?

First, obtain a copy of the IARD Entitlement Package from the following website: <http://www.iard.com/GetStarted.asp>. Second, request access to the IARD system for your firm by completing and submitting the IARD Entitlement Package. The IARD Entitlement Package explains how the form may be submitted. Mail the forms to: FINRA Entitlement Group, 9509 Key West Avenue, Rockville, MD 20850.

When FINRA receives your Entitlement Package, they will assign a *CRD* number (identification number for your firm) and a user I.D. code and password (identification number and system password for the individual(s) who will submit Form ADV filings for your firm). Your firm may request an I.D. code and password for more than one individual. FINRA also will create a financial account for you from which the IARD will deduct filing fees and any state fees you are required to pay. If you already have a *CRD* account with FINRA, it will also serve as your IARD account; a separate account will not be established.

Once you receive your *CRD* number, user I.D. code and password, and you have funded your account, you are ready to file electronically.

Questions regarding the Entitlement Process should be addressed to FINRA at 240.386.4848.

10. If I am applying for registration with the SEC, or amending my SEC registration, how do I make *notice filings* with the *state securities authorities*?

If you are applying for registration with the SEC or are amending your SEC registration, one or more *state securities authorities* may require you to provide them with copies of your SEC filings. We call these filings "*notice filings*." Your *notice filings* will be sent electronically to the states that you check on Item 2.C. of Part 1A. The *state securities authorities* to which you send *notice filings* may charge fees, which will be deducted from the account you establish with FINRA. To determine which *state securities authorities* require SEC-registered advisers to submit *notice filings* and to pay fees, consult the relevant state investment adviser law or *state securities authority*. See General Instruction 1.

If you are granted a continuing hardship exemption to file Form ADV on paper, FINRA will enter your filing into the IARD and your *notice filings* will be sent electronically to the *state securities authorities* that you check on Item 2.C. of Part 1A.

11. I am registered with a state. When must I switch to SEC registration?

If at the time of your *annual updating amendment* you meet at least one of the requirements for SEC registration in Item 2.A.(1) to (12) of Part 1A, you must apply for registration with the SEC within 90 days after you file the *annual updating amendment*. Once you register with the SEC, you are subject to SEC regulation, regardless of whether you remain registered with one or more states. See SEC rule 203A-1(b)(2). Each of your *investment adviser representatives*, however, may be subject to registration in those states in which the representative has a place of business. See Advisers Act section 203A(b)(1); SEC rule 203A-3(a). For additional information, consult the investment adviser laws or the *state securities authority* for the particular state in which you are "doing business." See General Instruction 1.

12. I am registered with the SEC. When must I switch to registration with a *state securities authority*?

If you check box 13 in Item 2.A. of Part 1A to report on your *annual updating amendment* that you are no longer eligible to register with the SEC, you must withdraw from SEC registration within 180 days after the end of your fiscal year by filing Form ADV-W. See SEC rule 203A-1(b)(2). You should consult state law or the *state securities authority* for the states in which you are "doing business" to determine if you are required to register in these states. See General Instruction 1. Until you file your Form ADV-W with the SEC, you will remain subject to SEC regulation, and you also will be subject to regulation in any states where you register. See SEC rule 203A-1(b)(2).

13. I am an *exempt reporting adviser*. When must I submit my first report on Form ADV?

- <u>All *exempt reporting advisers*</u>:
  You must submit your initial Form ADV filing within 60 days of relying on the exemption from registration under either section 203(l) of the Advisers Act as an adviser solely to one or more venture capital funds or section 203(m) of the Advisers Act because you act solely as an adviser to private funds and have assets under management in the United States of less than $150 million.

- <u>Additional instruction for advisers switching from being registered to being *exempt reporting advisers*</u>:
  If you are currently registered as an investment adviser (or have an application for registration pending) with the SEC or with a *state securities authority*, you must file a Form ADV-W to withdraw from registration in the jurisdictions where you are switching. You must submit the Form ADV-W <u>before</u> submitting your first report as an *exempt reporting adviser*.

14. I am an *exempt reporting adviser*. Is it possible that I might be required to also register with or submit a report to a *state securities authority*?

Yes, you may be required to register with or submit a report to one or more *state securities authorities*. If you are required to register with one or more *state securities authorities*, you must complete all of Form ADV. See General Instruction 3. If you are required to submit a report to one or more *state securities authorities*, check the box(es) in Item 2.C. of Part 1A next to the state(s) you would like to receive the report. Each of your *investment adviser representatives* may also be subject to registration requirements. For additional information about the requirements that may apply to you, consult the investment adviser laws or the *state securities authority* for the particular state in which you are "doing business." See General Instruction 1.

15. What do I do if I no longer meet the definition of "*exempt reporting adviser*"?

- <u>Advisers Switching to SEC Registration</u>:

  - You may no longer be an *exempt reporting adviser* and may be required to register with the SEC if you wish to continue doing business as an investment adviser. For example, you may be relying on section 203(l) and wish to accept a *client* that is not a venture capital fund as defined in SEC rule 203(l)-1, or you may have been relying on SEC rule 203(m)-1 and reported in Section 2.B. of Schedule D to your *annual updating amendment* that you have *private fund* assets of $150 million or more.

- If you are relying on section 203(l), unless you qualify for another exemption, you would violate the Advisers Act's registration requirement if you accept a *client* that is not a venture capital fund as defined in SEC rule 203(l)-1 before the SEC approves your application for registration. You must submit your final report as an *exempt reporting adviser* and apply for SEC registration in the same filing.

- If you were relying on SEC rule 203(m)-1 and you reported in Section 2.B. of Schedule D to your *annual updating amendment* that you have *private fund* assets of $150 million or more, you must register with the SEC unless you qualify for another exemption. If you have complied with all SEC reporting requirements applicable to an *exempt reporting adviser* as such, you have up to 90 days after filing your *annual updating amendment* to apply for SEC registration, and you may continue doing business as a *private fund* adviser during this time. You must submit your final report as an *exempt reporting adviser* and apply for SEC registration in the same filing. Unless you qualify for another exemption, you would violate the Advisers Act's registration requirement if you accept a *client* that is not a *private fund* during this transition period before the SEC approves your application for registration, and you must comply with all SEC reporting requirements applicable to an *exempt reporting adviser* as such during this 90-day transition period. If you have not complied with all SEC reporting requirements applicable to an *exempt reporting adviser* as such, this 90-day transition period is not available to you. Therefore, if the transition period is not available to you, and you do not qualify for another exemption, your application for registration must be approved by the SEC before you meet or exceed SEC rule 203(m)-1's $150 million asset threshold.

- You will be deemed in compliance with the Form ADV filing and reporting requirements until the SEC approves or denies your application. If your application is approved, you will be able to continue business as a registered adviser.

- If you register with the SEC, you may be subject to state *notice filing* requirements. To determine these requirements, consult the investment adviser laws or the *state securities authority* for the particular state in which you are "doing business." See General Instruction 1.

Note: If you are relying on SEC rule 203(m)-1 and you accept a *client* that is not a *private fund*, you will lose the exemption provided by SEC rule 203(m)-1 immediately. To avoid this result, you should apply for SEC registration in advance so that the SEC has approved your registration before you accept a *client* that is not a *private fund.*

The 90-day transition period described above also applies to investment advisers with their *principal offices and places of business* outside of the United States with respect to their *clients* who are *United States persons* (*e.g.*, the adviser would not be eligible for the 90-day transition period if it accepted a *client* that is a *United States person* and is not a *private fund*).

- Advisers Not Switching to SEC Registration:

  - You may no longer be an *exempt reporting adviser* but may not be required to register with the SEC or may be prohibited from doing so. For example, you may cease to do business as an investment adviser, become eligible for an exemption that does not require reporting, or be ineligible for SEC registration. In this case, you must submit a final report as an *exempt reporting adviser* to update only Item 1 of Part 1A of Form ADV.

  - You may be subject to state registration requirements. To determine these requirements, consult the investment adviser laws or the *state securities authority* for the particular state in which you are "doing business." See General Instruction 1.

16. Are there filing fees?

Yes. These fees go to support and maintain the IARD. The IARD filing fees are in addition to any registration or other fee that may be required by state law. You must pay an IARD filing fee for your initial application, your initial report, and each *annual updating amendment.* There is no filing fee for an other-than-annual amendment, a final report as an *exempt reporting adviser*, or Form ADV-W. The IARD filing fee schedule is published at <http://www.sec.gov/iard>; <http://www.nasaa.org>; and <http://www.iard.com>.

If you are submitting a paper filing under a continuing hardship exemption (see Instruction 17), you are required to pay an additional fee. The amount of the additional fee depends on whether you are filing Form ADV or Form ADV-W. (There is no additional fee for filings made on Form ADV-W.) The hardship filing fee schedule is available by contacting FINRA at 240.386.4848.

17. What if I am not able to file electronically?

If you are required to file electronically but cannot do so, you may be eligible for one of two types of hardship exemptions from the electronic filing requirements.

- A **temporary hardship exemption** is available if you file electronically, but you encounter unexpected difficulties that prevent you from making a timely filing with the IARD, such as a computer malfunction or electrical outage. This exemption does not permit you to file on paper; instead it extends the deadline for an electronic filing for seven business days. See SEC rules 203-3(a) and 204-4(e).

- A **continuing hardship exemption** may be granted if you are a small business and you can demonstrate that filing electronically would impose an undue hardship. You are a small business, and may be eligible for a continuing hardship exemption, if you are required to answer Item 12 of Part 1A (because you have assets under management of less than $25 million) and you are able to respond "no" to each question in Item 12. See SEC rule 0-7.

  If you have been granted a continuing hardship exemption, you must complete and submit the paper version of Form ADV to FINRA. FINRA will enter your responses into the IARD. As discussed in General Instruction 16, FINRA will charge you a fee to reimburse it for the expense of data entry.

18. I am eligible to file on paper. How do I make a paper filing?

When filing on paper, you must:

- Type all of your responses.
- Include your name (the same name you provide in response to Item 1.A. of Part 1A) and the date on every page.
- If you are amending your Form ADV:
  - complete page 1 and circle the number of any item for which you are changing your response.
  - include your SEC 801-number (if you have one), or your 802-number (if you have one), and your *CRD* number (if you have one) on every page.
  - complete the amended item in full and circle the number of the item for which you are changing your response.
  - to amend Schedule A or Schedule B, complete and submit Schedule C.

Where you submit your paper filing depends on why you are eligible to file on paper:

- If you are filing on paper because you have been granted a continuing hardship exemption, submit one manually signed Form ADV and one copy to: IARD Document Processing, FINRA, P.O. Box 9495, Gaithersburg, MD 20898-9495.

If you complete Form ADV on paper and submit it to FINRA but you do not have a continuing hardship exemption, the submission will be returned to you.

- If you are filing on paper because a state in which you are registered or in which you are applying for registration allows you to submit paper instead of electronic filings, submit one manually signed Form ADV and one copy to the appropriate *state securities authorities*.

19. Who is required to file Form ADV-NR?

Every *non-resident* general partner and *managing agent* of all SEC-registered advisers and *exempt reporting advisers*, whether or not the adviser is resident in the United States, must file Form ADV-NR in connection with the adviser's initial application or report. A general partner or *managing agent* of an SEC-registered adviser or *exempt reporting adviser* who becomes a *non-resident* after the adviser's initial application or report has been submitted must file Form ADV-NR within 30 days. Form ADV-NR must be filed on paper (it cannot be filed electronically).

Submit Form ADV-NR to the SEC at the following address:

Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549;
Attn: OCIE Registrations Branch.

Failure to file Form ADV-NR promptly may delay SEC consideration of your initial application.

Federal Information Law and Requirements

Sections 203 and 204 of the Advisers Act [15 U.S.C. 80b-3 and 80b-4] authorize the SEC to collect the information required by Form ADV. The SEC collects the information for regulatory purposes, such as deciding whether to grant registration. Filing Form ADV is mandatory for advisers who are required to register with the SEC and for *exempt reporting advisers*. The SEC maintains the information submitted on this form and makes it publicly available. The SEC may return forms that do not include required information. Intentional misstatements or omissions constitute federal criminal violations under 18 U.S.C. 1001 and 15 U.S.C. 80b-17.

SEC's Collection of Information

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Advisers Act authorizes the SEC to collect the information on Form ADV from investment advisers. See 15 U.S.C. 80b-3 and 80b-4. Filing the form is mandatory.

The form enables the SEC to register investment advisers and to obtain information from and about *exempt reporting advisers*. Every applicant for registration with the SEC as an adviser, and every *exempt reporting adviser*, must file the form. See 17 CFR 275.203-1 and 204-4. By accepting a form, however, the SEC does not make a finding that it has been completed or submitted correctly. The form is filed annually by every adviser, no later than 90 days after the end of its fiscal year, to amend its registration or its report. It is also filed during the year to reflect material changes. See 17 CFR 275.204-1. The SEC maintains the information on the form and makes it publicly available through the IARD.

Anyone may send the SEC comments on the accuracy of the burden estimate on page 1 of the form, as well as suggestions for reducing the burden. The Office of Management and Budget has reviewed this collection of information under 44 U.S.C. 3507.

The information contained in the form is part of a system of records subject to the Privacy Act of 1974, as amended. The SEC has published in the Federal Register the Privacy Act System of Records Notice for these records.

APPENDIX B

UNITED STATES[1]
SECURITIES AND EXCHANGE COMMISSION

FORM CRS

OMB APPROVAL	
OMB Number:	3235-0766
Expires:	[Date]
Estimated average burden hours per response:	[xx.xx]

Sections 3, 10, 15, 15(c)(6), 15(*l*), 17, 23, and 36 of the Securities Exchange Act of 1934 ("Exchange Act") and section 913(f) of Title IX of the Dodd-Frank Act authorize the Commission to require the collection of the information on Form CRS from brokers and dealers. *See* 15 U.S.C. 78c, 78j, 78o, 78o(c)(6), 78o(*l*), 78q, 78w and 78mm. Filing Form CRS is mandatory for every broker or dealer registered with the Commission pursuant to section 15 of the Exchange Act that offers services to a retail investor. *See* 17 CFR 240.17a-14. Intentional misstatements or omissions constitute federal criminal violations (*see* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a)). The Commission may use the information provided in Form CRS to manage its regulatory and examination programs. Form CRS is made publically available.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the requirements of 44 U.S.C. 3507.

The information contained in the form is part of a system of records subject to the Privacy Act of 1974, as amended. The information may be disclosed as outlined above and in the routine uses listed in the applicable system of records notice, SEC-70, SEC's Division of Trading and Markets Records, published in the Federal Register at 83 FR 6892 (February 15, 2018).

SEC 2942 (06-19)

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[1] This cover page will be included for Form CRS (17 CFR 249.640) only.

[Form ADV, Part 3: Instructions to Form CRS][2]

General Instructions

Under rule 17a-14 under the Securities Exchange Act of 1934 and rule 204-5 under the Investment Advisers Act of 1940, broker-dealers registered under section 15 of the Exchange Act and investment advisers registered under section 203 of the Advisers Act are required to deliver to *retail investors* a *relationship summary* disclosing certain information about the firm.[3] Read all the General Instructions as well as the particular item requirements before preparing or updating the *relationship summary.*

If you do not have any *retail investors* to whom you must deliver a *relationship summary*, you are not required to prepare or file one. See also Advisers Act rule 204-5; Exchange Act rule 17a-14(a).

1. Format.

A. The *relationship summary* must include the required items enumerated below. The items require you to provide specific information.

B. You must respond to each item and must provide responses in the same order as the items appear in these instructions. You may not include disclosure in the *relationship summary* other than disclosure that is required or permitted by these Instructions and the applicable item.

C. You must make a copy of the *relationship summary* available upon request without charge. In paper format, the *relationship summary* for broker-dealers and investment advisers must not exceed two pages. For *dual registrants* that include their brokerage services and investment advisory services in one *relationship summary*, it must not exceed four pages in paper format. *Dual registrants* and *affiliates* that prepare separate *relationship summaries* are limited to two pages for each *relationship summary*. See General Instruction 5. You must use reasonable paper size, font size, and margins. If delivered electronically, the relationship summary must not exceed the equivalent of two pages or four pages in paper format, as applicable.

2. Plain English; Fair Disclosure.

A. The items of the *relationship summary* are designed to promote effective communication between you and *retail investors*. Write your *relationship summary* in plain English, taking into consideration *retail investors*' level of

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2 The bracketed text will be included for Form ADV, Part 3 (17 CFR 279.1) only.

3 Terms that are italicized in these instructions are defined in General Instruction 11.

financial experience. You should include white space and implement other design features to make the *relationship summary* easy to read. The *relationship summary* should be concise and direct. Specifically: (i) use short sentences and paragraphs; (ii) use definite, concrete, everyday words; (iii) use active voice; (iv) avoid legal jargon or highly technical business terms unless you clearly explain them; and (v) avoid multiple negatives. You must write your response to each item as if you are speaking to the *retail investor*, using "you," "us," "our firm," etc.

Note: The SEC's Office of Investor Education and Advocacy has published A Plain English Handbook. You may find the handbook helpful in writing your *relationship summary*. For a copy of this handbook, visit the SEC's website at www.sec.gov/news/extra/handbook.htm.

B. All information in your *relationship summary* must be true and may not omit any material facts necessary in order to make the disclosures required by these Instructions and the applicable Item, in light of the circumstances under which they were made, not misleading. If a required disclosure or conversation starter is inapplicable to your business or specific wording required by these Instructions is inaccurate, you may omit or modify that disclosure or conversation starter.

C. Responses must be factual and provide balanced descriptions to help *retail investors* evaluate your services. For example, you may not include exaggerated or unsubstantiated claims, vague and imprecise "boilerplate" explanations, or disproportionate emphasis on possible investments or activities that are not offered to *retail investors*.

D. Broker-dealers and investment advisers have disclosure and reporting obligations under state and federal laws, including, but not limited to, obligations under the Exchange Act, the Advisers Act, and the respective rules thereunder. Broker-dealers are also subject to disclosure obligations under the rules of self-regulatory organizations. Delivery of the *relationship summary* will not necessarily satisfy the additional requirements that you have under the federal securities laws and regulations or other laws or regulations.

3. Electronic And Graphical Formats.

A. You are encouraged to use charts, graphs, tables, and other graphics or text features in order to respond to the required disclosures. You are also encouraged to use text features, text colors, and graphical cues, such as dual-column charts, to compare services, account characteristics, investments, fees, and conflicts of interest. For a *relationship summary* that is posted on your website or otherwise provided electronically, we encourage online tools that populate information in comparison boxes based on investor selections. You also may include: (i) a means of facilitating access to video or audio messages, or other forms of information (whether by hyperlink, website address, Quick Response Code ("QR code"), or other equivalent methods or technologies); (ii) mouse-over windows;

(iii) pop-up boxes; (iv) chat functionality; (v) fee calculators; or (vi) other forms of electronic media, communications, or tools designed to enhance a *retail investor's* understanding of the material in the *relationship summary*.

B. In a *relationship summary* that is posted on your website or otherwise provided electronically, you must provide a means of facilitating access to any information that is referenced in the *relationship summary* if the information is available online, including, for example, hyperlinks to fee schedules, conflicts disclosures, the firm's narrative brochure required by Part 2A of Form ADV, or other regulatory disclosures. In a *relationship summary* that is delivered in paper format, you may include URL addresses, QR codes, or other means of facilitating access to such information.

C. Explanatory or supplemental information included in the *relationship summary* pursuant to General Instructions 3.A. or 3.B.: (i) must be responsive to and meet the requirements in these instructions for the particular Item in which the information is placed; and (ii) may not, because of the nature, quantity, or manner of presentation, obscure or impede understanding of the information that must be included. When using interactive graphics or tools, you may include instructions on their use and interpretation.

4. **Formatting For Conversation Starters, Additional Information, and Standard of Conduct.**

A. For the "conversation starters" required by Items 2, 3, 4, and 5 below, you must use text features to make the conversation starters more noticeable and prominent in relation to other discussion text, for example, by: using larger or different font, a text box around the heading or questions; bolded, italicized or underlined text; or lines to offset the questions from the other sections.

B. Investment advisers that provide only automated investment advisory services or broker-dealers that provide services only online without a particular individual with whom a *retail investor* can discuss these conversation starters must include a section or page on their website that answers each of the questions and must provide in the *relationship summary* a means of facilitating access to that section or page. If you provide automated investment advisory or brokerage services but also make a financial professional available to discuss your services with a *retail investor*, a financial professional must be available to discuss these conversation starters with the *retail investor*.

C. For references to additional information regarding services, fees, and conflicts of interest required by Items 2.C., 3.A.(iii), and 3.B.(iv) below, you must use text features to make this information more noticeable and prominent in relation to other discussion text, for example, by: using larger or different font, a text box around the heading or questions, bolded, italicized or underlined text, or lines to offset the information from the other sections. A *relationship summary* provided electronically must include a hyperlink, QR code, or other means of facilitating access that leads directly to the relevant additional information.

5. *Dual Registrants, Affiliates*, and Additional Services.

A. If you are a *dual registrant*, you are encouraged to prepare a single *relationship summary* discussing both your brokerage and investment advisory services. Alternatively, you may prepare two separate *relationship summaries* for brokerage services and investment advisory services. Whether you prepare a single *relationship summary* or two, you must present the brokerage and investment advisory information with equal prominence and in a manner that clearly distinguishes and facilitates comparison of the two types of services. If you prepare two separate *relationship summaries*, you must reference and provide a means of facilitating access to the other, and you must deliver to each *retail investor* both *relationship summaries* with equal prominence and at the same time, without regard to whether the particular *retail investor* qualifies for those retail services or accounts.

B. If you are a broker-dealer or investment adviser and your *affiliate* also provides brokerage or investment advisory services to *retail investors*, you may prepare a single *relationship summary* discussing the services you and your *affiliate* provide. Alternatively, you may prepare separate *relationship summaries* for your services and your *affiliate's* services.

(i) Whether you prepare a single *relationship summary* or separate *relationship summaries*, you must design them in a manner that presents the brokerage and investment advisory information with equal prominence and clearly distinguishes and facilitates comparison of the two types of services.

(ii) If you prepare separate *relationship summaries*:

a. If a *dually licensed financial professional* provides brokerage and investment advisory services on behalf of you and your *affiliate*, you must deliver to each *retail investor* both your and your *affiliate's relationship summaries* with equal prominence and at the same time, without regard to whether the particular *retail investor* qualifies for those retail services or accounts. Each of the *relationship summaries* must reference and provide a means of facilitating access to the other.

b. If General Instruction 5.B.(ii)(a) does not apply, you may choose whether or not to reference and provide a means of facilitating access to your *affiliate's relationship summary* and whether or not to deliver your and your *affiliate's relationship summaries* to each *retail investor* with equal prominence and at the same time.

C. You may acknowledge other financial services that you provide in addition to your services as a broker-dealer or investment adviser registered with the SEC, such as insurance, banking, or retirement services, or investment advice pursuant to state registration or licensing. You may include references and means of facilitating access to additional information about those services. Information not pertaining to brokerage or investment advisory services may not, because of the nature, quantity, or manner of presentation, obscure or impede understanding of the information that must be included. See also General Instruction 3.C.

6. <u>Preserving Records.</u>

A. You must maintain records in accordance with Advisers Act rule 204-2(a)(14)(i) and/or Exchange Act rule 17a-4(e)(10), as applicable.

7. <u>Initial Filing and Delivery; Transition Provisions.</u>

A. **Initial filing.**

(i) If you are an investment adviser and are required to deliver a *relationship summary* to a *retail investor*, you must file Form ADV, Part 3 (Form CRS) electronically with the Investment Adviser Registration Depository (IARD). If you are a registered broker-dealer and are required to deliver a *relationship summary* to a *retail investor*, you must file Form CRS electronically through the Central Registration Depository ("Web CRD®") operated by the Financial Industry Regulatory Authority, Inc. (FINRA). If you are a *dual registrant* and are required to deliver a *relationship summary* to one or more *retail investor* clients or customers of both your investment advisory and brokerage businesses, you must file using IARD and Web CRD®. You must file Form CRS using a text-searchable format with machine-readable headings.

(ii) Information for investment advisers on how to file with IARD is available on the SEC's website at www.sec.gov/iard. Information for broker-dealers on how to file through Web CRD® is available on FINRA's website at http://www.finra.org/industry/web-crd/web-crd-system-links.

B. **Initial delivery.**

(i) *Investment Advisers*: If you are an investment adviser, you must deliver a *relationship summary* to each *retail investor* before or at the time you enter into an investment advisory contract with the *retail investor*. You must deliver the *relationship summary* even if your agreement with the *retail investor* is oral. See Advisers Act rule 204-5(b)(1).

(ii) *Broker-Dealers*: If you are a broker-dealer, you must deliver a *relationship summary* to each *retail investor*, before or at the earliest of: (i) a recommendation of an account type, a securities transaction, or an investment strategy involving securities; (ii) placing an order for the *retail* *investor*; or (iii) the opening of a brokerage account for the *retail investor*. See Exchange Act rule 17a-14(c)(1).

(iii) *Dual Registrants*: A *dual registrant* must deliver the *relationship summary* at the earlier of the timing requirements in General Instruction 7.B.(i) or (ii).

C. **Transition provisions for initial filing and delivery after the effective date of the new Form CRS requirements.**

(i) *Filings for Investment Advisers*

a. If you are already registered or have an application for registration pending with the SEC as an investment adviser before June 30, 2020 you must electronically file, in accordance with Instruction 7.A. above, your initial *relationship summary* beginning on May 1, 2020 and by no later than June 30, 2020 either as: (1) an other-than-annual amendment or (2) part of your initial application or *annual updating amendment*. See Advisers Act rules 203-1 and 204-1.

b. If you file an application for registration with the SEC as an investment adviser on or after June 30, 2020, the Commission will not accept any initial application that does not include a *relationship summary*. See Advisers Act rule 203-1.

(ii) *Filings for Broker-Dealers*

a. If you are already registered with the SEC as a broker-dealer before June 30, 2020, you must electronically file, in accordance with Instruction 7.A. above, your initial *relationship summary* beginning on May 1, 2020 and by no later than June 30, 2020. See Exchange Act rule 17a-14.

b. If you file an application for registration or have an application pending with the SEC as a broker-dealer on or after June 30, 2020, you must file your *relationship summary* by no later than the date that your registration becomes effective. See Exchange Act rule 17a-14.

(iii) *Delivery to New and Prospective Clients and Customers:* As of the date by which you are first required to electronically file your *relationship summary* with the SEC, you must begin to deliver your *relationship summary* to new and prospective clients and customers who are *retail investors* as required by Instruction 7.B. See Advisers Act rule 204-5 and Exchange Act rule 17a-14.

(iv) *Delivery to Existing Clients and Customers:* Within 30 days after the date by which you are first required to electronically file your *relationship* *summary* with the SEC, you must deliver your *relationship summary* to each of your existing clients and customers who are *retail investors*. See Advisers Act rule 204-5 and Exchange Act rule 17a-14.

8. Updating the *Relationship Summary* and Filing Amendments.

A. You must update your *relationship summary* and file it in accordance with Instruction 7.A. above within 30 days whenever any information in the *relationship summary* becomes materially inaccurate. The filing must include an exhibit highlighting changes required by Instruction 8.C. below.

B. You must communicate any changes in the updated *relationship summary* to *retail investors* who are existing clients or customers within 60 days after the updates are required to be made and without charge. You can make the communication by delivering the amended *relationship summary* or by communicating the information through another disclosure that is delivered to the *retail investor*.

C. Each amended *relationship summary* that is delivered to a *retail investor* who is an existing client or customer must highlight the most recent changes by, for example, marking the revised text or including a summary of material changes. The additional disclosure showing revised text or summarizing the material changes must be attached as an exhibit to the unmarked amended *relationship summary*.

9. Additional Delivery Requirements to Existing Clients and Customers.

A. You must deliver the most recent *relationship summary* to a *retail investor* who is an existing client or customer before or at the time you: (i) open a new account that is different from the *retail investor's* existing account(s); (ii) recommend that the *retail investor* roll over assets from a retirement account into a new or existing account or investment; or (iii) recommend or provide a new brokerage or investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in an existing account, for example, the first-time purchase of a direct-sold mutual fund or insurance product that is a security through a "check and application" process, *i.e.*, not held directly within an account.

B. You also must deliver the *relationship summary* to a *retail investor* within 30 days upon the *retail investor's* request.

10. Electronic Posting and Manner of Delivery.

A. You must post the current version of the *relationship summary* prominently on your public website, if you have one, in a location and format that is easily accessible for *retail investors*.

B. You may deliver the *relationship summary* electronically, including updates, consistent with SEC guidance regarding electronic delivery, in particular Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information, which you can find at www.sec.gov/rules/concept/33-7288.txt. You may deliver the *relationship summary* to new or prospective clients or customers in a manner that is consistent with how the *retail investor* requested information about you or your financial professional consistent with SEC guidance, in particular Form CRS Relationship Summary; Amendments to Form ADV, which you can find at https://www.sec.gov/rules/final/2019/34-86032.pdf.

C. If the *relationship summary* is delivered electronically, it must be presented prominently in the electronic medium, for example, as a direct link or in the body of an email or message, and must be easily accessible for *retail investor*s.

D. If the *relationship summary* is delivered in paper format as part of a package of documents, you must ensure that the *relationship summary* is the first among any documents that are delivered at that time.

11. <u>Definitions.</u>

For purposes of Form CRS and these Instructions, the following terms have the meanings ascribed to them below:

A. **Affiliate:** Any persons directly or indirectly controlling or controlled by you or under common control with you.

B. **Dually licensed financial professional:** A natural person who is both an associated person of a broker-dealer registered under section 15 of the Exchange Act, as defined in section 3(a)(18) of the Exchange Act, and a supervised person of an investment adviser registered under section 203 of the Advisers Act, as defined in section 202(a)(25) of the Advisers Act.

C. **Dual registrant:** A firm that is dually registered as a broker-dealer under section 15 of the Exchange Act and an investment adviser under section 203 of the Advisers Act and offers services to *retail investors* as both a broker-dealer and an investment adviser. For example, if you are dually registered and offer investment advisory services to *retail investors*, but offer brokerage services only to institutional investors, you are not a *dual registrant* for purposes of Form CRS and these Instructions.

D. **Relationship summary:** A written disclosure statement prepared in accordance with these Instructions that you must provide to *retail investors*. See Advisers Act rule 204-5; Exchange Act rule 17a-14; Form CRS.

E. **Retail investor:** A natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes.

Item Instructions

Item 1. Introduction

Include the date prominently at the beginning of the *relationship summary* (*e.g.*, in the header or footer of the first page or in a similar location for a *relationship summary* provided electronically). Briefly discuss the following information in an introduction:

A. State your name and whether you are registered with the Securities and Exchange Commission as a broker-dealer, investment adviser, or both. Also indicate that brokerage and investment advisory services and fees differ and that it is important for the *retail investor* to understand the differences. You may also include a reference to FINRA or Securities Investor Protection Corporation membership in a manner consistent with other rules or regulations (*e.g.*, FINRA rule 2210).

B. State that free and simple tools are available to research firms and financial professionals at Investor.gov/CRS, which also provides educational materials about broker-dealers, investment advisers, and investing.

Item 2. Relationships and Services

A. Use the heading: "What investment services and advice can you provide me?"

B. **Description of Services:** State that you offer brokerage services, investment advisory services, or both, to *retail investors*, and summarize the principal services, accounts, or investments you make available to *retail investors*, and any material limitations on such services. For broker-dealers, state the particular types of principal brokerage services you offer to *retail investors*, including buying and selling securities, and whether or not you offer recommendations to *retail investors*. For investment advisers, state the particular types of principal investment advisory services you offer to *retail investors*, including, for example, financial planning and wrap fee programs.

In your description you must address the following:

(i) *Monitoring:* Explain whether or not you monitor *retail investors'* investments, including the frequency and any material limitations. If so, indicate whether or not the services described in response to this Item 2.B.(i) are offered as part of your standard services.

(ii) *Investment Authority*: For investment advisers that accept discretionary authority, describe those services and any material limitations on that authority. Any such summary must include the specific circumstances that would trigger this authority and any material limitations on that authority (*e.g.*, length of time). For investment advisers that offer non-discretionary services and broker-dealers, explain that the *retail investor* makes the ultimate decision regarding the purchase or sale of investments.

Broker-dealers may, but are not required to state whether you accept limited discretionary authority.

Note: If you are a broker-dealer offering recommendations, you should consider the applicability of the Investment Advisers Act of 1940, consistent with SEC guidance.

(iii) *Limited Investment Offerings*: Explain whether or not you make available or offer advice only with respect to proprietary products, or a limited menu of products or types of investments, and if so, describe these limitations.

(iv) *Account Minimums and Other Requirements*: Explain whether or not you have any requirements for *retail investors* to open or maintain an account or establish a relationship, such as minimum account size or investment amount.

C. **Additional Information:** Include specific references to more detailed information about your services that, at a minimum, include the same or equivalent information to that required by the Form ADV, Part 2A brochure (Items 4 and 7 of Part 2A or Items 4.A. and 5 of Part 2A Appendix 1) and Regulation Best Interest, as applicable. If you are a broker-dealer that does not provide recommendations subject to Regulation Best Interest, to the extent you prepare more detailed information about your services, you must include specific references to such information. You may include hyperlinks, mouse-over windows, or other means of facilitating access to this additional information and to any additional examples or explanations of such services.

D. **Conversation Starters:** Include the following additional questions for a *retail investor* to ask a financial professional and start a conversation about relationships and services:

(i) If you are a broker-dealer and not a *dual registrant*, include: "Given my financial situation, should I choose a brokerage service? Why or why not?"

(ii) If you are an investment adviser and not a *dual registrant*, include: "Given my financial situation, should I choose an investment advisory service? Why or why not?"

(iii) If you are a *dual registrant*, include: "Given my financial situation, should I choose an investment advisory service? Should I choose a brokerage service? Should I choose both types of services? Why or why not?"

(iv) "How will you choose investments to recommend to me?"

(v) "What is your relevant experience, including your licenses, education and other qualifications? What do these qualifications mean?"

Item 3. **Fees, Costs, Conflicts, and Standard of Conduct**

A. Use the heading: "What fees will I pay?"

(i) *Description of Principal Fees and Costs*: Summarize the principal fees and costs that *retail investors* will incur for your brokerage or investment advisory services, including how frequently they are assessed and the conflicts of interest they create.

a. Broker-dealers must describe their transaction-based fees. With respect to addressing conflicts of interest, a broker-dealer could, for example, include a statement that a *retail investor* would be charged more when there are more trades in his or her account, and that the firm may therefore have an incentive to encourage a *retail investor* to trade often.

b. Investment advisers must describe their ongoing asset-based fees, fixed fees, wrap fee program fees, or other direct fee arrangement. The principal fees for investment advisory services should align with the type of fee(s) that you report in response to Form ADV Part 1A, Item 5.E.

(1) Include information about each type of fee you report in Form ADV that is responsive to this Item 3.A. Investment advisers with wrap fee program fees are encouraged to explain that asset-based fees associated with the wrap fee program will include most transaction costs and fees to a broker-dealer or bank that has custody of these assets, and therefore are higher than a typical asset-based advisory fee.

(2) With respect to addressing conflicts of interest, an investment adviser that charges an asset-based fee could, for example, include a statement that the more assets there are in a *retail investor's* advisory account, the more a *retail investor* will pay in fees, and the firm may therefore have an incentive to encourage the *retail investor* to increase the assets in his or her account.

Note: If you receive compensation in connection with the purchase or sale of securities, you should carefully consider the applicability of the broker-dealer registration requirements of the Securities Exchange Act of 1934 and any applicable state securities statutes.

(ii) *Description of Other Fees and Costs*: Describe other fees and costs related to your brokerage or investment advisory services and investments in addition to the firm's principal fees and costs disclosed in Item 3.A.(i) that the *retail investor* will pay directly or indirectly. List examples of the categories of the most common fees and costs applicable to your *retail investors* (*e.g.*, custodian fees, account maintenance fees, fees related to mutual funds and variable annuities, and other transactional fees and product-level fees).

(iii) *Additional Information*: State "You will pay fees and costs whether you make or lose money on your investments. Fees and costs will reduce any amount of money you make on your investments over time. Please make sure you understand what fees and costs you are paying." You must include specific references to more detailed information about your fees and costs that, at a minimum, include the same or equivalent information to that required by the Form ADV, Part 2A brochure (specifically Items 5.A., B., C., and D.) and Regulation Best Interest, as applicable. If you are a broker-dealer that does not provide recommendations subject to Regulation Best Interest, to the extent you prepare more detailed information about your fees and costs, you must include specific references to such information. You may include hyperlinks, mouse-over windows, or other means of facilitating access to this additional information and to any additional examples or explanations of such fees and costs included in response to Item 3.A.(i) or (ii).

(iv) *Conversation Starter*: Include the following question for a *retail investor* to ask a financial professional and start a conversation about the impact of fees and costs on investments: "Help me understand how these fees and costs might affect my investments. If I give you $10,000 to invest, how much will go to fees and costs, and how much will be invested for me?"

B. If you are a broker-dealer, use the heading: "What are your legal obligations to me when providing recommendations? How else does your firm make money and what conflicts of interest do you have?" If you are an investment adviser, use the heading: "What are your legal obligations to me when acting as my investment adviser? How else does your firm make money and what conflicts of interest do you have?" If you are a *dual registrant* that prepares a single *relationship summary*, use the heading: "What are your legal obligations to me when providing recommendations as my broker-dealer or when acting as my investment adviser? How else does your firm make money and what conflicts of interest do you have?"

(i) *Standard of Conduct*.

a. If you are a broker-dealer that provides recommendations subject to Regulation Best Interest, include (emphasis required): "*When we provide you with a recommendation*, we have to act in your best interest and not put our interest ahead of yours. At the same time, the way we make money creates some conflicts with your interests. You should understand and ask us about these conflicts because they can affect the recommendations we provide you. Here are some examples to help you understand what this means." If you are a broker-dealer that does not provide recommendations subject to Regulation Best Interest, include (emphasis required): "We *do not* provide recommendations. The way we make money creates some conflicts with your interests. You should understand and ask us about these conflicts because they can affect the services we provide you. Here are some examples to help you understand what this means."

b. If you are an investment adviser, include (emphasis required): "*When we act as your investment adviser*, we have to act in your best interest and not put our interest ahead of yours. At the same time, the way we make money creates some conflicts with your interests. You should understand and ask us about these conflicts because they can affect the investment advice we provide you. Here are some examples to help you understand what this means."

c. If you are a *dual registrant* that prepares a single *relationship summary* and you provide recommendations subject to Regulation Best Interest as a broker-dealer, include (emphasis required): "*When we provide you with a recommendation as your broker-dealer or act as your investment adviser*, we have to act in your best interest and not put our interest ahead of yours. At the same time, the way we make money creates some conflicts with your interests. You should understand and ask us about these conflicts because they can affect the recommendations and investment advice we provide you. Here are some examples to help you understand what this means." If you are a *dual registrant* that prepares a single *relationship summary* and you do not provide recommendations subject to Regulation Best Interest as a broker-dealer, include (emphasis required): "We *do not* provide recommendations as your broker-dealer. *When we act as your investment adviser*, we have to act in your best interest and not put our interests ahead of yours. At the same time, the way we make money creates some conflicts with your interest. You should understand and ask us about these conflicts because they can affect the services and investment advice we provide you. Here are some examples to help you understand what this means." If you are a *dual registrant* that prepares two separate *relationship summaries*, follow the instructions for broker-dealers and investment advisers in Items 3.B., 3.B.(i).a., and 3.B.(i).b.

(ii) *Examples of Ways You Make Money and Conflicts of Interest*: If applicable to you, summarize the following other ways in which you and your *affiliates* make money from brokerage or investment advisory services and investments you provide to *retail investors*. If none of these conflicts applies to you, summarize at least one other material conflict of interest that affects *retail investors*. Explain the incentives created by each of these examples.

a. Proprietary Products: Investments that are issued, sponsored, or managed by you or your *affiliates*.

b. Third-Party Payments: Compensation you receive from third parties when you recommend or sell certain investments.

c. Revenue Sharing: Investments where the manager or sponsor of those investments or another third party (such as an intermediary) shares with you revenue it earns on those investments.

d. Principal Trading: Investments you buy from a *retail investor*, and/or investments you sell to a *retail investor*, for or from your own accounts, respectively.

(iii) *Conversation Starter*: Include the following question for a *retail investor* to ask a financial professional and start a conversation about conflicts of interest: "How might your conflicts of interest affect me, and how will you address them?"

(iv) *Additional Information*: You must include specific references to more detailed information about your conflicts of interest that, at a minimum, include the same or equivalent information to that required by the Form ADV, Part 2A brochure and Regulation Best Interest, as applicable. If you are a broker-dealer that does not provide recommendations subject to Regulation Best Interest, to the extent you prepare more detailed information about your conflicts, you must include specific references to such information. You may include hyperlinks, mouse-over windows, or other means of facilitating access to this additional information and to any additional examples or explanations of such conflicts of interest.

C. Use the heading: "How do your financial professionals make money?"

(i) *Description of How Financial Professionals Make Money*: Summarize how your financial professionals are compensated, including cash and non-cash compensation, and the conflicts of interest those payments create.

(ii) *Required Topics in the Description*: Include, to the extent applicable, whether your financial professionals are compensated based on factors such as: the amount of client assets they service; the time and complexity required to meet a client's needs; the product sold (*i.e.*, differential compensation); product sales commissions; or revenue the firm earns from the financial professional's advisory services or recommendations.

Item 4. **Disciplinary History**

A. Use the heading: "Do you or your financial professionals have legal or disciplinary history?"

B. State "Yes" if you or any of your financial professionals currently disclose, or are required to disclose, the following information:

(i) Disciplinary information in your Form ADV (Item 11 of Part 1A or Item 9 of Part 2A).

(ii) Legal or disciplinary history in your Form BD (Items 11 A–K) (except to the extent such information is not released to BrokerCheck, pursuant to FINRA Rule 8312).

(iii) Disclosures for any of your financial professionals in Items 14 A–M on Form U4 (Uniform Application for Securities Industry Registration or Transfer), or in Items 7A or 7C–F of Form U5 (Uniform Termination Notice for Securities Industry Registration), or on Form U6 (Uniform Disciplinary Action Reporting Form) (except to the extent such information is not released to BrokerCheck, pursuant to FINRA Rule 8312).

C. State "No" if neither you nor any of your financial professionals currently discloses, or is required to disclose, the information listed in Item 4.B.

D. Regardless of your response to Item 4.B, you must:

(i) *Search Tool*: Direct the *retail investor* to visit Investor.gov/CRS for a free and simple search tool to research you and your financial professionals.

(ii) *Conversation Starter*: Include the following questions for a *retail investor* to ask a financial professional and start a conversation about the financial professional's disciplinary history: "As a financial professional, do you have any disciplinary history? For what type of conduct?"

Item 5. **Additional Information**

A. State where the *retail investor* can find additional information about your brokerage or investment advisory services and request a copy of the *relationship summary*. This information should be disclosed prominently at the end of the *relationship summary*.

B. Include a telephone number where *retail investors* can request up-to-date information and request a copy of the *relationship summary*.

C. **Conversation Starter:** Include the following questions for a *retail investor* to ask a financial professional and start a conversation about the contacts and complaints: "Who is my primary contact person? Is he or she a representative of an investment adviser or a broker-dealer? Who can I talk to if I have concerns about how this person is treating me?"

APPENDIX C

Feedback Forms Comment Summary

The Proposing Release, at Appendix F, provided investors seeking to comment on the relationship summary a form with standardized questions for providing their feedback. The Appendix F form could be completed electronically on our website. As of June 4, 2019, 93 individuals provided a relevant response or comment answering at least one question on this form (a "responsive" answer.).[1] About 50% (47) were completed electronically using the on-line version of the form on our website.[2] Other commenters (46) submitted a downloaded and completed copy of the form to the comment file in a .pdf file or submitted a completed a copy of the form at one of our investor roundtables.[3]

This Appendix reports the staff's summary of the 93 comments provided using the Appendix F form with a responsive answer to one or more questions (the "Feedback Forms"). Some questions called for a "structured" response (e.g., Question 2 asks commenters to indicate whether specific sections of the relationship summary are: "very useful," "useful," "not useful" or "unsure"). For these questions, the Feedback Forms are summarized from the structured question options. Other questions requested a narrative response and, for these questions, the Feedback Forms are summarized from the sentiment of these narrative answers.

Question 1: Overall do you find the Relationship Summary useful? If not, how would you change it? If so, what topics and how can they be improved?

Question 1 requested a narrative answer. 70 (over 70%) of individuals who submitted the Feedback Forms indicated in narrative answers in Question 1 or to other questions that they found the relationship summary to be useful.

Among those who indicated that they found the document overall to be useful, many suggested ways to improve the document. For example, 41 noted that some topics are too technical or otherwise need improvement in response to Question 4 or in other comments, 48 suggested additional information in response to Question 5 or in other comments; and 27 indicated that the document should be shorter in response to Question 6 or in other comments. Also, many indicated that they did not find the relationship summary entirely easy to read and follow (33 commenters (35%) answered "Somewhat" or "No" in either of Question 3(a) (*Do you find the format of the Relationship Summary easy to follow?*) or Question 3(c) (*Is the Relationship Summary easy to read?*).

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[1] A few individuals used the on-line version of the Appendix F form to provide comments on other topics and did not provide any responses or comments relevant to any of the form's questions. These non-responsive comment documents are not included in this summary.

[2] Feedback forms completed on line and included in this summary are at listed at Endnote 1.

[3] Feedback forms submitted to the comment file on a downloaded and completed copy of the Feedback form or at one of our investor roundtables that are included in this summary are listed at Endnote 2.

9 (about 10%) indicated that they did not find the relationship summary to be useful. The remaining responses to this question did not express a clear sentiment.

Question Q2(a): How useful is the Type of Relationship and Service section of the Relationship Summary?[4]

Very Useful	Useful	Not Useful	Unsure	No Response
41 (44%)	41 (44%)	5 (5%)	4 (4%)	2 (2%)

Question Q2(b): How useful is the Our Obligations to You section of the Relationship Summary?

Very Useful	Useful	Not Useful	Unsure	No Response
36 (39%)	42 (45%)	7 (8%)	4 (4%)	4 (4%)

Question Q2(c): How useful is the Fees and Costs section of the Relationship Summary?

Very Useful	Useful	Not Useful	Unsure	No Response
33 (35%)	43 (46%)	8 (9%)	6 (6%)	3 (3%)

Question Q2(d): How useful is the Comparison to different account types section of the Relationship Summary?

Very Useful	Useful	Not Useful	Unsure	No Response
29 (31%)	39 (42%)	6 (6%)	11 (12%)	8 (9%)

[4] Percentages reported in tables summarized responses to Questions 2 and 3 are based on the total number of Feedback Forms.

Question Q2(e): How useful is the Conflict of Interests section of the Relationship Summary?

Very Useful	Useful	Not Useful	Unsure	No Response
39 (42%)	30 (32%)	10 (11%)	10 (11%)	4 (4%)

Question Q2(f): How useful is the Additional Information section of the Relationship Summary?

Very Useful	Useful	Not Useful	Unsure	No Response
30 (32%)	35 (38%)	10 (11%)	10 (11%)	8 (9%)

Question Q2(g): How useful is the Key Questions to Ask section of the Relationship Summary?

Very Useful	Useful	Not Useful	Unsure	No Response
51 (55%)	28 (30%)	7 (8%)	3 (3%)	4 (4%)

Question Q3(a): Do you find the format of the Relationship Summary easy to follow?

Yes	Somewhat	No	No Response
58 (62%)	24 (26%)	7 (8%)	4 (4%)

Question Q3(b): Is the information in the appropriate order?

Yes	Somewhat	No	No Response
57 (61%)	26 (28%)	7 (8%)	3 (3%)

Question Q3(c): Is the Relationship Summary easy to read?

Yes	Somewhat	No	No Response
55 (59%)	23 (25%)	10 (11%)	5 (5%)

Question Q3(d): Should the Relationship Summary include additional information about different account types?

Yes	Somewhat	No	No Response
49 (53%)	9 (10%)	29 (31%)	6 (6%)

Question Q3(e): Would you seek out additional information about a firm's disciplinary history as suggested in the Relationship Summary?

Yes	Somewhat	No	No Response
65 (70%)	14 (15%)	10 (11%)	4 (4%)

Question 4: Are there topics in the Relationship Summary that are too technical or that could be improved?

Question 4 requested a narrative answer. Narrative answers offered by 25 (more than 25% of Feedback Forms) specifically stated that the relationship summary was not too technical.

On 27 Feedback Forms (about 30%), commenters did not respond to Question 4 or offered an answer that did not address this question. Among these 27, 13 appeared to fully agree that relationship summary format was easy to follow and the relationship summary was easy to read by checking "yes" in response to Question 3(a) (*Do you find the format of the Relationship Summary easy to follow?*) and Question 3(c) (*Is the Relationship Summary easy to read?*). Overall, 45 commenters (48%) on Feedback Forms fully agreed that the relation summary is easy to read and follow by checking "yes" in response to Question 3(a) ("*Do you find the format of the Relationship Summary easy to follow*") and Question 3(c) ("*Is the Relationship Summary easy to read*?).

On 41 of the Feedback Forms (44% of 93 Feedback Forms), the narrative response to Question 4 or other comments on the Feedback Form indicated that the relationship summary was too technical or suggested one or more topics that could be improved. Across all Feedback Forms (including those with comments indicating that the relationship summary was not too technical):

- 20 Feedback Forms included comment indicating that the relationship summary language was generally too technical, wordy or confusing, or should be made simpler;
- 23 Feedback Forms included narrative comments indicating that information about fees and costs was too technical or needed to be more clear, including seven (7) that asked for definitions of terms such as transaction-based fee, asset-based fee or wrap fee;
- 23 Feedback Forms included narrative comments suggesting that information in sections covering relationships and services and the obligations of financial professionals needed clarification, including ten (10) Feedback Forms that asked for a definition or better explanation of the term "fiduciary"; and

- 14 Feedback Forms included narrative comments suggesting clarification or more information about conflicts of interest.

Question 5: Is there additional information that we should require in the Relationship Summary, such as more specific information about the form or additional information about fees? Is that because you do not receive the information now, or because you would also like to see it presented in this summary document, or both? Is there any information that should be made more prominent?

Question 5 requested a narrative answer. 48 of the Feedback Forms (more than 50%) included comments suggesting additional information that could be required in response to Question 5 or another question on the Feedback Form. Many (29) indicated that additional information about fees and costs would be helpful.

On 13 of the Feedback Forms (about 14%) narrative comments responding to Question 5 indicated that no additional information was needed. On the remainder of Feedback Forms (32, over 30% of Feedback Forms), there was no answer given or the answer given was not relevant to Question 5.

Question 6: Is the Relationship Summary an appropriate length? If not, should it be longer or shorter?

Question 6 requested a narrative answer. 37 narrative answers responding to Question 6 or another question (about 40% of 93 Feedback Forms) specifically indicated that the relationship summary's length is appropriate. 27 of the Feedback Forms (about 30%) included comments suggesting that the relationship summary should be shorter. Two commenters suggested that the form should be longer. On the remainder of Feedback Forms (27, or almost 30%), there was no answer given or the answer given was not relevant to Question 6.

Question 7: Do you find the 'Key Questions to Ask' useful? Would the questions improve the quality of your discussion with your financial professional? If not, why not?

Question 7 requested a narrative answer. Responses on 77 (over 75%) of Feedback Forms indicated that the Key Questions were useful ("useful" and "very useful" answers to Question 2(g) are included, if there was no answer provided to Question 7).

11 Feedback Forms (about 12%) included specific comments agreeing that the Key Questions would encourage discussions with financial professionals. Another two (2) included a comment agreeing that, in general, the relationship summary could encourage dialogue between financial professionals and clients.

Several commenters (8) suggested moving the Key Questions to the beginning or closer to the beginning of the relationship summary, or including the Key Questions within individual sections, rather than placing the key questions at the end of the document.

Endnotes:

[1] Feedback forms completed on-line and included in this summary: Fors Anderson, 3/17/2019, https://www.sec.gov/comments/s7-08-18/s70818-5134364-183356.htm ("Anderson Feedback Form"), Sylva Baker, 8/6/2018, https://www.sec.gov/comments/s7-08-18/s70818-4170945-172084.pdf ("Baker Feedback Form"); Linda Baumbusch, 7/29/2018, https://www.sec.gov/comments/s7-08-18/s70818-4133141-171850.htm ("Baumbusch Feedback Form"); Mahesh Bhupalam, 7/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-4069296-169437.htm ("Bhupalam Feedback Form"); Hugh Caddess, 7/23/2018, https://www.sec.gov/comments/s7-08-18/s70818-4097528-170159.htm("Caddess Feedback Form"); Paul Calderon, 7/30/2018, https://www.sec.gov/comments/s7-08-18/s70818-4140254-171938.htm("Calderon Feedback Form"); Robert Carr, 7/10/2018, https://www.sec.gov/comments/s7-08-18/s70818-4024224-167344.htm ("Carr Feedback Form"); Rod Carroll, 7/10/2018m, https://www.sec.gov/comments/s7-08-18/s70818-4029201-167352.htm ("Carroll Feedback Form"); Charles Christine, 6/22/2018, https://www.sec.gov/comments/s7-08-18/s70818-3910620-166661.htm("Christine Feedback Form"); Lloyd Coleman, 7/17/2018, https://www.sec.gov/comments/s7-08-18/s70818-4063665-169130.htm ("Coleman Feedback Form"); Janice Daunheimer, 8/7/2018, https://www.sec.gov/comments/s7-08-18/s70818-4185205-172598.htm ("Daunheimer Feedback Form"); Juanita Fontaine, 7/21/2018, https://www.sec.gov/comments/s7-08-18/s70818-4096751-170113.htm ("Fontaine Feedback Form"); Frederick Greene, 7/13/2018, https://www.sec.gov/comments/s7-08-18/s70818-4044546-168910.htm ("Greene Feedback Form"); Chester Hawkins, 8/1/2018, https://www.sec.gov/comments/s7-08-18/s70818-4171653-172230.htm ("Hawkins Feedback Form"); Anthony Hicks, 7/20/2018, https://www.sec.gov/comments/s7-08-18/s70818-4096231-170102.htm ("Hicks Feedback Form"); Jeffrey T., 7/10/2018, https://www.sec.gov/comments/s7-08-18/s70818-4024265-167345.htm ("Jeffrey Feedback Form"); Mike Keeler, 7/10/2018, https://www.sec.gov/comments/s7-08-18/s70818-4024769-167348.htm ("Keeler Feedback Form"); Duane Lee, 12/3/2018, https://www.sec.gov/comments/s7-08-18/s70818-4719639-176708.htm ("Lee2 Feedback Form"); George Macke, 6/2/2018, https://www.sec.gov/comments/s7-08-18/s70818-3768103-162690.htm ("Macke Feedback Form"); Mary Malone, 7/15/2018, https://www.sec.gov/comments/s7-08-18/s70818-4048232-168957.htm ("Malone Feedback Form"); Mary Margolis, MBR Financial, 6/28/2018, https://www.sec.gov/comments/s7-08-18/s70818-3974252-167135.htm ("Margolis Feedback Form"); Darren Markle, 7/6/2018, https://www.sec.gov/comments/s7-08-18/s70818-4008397-167254.htm ("Markle Feedback Form"); Chelsea Matvey, 7/19/2018, https://www.sec.gov/comments/s7-08-18/s70818-4078676-169821.htm ("Matvey Feedback Form"); Kevin McGuire, 7/17/2018, https://www.sec.gov/comments/s7-08-18/s70818-4063664-169164.htm ("McGuire Feedback Form"); Jennifer Mellgren, 7/22/2018, https://www.sec.gov/comments/s7-08-18/s70818-4097514-170157.htm ("Mellgren Feedback Form"); Robert Mennella, 8/22/2018, https://www.sec.gov/comments/s7-08-18/s70818-4251004-173033.htm ("Mennella Feedback Form"); Steven Miller, 7/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-4065013-169285.htm ("Miller Feedback Form"); Bob Murphy, 7/25/2018, https://www.sec.gov/comments/s7-08-18/s70818-4111730-170372.htm ("Murphy Feedback Form"); Mary Newton, 7/10/2018, https://www.sec.gov/comments/s7-08-18/s70818-4024770-167347.htm ("Newton Feedback

Form"); Jon Panitzke, 7/23/2018, https://www.sec.gov/comments/s7-08-18/s70818-4105327-170265.htm ("Panitzke Feedback Form"); Marcus Paredes, 7/10/2018, https://www.sec.gov/comments/s7-08-18/s70818-4024691-167346.htm ("Panitzke Feedback Form"); Huelien Pham, 7/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-4069312-169440.htm ("Pham Feedback Form"); Loizos Prodromou, 7/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-4064613-169273.htm ("Prodromou Feedback Form"); Richard Rohr, 6/22/2018, https://www.sec.gov/comments/s7-08-18/s70818-3910614-166660.htm ("Rohr Feedback Form"); Kathy Sachs, 7/23/2018, https://www.sec.gov/comments/s7-08-18/s70818-4105119-170257.htm ("Sachs Feedback Form"); Richard Salkowitz, 7/19/2018, https://www.sec.gov/comments/s7-08-18/s70818-4078450-169772.htm ("Salkowitz Feedback Form"); Dwight Sanders, 6/8/2018, https://www.sec.gov/comments/s7-08-18/s70818-3816823-162750.htm ("Sanders1Feedback Form"); Dr. Dwight Sanders, 6/30/2018, https://www.sec.gov/comments/s7-08-18/s70818-3985541-167075.htm ("Sanders2 Feedback Form"); Daniel Schuman, 7/20/2018, https://www.sec.gov/comments/s7-08-18/s70818-4096425-170103.htm ("Schuman Feedback Form"); Ron Shepherd, 6/20/2018, https://www.sec.gov/comments/s7-08-18/s70818-3900517-162957.htm ("Shepherd Feedback Form"); Pat Smith, 7/24/2018, https://www.sec.gov/comments/s7-08-18/s70818-4110731-170363.htm ("Smith1 Feedback Form"); Joe Smith, 8/6/2018, https://www.sec.gov/comments/s7-08-18/s70818-4173957-172348.htm ("Smith2 Feedback Form"); Star Identifier, 11/5/2018, https://www.sec.gov/comments/s7-08-18/s70818-4611472-176365.htm ("Star Feedback Form"); Cyril Anouar Streit, 9/10/2018, https://www.sec.gov/comments/s7-08-18/s70818-4445712-173232.htm ("Streit Feedback Form"); Jay Thompson, 7/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-4069295-169419.htm ("Thompson Feedback Form"); Brenda Winslow, 6/6/2018, https://www.sec.gov/comments/s7-08-18/s70818-3784415-162708.htm ("Winslow Feedback Form"); Mark Winsor, 7/21/2018, https://www.sec.gov/comments/s7-08-18/s70818-4096783-170118.htm ("Winsor Feedback Form").

[2] Feedback Forms filed in the comment file in .pdf format: Anonymous, 6/15/2018, https://www.sec.gov/comments/s7-08-18/s70818-3857882-162788.pdf ("Anonymous01 Feedback Form"); Anonymous, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3898398-162931.pdf ("Anonymous02 Feedback Form"); Anonymous, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3898681-162940.pdf ("Anonymous03 Feedback Form"); Anonymous, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3897774-162930.pdf ("Anonymous04 Feedback Form"); Anonymous, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3898814-162941.pdf ("Anonymous05 Feedback Form"); Anonymous, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3897701-162929.pdf ("Anonymous06 Feedback Form"); Anonymous, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3899032-162942.pdf ("Anonymous07 Feedback Form"); Anonymous, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3897489-162926.pdf ("Anonymous08 Feedback Form"); Anonymous, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3898137-162934.pdf ("Anonymous09 Feedback Form"); Anonymous, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3898482-162937.pdf ("Anonymous10 Feedback Form"); Anonymous, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3897632-162927.pdf ("Anonymous11

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162944.pdf ("Parsons Feedback Form"); David Schreiner, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3899390-162946.pdf ("Schreiner Feedback Form"); Ron Seits, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3899580-162956.pdf ("Seits Feedback Form"); Mark Shaffer, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3899570-162954.pdf ("Shaffer Feedback Form"); Malia Starmer, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3899562-162953.pdf ("Starmer1 Feedback Form"); Jason Starmer, 6/18/2018, https://www.sec.gov/comments/s7-08-18/s70818-3899436-162949.pdf ("Starmer2 Feedback Form").

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Commission Interpretation Regarding Standard of Conduct for Investment Advisers

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 276

[Release No. IA–5248; File No. S7–07–18]

RIN 3235–AM36

Commission Interpretation Regarding Standard of Conduct for Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: The Securities and Exchange Commission (the "SEC" or the "Commission") is publishing an interpretation of the standard of conduct for investment advisers under the Investment Advisers Act of 1940 (the "Advisers Act" or the "Act").

DATES: Effective July 12, 2019.

FOR FURTHER INFORMATION CONTACT: Olawalé Oriola, Senior Counsel; Matthew Cook, Senior Counsel; or Jennifer Songer, Branch Chief, at (202) 551–6787 or *IArules@sec.gov,* Investment Adviser Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is publishing an interpretation of the standard of conduct for investment advisers under the Advisers Act [15 U.S.C. 80b].[1]

Table of Contents

I. Introduction

Under federal law, an investment adviser is a fiduciary.[2] The fiduciary duty an investment adviser owes to its client under the Advisers Act, which comprises a duty of care and a duty of loyalty, is important to the Commission's investor protection efforts. Also important to the Commission's investor protection efforts is the standard of conduct that a broker-dealer owes to a retail customer when it makes a recommendation of any securities transaction or investment strategy involving securities.[3] Both investment advisers and broker-dealers play an important role in our capital markets and our economy more broadly. Investment advisers and broker-dealers have different types of relationships with investors, offer different services, and have different compensation models. This variety is important because it presents investors with choices regarding the types of relationships they can have, the services they can receive, and how they can pay for those services.

On April 18, 2018, the Commission proposed rules and forms intended to enhance the required standard of conduct for broker-dealers[4] and provide retail investors with clear and succinct information regarding the key aspects of their brokerage and advisory relationships.[5] In connection with the publication of these proposals, the Commission published for comment a separate proposed interpretation regarding the standard of conduct for investment advisers under the Advisers Act ("Proposed Interpretation").[6] We stated in the Proposed Interpretation, and we continue to believe, that it is appropriate and beneficial to address in one release and reaffirm—and in some cases clarify—certain aspects of the fiduciary duty that an investment adviser owes to its clients under section 206 of the Advisers Act.[7] After

[1] 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any paragraph of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR 275], in which these rules are published.

[2] *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 194 (1963) ("SEC v. Capital Gains"); *see also infra* footnotes 34–44 and accompanying text; Investment Adviser Codes of Ethics, Investment Advisers Act Release No. 2256 (July 2, 2004); Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204 (Dec. 17, 2003); Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV, Investment Advisers Act Release No. 1862 (Apr. 5, 2000). Investment advisers also have antifraud liability with respect to prospective clients under section 206 of the Advisers Act.

[3] *See* Regulation Best Interest, Exchange Act Release No. 34–86031 (June 5, 2019) ("Reg. BI Adoption"). This final interpretation regarding the standard of conduct for investment advisers under the Advisers Act ("Final Interpretation") interprets section 206 of the Advisers Act, which is applicable to both SEC- and state-registered investment advisers, as well as other investment advisers that are exempt from registration or subject to a prohibition on registration under the Advisers Act. This Final Interpretation is intended to highlight the principles relevant to an adviser's fiduciary duty. It is not, however, intended to be the exclusive resource for understanding these principles. Separately, in various circumstances, case law, statutes (such as the Employee Retirement Income Security Act of 1974 ("ERISA")), and state law impose obligations on investment advisers. In some cases, these standards may differ from the standard enforced by the Commission.

[4] Regulation Best Interest, Exchange Act Release No. 83062 (Apr. 18, 2018) ("Reg. BI Proposal").

[5] Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, Investment Advisers Act Release No. 4888 (Apr. 18, 2018) ("Relationship Summary Proposal").

[6] Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, Investment Advisers Act Release No. 4889 (Apr. 18, 2018).

[7] Further, the Commission recognizes that many advisers provide impersonal investment advice. *See, e.g.,* Advisers Act rule 203A–3 (defining "impersonal investment advice" in the context of defining "investment adviser representative" as "investment advisory services provided by means of written material or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts"). This Final Interpretation

Continued

considering the comments received, we are publishing this Final Interpretation with some clarifications to address comments.[8]

A. Overview of Comments

We received over 150 comment letters on our Proposed Interpretation from individuals, investment advisers, trade or professional organizations, law firms, consumer advocacy groups, and bar associations.[9] Although many commenters generally agreed that the Proposed Interpretation was useful,[10] some noted the challenges inherent in a Commission interpretation covering the broad scope of the fiduciary duty that an investment adviser owes to its clients under the Advisers Act.[11] Some of these commenters suggested modifications to or withdrawal of the Proposed Interpretation.[12] Although most commenters agreed that an investment adviser's fiduciary duty comprises a duty of care and a duty of loyalty, as described in the Proposed Interpretation, they had differing views on aspects of the fiduciary duty and in some cases sought clarification on its application.[13]

Some commenters requested that we adopt rule text instead.[14] The relationship between an investment adviser and its client has long been based on fiduciary principles not generally set forth in specific statute or rule text. We believe that this principles-based approach should continue as it expresses broadly the standard to which investment advisers are held while allowing them flexibility to meet that standard in the context of their specific services. In our view, adopting rule text is not necessary to achieve our goal in this Final Interpretation of reaffirming and in some cases clarifying certain aspects of the fiduciary duty.

II. Investment Advisers' Fiduciary Duty

The Advisers Act establishes a federal fiduciary duty for investment advisers.[15] This fiduciary duty is based on equitable common law principles and is fundamental to advisers' relationships with their clients under the Advisers Act.[16] The investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship.[17] The fiduciary duty to which advisers are subject is not specifically defined in the Advisers Act or in Commission rules, but reflects a Congressional recognition "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." [18] An adviser's fiduciary duty is imposed under the Advisers Act in recognition of the nature of the relationship between an investment adviser and a client and the desire "so far as is presently practicable

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does not address the extent to which the Advisers Act applies to different types of impersonal investment advice.

[8] In the Proposed Interpretation, the Commission also requested comment on: Licensing and continuing education requirements for personnel of SEC-registered investment advisers; delivery of account statements to clients with investment advisory accounts; and financial responsibility requirements for SEC-registered investment advisers, including fidelity bonds. We are continuing to evaluate the comments received in response.

[9] Comment letters submitted in File No. S7–09–18 are available on the Commission's website at *https://www.sec.gov/comments/s7-09-18/s70918.htm*. We also considered those comments submitted in File No. S7–08–18 (Comments on Relationship Summary Proposal) and File No. S7–07–18 (Comments on Reg. BI Proposal). Those comments are available on the Commission's website at *https://www.sec.gov/comments/s7-08-18/s70818.htm* and *https://www.sec.gov/comments/s7-07-18/s70718.htm*.

[10] *See, e.g.*, Comment Letter of North American Securities Administrators Association (Aug. 23, 2018) ("NASAA Letter") (stating that the Proposed Interpretation is a "useful resource"); Comment Letter of Invesco (Aug. 7, 2018) ("Invesco Letter") (agreeing that "there are benefits to having a clear statement regarding the fiduciary duty that applies to an investment adviser").

[11] *See, e.g.*, Comment Letter of Pickard Djinis and Pisarri LLP (Aug. 7, 2018) ("Pickard Letter") (noting the Commission's "efforts to synthesize case law, legislative history, academic literature, prior Commission releases and other sources to produce a comprehensive explanation of the fiduciary standard of conduct"); Comment Letter of Dechert LLP (Aug. 7, 2018) ("Dechert Letter") ("It is crucial that any universal interpretation of an adviser's fiduciary duty be based on sound and time-tested principles. Given the difficulty of defining and encompassing all of an adviser's responsibilities to its clients, while also accommodating the diversity of advisory arrangements, interpretive issues will arise in the future."); Comment Letter of the Hedge Funds Subcommittee of the Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association (Aug. 24, 2018) ("ABA Letter") ("We note at the outset that it is difficult to capture the nature of an investment adviser's fiduciary duty in a broad statement that has universal applicability.").

[12] *See, e.g.*, Comment Letter of L.A. Schnase (Jul. 30, 2018) (urging the Commission not to issue the Proposed Interpretation in final form, or at least not without substantial rewriting or reshaping); Comment Letter of Money Management Institute (Aug. 7, 2018) ("MMI Letter") (urging the Commission to "revise the interpretation so that it reflects the common law principles in which an investment adviser's fiduciary duty is grounded"); Dechert Letter (recommending that we withdraw the Proposed Interpretation and instead rely on existing authority and sources of law, as well as existing Commission practices for providing interpretive guidance, in order to define the source and scope of an investment adviser's fiduciary duty).

[13] *See, e.g.*, Comment Letter of Cambridge Investment Research Inc. (Aug. 7, 2018) ("Cambridge Letter") (stating that "greater clarity on all aspects of an investment adviser's fiduciary duty will improve the ability to craft such policies and procedures, as well as support the elimination of confusion for retail clients and investment professionals"); Comment Letter of Institutional Limited Partners Association (Aug. 6, 2018) ("ILPA Letter 1") ("Interpretation will provide more certainty regarding the fiduciary duties owed by private fund advisers to their clients."); Comment Letter of New York City Bar Association (Jun. 26, 2018) ("NY City Bar Letter") (stating that the uniform interpretation of an investment adviser's fiduciary duty is necessary).

[14] Some commenters suggested that we codify the Proposed Interpretation. *See, e.g.*, Comment Letter of Roy Tanga (Apr. 25, 2018); Comment Letter of Financial Engines (Aug. 6, 2018) ("Financial Engines Letter"); ILPA Letter 1; Comment Letter of AARP (Aug. 7, 2018) ("AARP Letter"); Comment Letter of Gordon Donohue (Aug. 6, 2018); Comment Letter of Financial Planning Coalition (Aug. 7, 2018) ("FPC Letter").

[15] *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 17 (1979) ("*Transamerica Mortgage* v. *Lewis*") ("§ 206 establishes federal fiduciary standards to govern the conduct of investment advisers.") (quotation marks omitted); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC* v. *Capital Gains*, stating that the Supreme Court's reference to fraud in the "equitable" sense of the term was "premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers"); *SEC* v. *Capital Gains, supra* footnote 2; Amendments to Form ADV, Investment Advisers Act Release No. 3060 (July 28, 2010) ("Investment Advisers Act Release 3060") ("Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003) ("Investment Advisers Act Release 2106")).

[16] *See SEC* v. *Capital Gains, supra* footnote 2 (discussing the history of the Advisers Act, and how equitable principles influenced the common law of fraud and changed the suits brought against a fiduciary, "which Congress recognized the investment adviser to be").

[17] The Commission has previously recognized the broad scope of section 206 of the Advisers Act in a variety of contexts. *See, e.g.*, Investment Advisers Act Release 2106, *supra* footnote 15; Timbervest, LLC, et al., Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) ("[O]nce an investment advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the advisory relationship."); *see also SEC* v. *Lauer*, 2008 WL 4372896, at 24 (S.D. Fla. Sept. 24, 2008) ("Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be 'in the offer or sale of any' security or 'in connection with the purchase or sale of any security.' "); Thomas P. Lemke & Gerald T. Lins, Regulation of Investment Advisers (2013 ed.), at § 2:30 ("[T]he SEC has . . . applied [sections 206(1) and 206(2)] where fraud arose from an investment advisory relationship, even though the wrongdoing did not specifically involve securities.").

[18] *See SEC* v. *Capital Gains, supra* footnote 2; *see also* In the Matter of Arleen W. Hughes, Exchange Act Release No. 4048 (Feb. 18, 1948) ("Arleen Hughes") (Commission Opinion) (discussing the relationship of trust and confidence between the client and a dual registrant and stating that the registrant was a fiduciary and subject to liability under the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934).

to eliminate the abuses'' that led to the enactment of the Advisers Act.[19] It is made enforceable by the antifraud provisions of the Advisers Act.[20]

An investment adviser's fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty.[21] This fiduciary duty requires an adviser ''to adopt the principal's goals, objectives, or ends.'' [22] This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the ''best interest'' of its client at all times.[23] In our view, an investment adviser's obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty. As discussed in more detail below, in our view, the duty of care requires an investment adviser to provide investment advice in the best interest of its client, based on the client's objectives. Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict.[24] We believe this is another part of an investment adviser's obligation to act in the best interest of its client.

A. Application of Duty Determined by Scope of Relationship

An adviser's fiduciary duty is imposed under the Advisers Act in recognition of the nature of the relationship between an adviser and its client—a relationship of trust and confidence.[25] The adviser's fiduciary duty is principles-based and applies to the entire relationship between the adviser and its client. The fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent.[26] With regard to the scope of the adviser-client relationship, we recognize that investment advisers provide a wide range of services, from a single financial plan for which a client may pay a one-time fee, to ongoing portfolio management for which a client may pay a periodic fee based on the value of assets in the portfolio. Investment advisers also serve a large variety of clients, from retail clients with limited assets and investment knowledge and experience to institutional clients with very large portfolios and substantial knowledge, experience, and analytical resources.[27] In our experience, the principles-based fiduciary duty imposed by the Advisers Act has provided sufficient flexibility to serve as an effective standard of conduct for investment advisers, regardless of the services they provide or the types of clients they serve.

Although all investment advisers owe each of their clients a fiduciary duty under the Advisers Act, that fiduciary duty must be viewed in the context of the agreed-upon scope of the relationship between the adviser and the client. In particular, the specific obligations that flow from the adviser's fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal. For example, the obligations

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[19] *See SEC* v. *Capital Gains, supra* footnote 2 (noting that the ''declaration of policy'' in the original bill, which became the Advisers Act, declared that ''the national public interest and the interest of investors are adversely affected . . . when the business of investment advisers is so conducted as to defraud or mislead investors, or to enable such advisers to relieve themselves of their fiduciary obligations to their clients. It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, *are to mitigate and, so far as is presently practicable to eliminate* the abuses enumerated in this section'') (citing S. 3580, 76th Cong., 3d Sess., § 202 and Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong. 2d Sess., 1, at 28) (emphasis added).

[20] *Id.; Transamerica Mortgage* v. *Lewis, supra* footnote 15 (''[T]he Act's legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations.''). Some commenters questioned the standard to which the Advisers Act holds investment advisers. *See, e.g.,* Comment Letter of Stark & Stark, PC (undated) (''The duty of care at common law and under the Advisers Act only requires that advisers not be negligent in performing their duties.'') (internal citation omitted); Comment Letter of Institutional Limited Partners Association (Nov. 21, 2018) (''ILPA Letter 2'') (''The Advisers Act standard is a lower simple 'negligence' standard.''). Claims arising under Advisers Act section 206(2) are not scienter-based and can be adequately pled with only a showing of negligence. *Robare Group, Ltd., et al.* v. *SEC,* 922 F.3d 468, 472 (D.C. Cir. 2019) (''*Robare* v. *SEC*''); *SEC* v. *Steadman,* 967 F.2d 636, 643, n.5 (D.C. Cir. 1992) (citing *SEC* v. *Capital Gains, supra* footnote 2) (''[A] violation of § 206(2) of the Investment Advisers Act may rest on a finding of simple negligence.''); *SEC* v. *DiBella,* 587 F.3d 553, 567 (2d Cir. 2009) (''the government need not show intent to make out a section 206(2) violation''); *SEC* v. *Gruss,* 859 F. Supp. 2d 653, 669 (S.D.N.Y. 2012) (''Claims arising under Section 206(2) are not scienter-based and can be adequately pled with only a showing of negligence.''). However, claims arising under Advisers Act section 206(1) require scienter. *See, e.g., Robare* v. *SEC; SEC* v. *Moran,* 922 F. Supp. 867, 896 (S.D.N.Y. 1996); *Carroll* v. *Bear, Stearns & Co.,* 416 F. Supp. 998, 1001 (S.D.N.Y. 1976).

[21] *See, e.g.,* Investment Advisers Act Release 2106, *supra* footnote 15. These duties were generally recognized by commenters. *See, e.g.,* Comment Letter of Consumer Federation of America (Aug. 7, 2018) (''CFA Letter''); Comment Letter of the Investment Adviser Association (Aug. 6, 2018) (''IAA Letter''); Comment Letter of Investments & Wealth Institute (Aug. 6, 2018); Comment Letter of Raymond James (Aug. 7, 2018); FPC Comment Letter. *But see* Dechert Letter (questioning the sufficiency of support for a duty of care).

[22] Arthur B. Laby, *The Fiduciary Obligations as the Adoption of Ends,* 56 Buffalo Law Review 99 (2008); *see also* Restatement (Third) of Agency, § 2.02 Scope of Actual Authority (2006) (describing a fiduciary's authority in terms of the fiduciary's reasonable understanding of the principal's manifestations and objectives).

[23] Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that ''under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own,'' citing Investment Advisers Act Release 2106, *supra* footnote 15). *See SEC* v. *Tambone,* 550 F.3d 106, 146 (1st Cir. 2008) (''*SEC* v. *Tambone*'') (''Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund . . .''); *SEC* v. *Moran,* 944 F. Supp. 286, 297 (S.D.N.Y 1996) (''*SEC* v. *Moran*'') (''Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.''). Although most commenters agreed that an adviser has an obligation to act in its client's best interest, some questioned whether the Proposed Interpretation appropriately considered the best interest obligation as part of the duty of care, or whether it instead should be considered part of the duty of loyalty. *See, e.g.,* MMI Letter; Comment Letter of Investment Company Institute (Aug. 7, 2018) (''ICI Letter'').

[24] *See infra* footnotes 67–70 and accompanying text for a more detailed discussion of informed consent and how it is generally considered on an objective basis and may be inferred.

[25] *See, e.g.,* Hearings on S. 3580 before Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. (leading investment advisers emphasized their relationship of ''trust and confidence'' with their clients); *SEC* v. *Capital Gains, supra* footnote 2 (citing same).

[26] Several commenters asked that we clarify that an adviser and its client can tailor the scope of the relationship to which the fiduciary duty applies through contract. *See, e.g.,* MMI Letter; Financial Engines Letter; ABA Letter.

[27] This Final Interpretation also applies to automated advisers, which are often colloquially referred to as ''robo-advisers.'' Automated advisers, like all SEC-registered investment advisers, are subject to all of the requirements of the Advisers Act, including the requirement that they provide advice consistent with the fiduciary duty they owe to their clients. *See* Division of Investment Management, Robo Advisers, IM Guidance Update No. 2017–02 (Feb. 2017), *available at https://www.sec.gov/investment/im-guidance-2017-02.pdf* (describing Commission staff's guidance as to three distinct areas under the Advisers Act that automated advisers should consider, due to the nature of their business model, in seeking to comply with their obligations under the Advisers Act).

of an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client (*e.g.*, monitoring and periodically adjusting a portfolio of equity and fixed income investments with limited restrictions on allocation) will be significantly different from the obligations of an adviser to a registered investment company or private fund where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity (*e.g.*, a mandate to manage a fixed income portfolio subject to specified parameters, including concentration limits and credit quality and maturity ranges).[28]

While the application of the investment adviser's fiduciary duty will vary with the scope of the relationship, the relationship in all cases remains that of a fiduciary to the client. In other words, an adviser's federal fiduciary duty may not be waived, though it will apply in a manner that reflects the agreed-upon scope of the relationship.[29] A contract provision purporting to waive the adviser's federal fiduciary duty generally, such as (i) a statement that the adviser will not act as a fiduciary, (ii) a blanket waiver of all conflicts of interest, or (iii) a waiver of any specific obligation under the Advisers Act, would be inconsistent with the Advisers Act,[30] regardless of the sophistication of the client.[31]

[28] *See, e.g., infra* text following footnote 35.

[29] Because an adviser's federal fiduciary obligations are enforceable through section 206 of the Advisers Act, we would view a waiver of enforcement of section 206 as implicating section 215(a) of the Advisers Act, which provides that "any condition, stipulation or provision binding any person to waive compliance with any provision of this title . . . shall be void." *See also* Restatement (Third) of Agency, § 8.06 Principal's Consent (2006) ("[T]he law applicable to relationships of agency as defined in § 1.01 imposes mandatory limits on the circumstances under which an agent may be empowered to take disloyal action. These limits serve protective and cautionary purposes. Thus, an agreement that contains general or broad language purporting to release an agent in advance from the agent's general fiduciary obligation to the principal is not likely to be enforceable. This is because a broadly sweeping release of an agent's fiduciary duty may not reflect an adequately informed judgment on the part of the principal; if effective, the release would expose the principal to the risk that the agent will exploit the agent's position in ways not foreseeable by the principal at the time the principal agreed to the release. In contrast, when a principal consents to specific transactions or to specified types of conduct by the agent, the principal has a focused opportunity to assess risks that are more readily identifiable.").

[30] *See* sections 206 and 215(a). Commenters generally agreed that a client cannot waive an investment adviser's fiduciary duty through agreement. *See* Dechert Letter; Comment Letter of Ropes & Gray LLP (Aug. 7, 2018) ("Ropes & Gray Letter"), at n.20; *see also supra* footnote 29. In the Proposed Interpretation, we stated that "the investment adviser cannot disclose or negotiate away, and the investor cannot waive, the federal fiduciary duty." One commenter disputed this broad statement, believing that it called into question "the ability of an investment adviser and client to define the scope of the adviser's services and duties." ABA Letter; *see also* Financial Engines Letter. We have modified this statement to clarify that a general waiver of the fiduciary duty would violate that duty and to provide examples of such a general waiver.

[31] Some commenters mentioned a 2007 No-Action Letter in which staff indicated that whether a clause in an advisory agreement that purports to limit an adviser's liability under that agreement (a so-called "hedge clause") would violate sections 206(1) and 206(2) of the Advisers Act depends on all of the surrounding facts and circumstances. Heitman Capital Management, LLC, SEC Staff No-Action Letter (Feb. 12, 2007) ("Heitman Letter"). A few commenters indicated that the Heitman Letter expanded the ability of investment advisers to private funds, and potentially other sophisticated clients, to disclaim their fiduciary duties under state law in an advisory agreement. *See, e.g.*, ILPA Letter 1; ILPA Letter 2. The commenters' descriptions of the Heitman Letter suggest that it may have been applied incorrectly. The Heitman Letter does not address the scope or substance of an adviser's federal fiduciary duty; rather, it addresses the extent to which hedge clauses may be misleading in violation of the Advisers Act's antifraud provisions. Another commenter agreed with this reading of the Heitman Letter. *See* Comment Letter of American Investment Council (Feb. 25, 2019). In response to these comments, we express below the Commission's views about an adviser's obligations under sections 206(1) and 206(2) of the Advisers Act with respect to the use of hedge clauses. Accordingly, because we are expressing our views in this Final Interpretation, the Heitman Letter is withdrawn.

This Final Interpretation makes clear that an adviser's federal fiduciary duty may not be waived, though its application may be shaped by agreement. This Final Interpretation does not take a position on the scope or substance of any fiduciary duty that applies to an adviser under applicable state law. *See supra* footnote 3. The question of whether a hedge clause violates the Advisers Act's antifraud provisions depends on all of the surrounding facts and circumstances, including the particular circumstances of the client (*e.g.*, sophistication). In our view, however, there are few (if any) circumstances in which a hedge clause in an agreement with a retail client would be consistent with those antifraud provisions, where the hedge clause purports to relieve the adviser from liability for conduct as to which the client has a non-waivable cause of action against the adviser provided by state or federal law. Such a hedge clause generally is likely to mislead those retail clients into not exercising their legal rights, in violation of the antifraud provisions, even where the agreement otherwise specifies that the client may continue to retain its non-waivable rights. Whether a hedge clause in an agreement with an institutional client would violate the Advisers Act's antifraud provisions will be determined based on the particular facts and circumstances. To the extent that a hedge clause creates a conflict of interest between an adviser and its client, the adviser must address the conflict as required by its duty of loyalty.

B. Duty of Care

As fiduciaries, investment advisers owe their clients a duty of care.[32] The Commission has discussed the duty of care and its components in a number of contexts.[33] The duty of care includes, among other things: (i) The duty to provide advice that is in the best interest of the client, (ii) the duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades, and (iii) the duty to provide advice and monitoring over the course of the relationship.

1. Duty To Provide Advice That Is in the Best Interest of the Client

The duty of care includes a duty to provide investment advice that is in the best interest of the client, including a duty to provide advice that is suitable for the client.[34] In order to provide such

[32] *See* Investment Advisers Act Release 2106, *supra* footnote 15 (stating that under the Advisers Act, "an adviser is a fiduciary that owes each of its clients duties of care and loyalty with respect to all services undertaken on the client's behalf, including proxy voting," which is the subject of the release, and citing *SEC* v. *Capital Gains supra* footnote 2, to support this point). This Final Interpretation does not address the specifics of how an investment adviser might satisfy its fiduciary duty when voting proxies. *See also* Restatement (Third) of Agency, § 8.08 (discussing the duty of care that an agent owes its principal as a matter of common law); Tamar Frankel & Arthur B. Laby, The Regulation of Money Managers (updated 2017) ("Advice can be divided into three stages. The first determines the needs of the particular client. The second determines the portfolio strategy that would lead to meeting the client's needs. The third relates to the choice of securities that the portfolio would contain. The duty of care relates to each of the stages and depends on the depth or extent of the advisers' obligation towards their clients.").

[33] *See, e.g.*, Suitability of Investment Advice Provided by Investment Advisers; Custodial Account Statements for Certain Advisory Clients, Investment Advisers Act Release No. 1406 (Mar. 16, 1994) ("Investment Advisers Act Release 1406") (stating that advisers have a duty of care and discussing advisers' suitability obligations); Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters, Exchange Act Release No. 23170 (Apr. 28, 1986) ("Exchange Act Release 23170") ("an adviser, as a fiduciary, owes its clients a duty of obtaining the best execution on securities transactions"). We highlight certain contexts, but not all, in which the Commission has addressed the duty of care. *See, e.g.*, Investment Advisers Act Release 2106, *supra* footnote 15.

[34] In 1994, the Commission proposed a rule that would have made express the fiduciary obligation of investment advisers to make only suitable recommendations to a client. Investment Advisers Act Release 1406, *supra* footnote 33. Although never adopted, the rule was designed, among other things, to reflect the Commission's interpretation of an adviser's *existing* suitability obligation under the Advisers Act. In addition, we do not cite Investment Advisers Act Release 1406 as the source of authority for the view we express here, which at least one comment letter suggested, but cite it merely to show that the Commission has long held this view. *See* Comment Letter of the Managed Funds Association and the Alternative Investment

advice, an adviser must have a reasonable understanding of the client's objectives. The basis for such a reasonable understanding generally would include, for retail clients, an understanding of the investment profile, or for institutional clients, an understanding of the investment mandate.[35] The duty to provide advice that is in the best interest of the client based on a reasonable understanding of the client's objectives is a critical component of the duty of care.

Reasonable Inquiry Into Client's Objectives

How an adviser develops a reasonable understanding will vary based on the specific facts and circumstances, including the nature of the client, the scope of the adviser-client relationship, and the nature and complexity of the anticipated investment advice.

In order to develop a reasonable understanding of a retail client's objectives, an adviser should, at a minimum, make a reasonable inquiry into the client's financial situation, level of financial sophistication, investment experience, and financial goals (which we refer to collectively as the retail client's "investment profile"). For example, an adviser undertaking to formulate a comprehensive financial plan for a retail client would generally need to obtain a range of personal and financial information about the client such as current income, investments, assets and debts, marital status, tax status, insurance policies, and financial goals.[36]

In addition, it will generally be necessary for an adviser to a retail client to update the client's investment profile in order to maintain a reasonable understanding of the client's objectives and adjust the advice to reflect any changed circumstances.[37] The frequency with which the adviser must update the client's investment profile in order to consider changes to any advice the adviser provides would itself turn on the facts and circumstances, including whether the adviser is aware of events that have occurred that could render inaccurate or incomplete the investment profile on which the adviser currently bases its advice. For instance, in the case of a financial plan where the investment adviser also provides advice on an ongoing basis, a change in the relevant tax law or knowledge that the client has retired or experienced a change in marital status could trigger an obligation to make a new inquiry.

By contrast, in providing investment advice to institutional clients, the nature and extent of the reasonable inquiry into the client's objectives generally is shaped by the specific investment mandates from those clients. For example, an investment adviser engaged to advise on an institutional client's investment grade bond portfolio would need to gain a reasonable understanding of the client's objectives within that bond portfolio, but not the client's objectives within its entire investment portfolio. Similarly, an investment adviser whose client is a registered investment company or a private fund would need to have a reasonable understanding of the fund's investment guidelines and objectives. For advisers acting on specific investment mandates for institutional clients, particularly funds, we believe that the obligation to update the client's objectives would not be applicable except as may be set forth in the advisory agreement.

Reasonable Belief That Advice Is in the Best Interest of the Client

An investment adviser must have a reasonable belief that the advice it provides is in the best interest of the client based on the client's objectives. The formation of a reasonable belief would involve considering, for example, whether investments are recommended only to those clients who can and are willing to tolerate the risks of those investments and for whom the potential benefits may justify the risks.[38] Whether the advice is in a client's best interest must be evaluated in the context of the portfolio that the adviser manages for the client and the client's objectives.

For example, when an adviser is advising a retail client with a conservative investment objective, investing in certain derivatives may be in the client's best interest when they are used to hedge interest rate risk or other risks in the client's portfolio, whereas investing in certain directionally speculative derivatives on their own may not. For that same client, investing in a particular security on margin may not be in the client's best interest, even if investing in that same security without the use of margin may be in the client's best interest. However, for example, when advising a financially sophisticated client, such as a fund or other sophisticated client that has an appropriate risk tolerance, it may be in the best interest of the client to invest in such derivatives or in securities on margin, or to invest in other complex instruments or other products that may have limited liquidity.

Similarly, when an adviser is assessing whether high risk products—such as penny stocks or other thinly-traded securities—are in a retail client's best interest, the adviser should generally apply heightened scrutiny to whether such investments fall within the retail client's risk tolerance and objectives. As another example,

Management Association (Aug. 7, 2018) (indicating that the Commission's failure to adopt the proposed suitability rule means "investment advisers are not subject to an express 'suitability' standard under existing regulation"). We believe that this obligation to make only suitable recommendations to a client is part of an adviser's fiduciary duty to act in the best interest of its client. Accordingly, an adviser must provide investment advice that is suitable for its client in providing advice that is in the best interest of its client. *See SEC* v. *Tambone, supra* footnote 23 ("Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund. . . ."); SEC v. Moran, *supra* footnote 23 ("Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.").

[35] Several commenters stated that the duty to make a reasonable inquiry into a client's investment profile may not apply in the institutional client context. *See, e.g.,* Comment Letter of BlackRock, Inc. (Aug. 7, 2018); Comment Letter of Teachers Insurance and Annuity Association of America (Aug. 7, 2018); Comment Letter of Allianz Global Investors U.S. LLC (Aug. 7, 2018) ("Allianz Letter"); Comment Letter of John Hancock Life Insurance Company (U.S.A.) (Aug. 3, 2018). Accordingly, we are describing the duty as a duty to have a reasonable understanding of the client's objectives. While not every client will have an investment profile, every client will have objectives. For example, an institutional client's objectives may be ascertained through its investment mandate.

[36] Investment Advisers Act Release 1406, *supra* footnote 33. After making a reasonable inquiry into the client's investment profile, it generally would be reasonable for an adviser to rely on information provided by the client (or the client's agent) regarding the client's financial circumstances, and an adviser should not be held to have given advice not in its client's best interest if it is later shown that the client had misled the adviser concerning the information on which the advice was based.

[37] Such updating would not be needed with one-time investment advice. In the Proposed Interpretation, we stated that an adviser "must" update a client's investment profile in order to adjust the advice to reflect any changed circumstances. We believe that any obligation to update a client's investment profile, like the nature and extent of the reasonable inquiry into a retail client's objectives, turns on what is reasonable under the circumstances. Accordingly, we have revised the wording of this statement in this Final Interpretation.

[38] Item 8 of Part 2A of Form ADV requires an investment adviser to describe its methods of analysis and investment strategies and disclose that investing in securities involves risk of loss which clients should be prepared to bear. This item also requires that an adviser explain the material risks involved for each significant investment strategy or method of analysis it uses and particular type of security it recommends, with more detail if those risks are significant or unusual. Accordingly, investment advisers are required to identify and explain certain risks involved in their investment strategies and the types of securities they recommend. An investment adviser needs to consider those same risks in determining the clients to which the adviser recommends those investments.

complex products such as inverse or leveraged exchange-traded products that are designed primarily as short-term trading tools for sophisticated investors may not be in the best interest of a retail client absent an identified, short-term, client-specific trading objective and, to the extent that such products are in the best interest of a retail client initially, they would require daily monitoring by the adviser.[39]

A reasonable belief that investment advice is in the best interest of a client also requires that an adviser conduct a reasonable investigation into the investment sufficient not to base its advice on materially inaccurate or incomplete information.[40] We have taken enforcement action where an investment adviser did not independently or reasonably investigate securities before recommending them to clients.[41]

The cost (including fees and compensation) associated with investment advice would generally be one of many important factors—such as an investment product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility, likely performance in a variety of market and economic conditions, time horizon, and cost of exit—to consider when determining whether a security or investment strategy involving a security or securities is in the best interest of the client. When considering similar investment products or strategies, the fiduciary duty does not necessarily require an adviser to recommend the lowest cost investment product or strategy.

Moreover, an adviser would not satisfy its fiduciary duty to provide advice that is in the client's best interest by simply advising its client to invest in the lowest cost (to the client) or least remunerative (to the investment adviser) investment product or strategy without any further analysis of other factors in the context of the portfolio that the adviser manages for the client and the client's objective. Rather, the adviser could recommend a higher-cost investment or strategy if the adviser reasonably concludes that there are other factors about the investment or strategy that outweigh cost and make the investment or strategy in the best interest of the client, in light of that client's objectives. For example, it might be consistent with an adviser's fiduciary duty to advise a client with a high risk tolerance and significant investment experience to invest in a private equity fund with relatively higher fees and significantly less liquidity as compared with a fund that invests in publicly-traded companies if the private equity fund was in the client's best interest because it provided exposure to an asset class that was appropriate in the context of the client's overall portfolio.

An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.[42] Advice about account type includes advice about whether to open or invest through a certain type of account (*e.g.*, a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.*, a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages.[43] In providing advice about account type, an adviser should consider all types of accounts offered by the adviser and acknowledge to a client when the account types the adviser offers are not in the client's best interest.[44]

2. Duty To Seek Best Execution

An investment adviser's duty of care includes a duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades (typically in the case of discretionary accounts).[45] In meeting this obligation, an adviser must seek to obtain the execution of transactions for each of its clients such that the client's total cost or proceeds in each transaction are the most favorable under the circumstances. An adviser fulfills this duty by seeking to obtain the execution of securities transactions on behalf of a client with

[39] *See* Exchange-Traded Funds, Securities Act Release No. 10515 (June 28, 2018); SEC staff and FINRA, Investor Alert, Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors (Aug. 1, 2009); SEC Office of Investor Education and Advocacy, Investor Bulletin: Exchange-Traded Funds (ETFs) (Aug. 2012); *see also* FINRA Regulatory Notice 09–31, Non-Traditional ETFs—FINRA Reminds Firms of Sales Practice Obligations Relating to Leveraged and Inverse Exchange-Traded Funds (June 2009).

[40] *See, e.g.*, Concept Release on the U.S. Proxy System, Investment Advisers Act Release No. 3052 (July 14, 2010) (indicating that a fiduciary "has a duty of care requiring it to make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information").

[41] *See, e.g.*, In the Matter of Larry C. Grossman, Investment Advisers Act Release No. 4543 (Sept. 30, 2016) (Commission Opinion) ("*In re* Grossman") (in connection with imposing liability on a principal of a registered investment adviser for recommending offshore private investment funds to clients), *stayed in part*, Investment Advisers Act No. 4563 (Nov. 1, 2016), *response to remand*, Investment Advisers Act Release No. 4871 (Mar. 29, 2018) (reinstating the Sept. 30, 2016 opinion and order, except with respect to the disgorgement and prejudgment interest in light of the Supreme Court's decision in *Kokesh* v. *SEC*, 137 S. Ct. 1635 (2017)).

[42] In addition, with respect to prospective clients, investment advisers have antifraud liability under section 206 of the Advisers Act, which, among other things, applies to transactions, practices, or courses of business which operate as a fraud or deceit upon prospective clients, including those regarding investment strategy, engaging a sub-adviser, and account type. We believe that, in order to avoid liability under this antifraud provision, an investment adviser should have sufficient information about the prospective client and its objectives to form a reasonable basis for advice before providing any advice about these matters. At the point in time at which the prospective client becomes a client of the investment adviser (*e.g.*, at account opening), the fiduciary duty applies. Accordingly, while advice to prospective clients about these matters must comply with the antifraud provisions under section 206 of the Advisers Act, the adviser must also satisfy its fiduciary duty with respect to any such advice (*e.g.*, regarding account type) when a prospective client becomes a client.

[43] We consider advice about "rollovers" to include advice about account type, in addition to any advice regarding the investments or investment strategy with respect to the assets to be rolled over, as the advice necessarily includes the advice about the account type into which assets are to be rolled over. As noted below, as a general matter, an adviser's duty to monitor extends to all personalized advice it provides to the client, including, for example, in an ongoing relationship, an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest. *See infra* text accompanying footnote 52.

[44] Accordingly, in providing advice to a client or customer about account type, a financial professional who is dually licensed (*i.e.*, an associated person of a broker-dealer and a supervised person of an investment adviser (regardless of whether the professional works for a dual registrant, affiliated firms, or unaffiliated firms)) should consider all types of accounts offered (*i.e.*, both brokerage accounts and advisory accounts) when determining whether the advice is in the client's best interest. A financial professional who is only a supervised person of an investment adviser (regardless of whether that advisory firm is a dual registrant or affiliated with a broker-dealer) may only recommend an advisory account the adviser offers when the account is in the client's best interest. If a financial professional who is only a supervised person of an investment adviser chooses to advise a client to consider a non-advisory account (or to speak with other personnel at a dual registrant or affiliate about a non-advisory account), that advice should be in the best interest of the client. This same framework applies in the case of a prospective client, but any advice or recommendation given to a prospective client would be subject to the antifraud provisions of the federal securities laws. *See supra* footnote 42 and Reg. BI Adoption, *supra* footnote 3.

[45] *See* Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Release No. 54165 (July 18, 2006) (stating that investment advisers have "best execution obligations"); Investment Advisers Act Release 3060, *supra* footnote 15 (discussing an adviser's best execution obligations in the context of directed brokerage arrangements and disclosure of soft dollar practices); *see also* Advisers Act rule 206(3)–2(c) (referring to adviser's duty of best execution of client transactions).

the goal of maximizing value for the client under the particular circumstances occurring at the time of the transaction. Maximizing value encompasses more than just minimizing cost. When seeking best execution, an adviser should consider "the full range and quality of a broker's services in placing brokerage including, among other things, the value of research provided as well as execution capability, commission rate, financial responsibility, and responsiveness" to the adviser.[46] In other words, the "determinative factor" is not the lowest possible commission cost, "but whether the transaction represents the best qualitative execution."[47] Further, an investment adviser should "periodically and systematically" evaluate the execution it is receiving for clients.[48]

3. Duty To Provide Advice and Monitoring Over the Course of the Relationship

An investment adviser's duty of care also encompasses the duty to provide advice and monitoring at a frequency that is in the best interest of the client, taking into account the scope of the agreed relationship.[49] For example, when the adviser has an ongoing relationship with a client and is compensated with a periodic asset-based fee, the adviser's duty to provide advice and monitoring will be relatively extensive as is consistent with the nature of the relationship.[50] Conversely, absent an express agreement regarding the adviser's monitoring obligation, when the adviser and the client have a relationship of limited duration, such as for the provision of a one-time financial plan for a one-time fee, the adviser is unlikely to have a duty to monitor. In other words, in the absence of any agreed limitation or expansion, the scope of the duty to monitor will be indicated by the duration and nature of the agreed advisory arrangement.[51] As a general matter, an adviser's duty to monitor extends to all personalized advice it provides to the client, including, for example, in an ongoing relationship, an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest.[52]

C. Duty of Loyalty

The duty of loyalty requires that an adviser not subordinate its clients' interests to its own.[53] In other words, an investment adviser must not place its own interest ahead of its client's interests.[54] To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship.[55] Material facts relating to the advisory relationship include the capacity in which the firm is acting with respect to the advice provided. This will be particularly relevant for firms or individuals that are dually registered as broker-dealers and investment advisers and who serve the same client in both an advisory and a brokerage capacity. Thus, such firms and individuals generally should provide full and fair disclosure about the circumstances in which they intend to act in their

[46] Exchange Act Release 23170, *supra* footnote 33.

[47] *Id.*

[48] *Id.* The Advisers Act does not prohibit advisers from using an affiliated broker to execute client trades. However, the adviser's use of such an affiliate involves a conflict of interest that must be fully and fairly disclosed and the client must provide informed consent to the conflict. *See also* Interpretation of Section 206(3) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1732 (Jul. 17, 1998) (discussing application of section 206(3) of the Advisers Act to certain principal and agency transactions). Two commenters requested that we prescribe specific obligations related to best execution. Comment Letter of the Healthy Markets Association (Aug. 7, 2018); Comment Letter of ICE Data Services (Aug. 7, 2018). However, prescribing specific requirements of how an adviser might satisfy its best execution obligations is outside of the scope of this Final Interpretation.

[49] *Cf. SEC* v. *Capital Gains, supra* footnote 2 (describing advisers' "basic function" as "furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments" (quoting Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong. 2d Sess., 1, at 28)). *Cf.* Barbara Black, *Brokers and Advisers—What's in a Name?,* 32 Fordham Journal of Corporate and Financial Law XI (2005) ("[W]here the investment adviser's duties include management of the account, [the adviser] is under an obligation to monitor the performance of the account and to make appropriate changes in the portfolio."); Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers,* 55 Villanova Law Review 701 (2010) ("Laby Villanova Article") (stating that the scope of an adviser's activity can be altered by contract and that an adviser's fiduciary duty would be commensurate with the scope of the relationship) (internal citations omitted).

[50] However, an adviser and client may scope the frequency of the adviser's monitoring (*e.g.,* agreement to monitor quarterly or monthly and as appropriate in between based on market events), provided that there is full and fair disclosure and informed consent. We consider the frequency of monitoring, as well as any other material facts relating to the agreed frequency, such as whether there will also be interim monitoring when there are market events relevant to the client's portfolio, to be a material fact relating to the advisory relationship about which an adviser must make full and fair disclosure and obtain informed consent as required by its fiduciary duty.

[51] *See also* Laby Villanova Article, *supra* footnote 49, at 728 (2010) ("If an adviser has agreed to provide continuous supervisory services, the scope of the adviser's fiduciary duty entails a continuous, ongoing duty to supervise the client's account, regardless of whether any trading occurs. This feature of the adviser's duty, even in a non-discretionary account, contrasts sharply with the duty of a broker administering a non-discretionary account, where no duty to monitor is required.") (internal citations omitted).

[52] Investment advisers also may consider whether written policies and procedures relating to monitoring would be appropriate under Advisers Act rule 206(4)–7, which requires any investment adviser registered or required to be registered under the Advisers Act to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules thereunder by the adviser and its supervised persons.

[53] Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that "[u]nder the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Investment Advisers Act Release 2106, *supra* footnote 15). The duty of loyalty applies not just to advice regarding potential investments, but to all advice the investment adviser provides to an existing client, including advice about investment strategy, engaging a sub-adviser, and account type. *See supra* text accompanying footnotes 42–43.

[54] For example, an adviser cannot favor its own interests over those of a client, whether by favoring its own accounts or by favoring certain client accounts that pay higher fee rates to the adviser over other client accounts. The Commission has brought numerous enforcement actions against advisers that allocated trades to their own accounts and allocated less favorable or unprofitable trades to their clients' accounts. *See, e.g., SEC* v. *Strategic Capital Management, LLC and Michael J. Breton,* Litigation Release No. 23867 (June 23, 2017) (partial settlement) (adviser placed trades through a master brokerage account and then allocated profitable trades to adviser's account while placing unprofitable trades into the client accounts in violation of fiduciary duty and contrary to disclosures). In the Proposed Interpretation, we stated that the duty of loyalty requires an adviser to "put its client's interest first." One commenter suggested that the requirement of an adviser to put its client's interest "first" is very different from a requirement not to "subordinate" or "subrogate" clients' interests, and is inconsistent with how the duty of loyalty had been applied in the past. *See* Comment Letter of the Asset Management Group of the Securities Industry and Financial Markets Association (Aug. 7, 2018) ("SIFMA AMG Letter"). Accordingly, we have revised the description of the duty of loyalty in this Final Interpretation to be more consistent with how we have previously described the duty. *See* Investment Advisers Act Release 3060, *supra* footnote 15 ("Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own.") (citing Investment Advisers Act Release 2106, *supra* footnote 15). In practice, referring to putting a client's interest first is a plain English formulation commonly used by investment advisers to explain their duty of loyalty in a way that may be more understandable to retail clients.

[55] *See SEC* v. *Capital Gains, supra* footnote 2 ("Failure to disclose material facts must be deemed fraud or deceit within its intended meaning."); Investment Advisers Act Release 3060, *supra* footnote 15 ("as a fiduciary, an adviser has an ongoing obligation to inform its clients of any material information that could affect the advisory relationship"); *see also* General Instruction 3 to Part 2 of Form ADV ("Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship.").

brokerage capacity and the circumstances in which they intend to act in their advisory capacity. This disclosure may be accomplished through a variety of means, including, among others, written disclosure at the beginning of a relationship that clearly sets forth when the dual registrant would act in an advisory capacity and how it would provide notification of any changes in capacity.[56] Similarly, a dual registrant acting in its advisory capacity should disclose any circumstances under which its advice will be limited to a menu of certain products offered through its affiliated broker-dealer or affiliated investment adviser.

In addition, an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.[57] We believe that while full and fair disclosure of all material facts relating to the advisory relationship or of conflicts of interest and a client's informed consent prevent the presence of those material facts or conflicts themselves from violating the adviser's fiduciary duty, such disclosure and consent do not themselves satisfy the adviser's duty to act in the client's best interest.[58] To illustrate what constitutes full and fair disclosure, we are providing the following guidance on (i) the appropriate level of specificity, including the appropriateness of stating that an adviser "may" have a conflict, and (ii) considerations for disclosure regarding conflicts related to the allocation of investment opportunities among eligible clients.

In order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent.[59] For example, it would be inadequate to disclose that the adviser has "other clients" without describing how the adviser will manage conflicts between clients if and when they arise, or to disclose that the adviser has "conflicts" without further description.

Similarly, disclosure that an adviser "may" have a particular conflict, without more, is not adequate when the conflict actually exists.[60] For example, we would consider the use of "may" inappropriate when the conflict exists with respect to some (but not all) types or classes of clients, advice, or transactions without additional disclosure specifying the types or classes of clients, advice, or transactions with respect to which the conflict exists. In addition, the use of "may" would be inappropriate if it simply precedes a list of all possible or potential conflicts regardless of likelihood and obfuscates

[56] *See also* Reg. BI Adoption, *supra* footnote 3, at 99.

[57] In the Proposed Interpretation, we stated that an adviser must seek to avoid conflicts of interest with its clients. Proposed Interpretation, *supra* footnote 6. Some commenters requested clarity on what it means to "seek to avoid" conflicts of interest. *See, e.g.,* Comment Letter of Schulte Roth & Zabel LLP (Aug. 8, 2018); ABA Letter (stating that this wording could be read to require an adviser to first seek to avoid a conflict, before addressing a conflict through disclosure, rather than being able to provide full and fair disclosure of a conflict, and only seek avoidance if the conflict cannot be addressed through disclosure). The Commission first used this phrasing when adopting amendments to the Form ADV Part 2 instructions. *See* Investment Advisers Act Release 3060, *supra* footnote 15 and General Instruction 3 to Part 2 of Form ADV ("As a fiduciary, you also must seek to avoid conflicts of interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship."). The release adopting this instruction clarifies the Commission's intent that it capture the fiduciary duty described in *SEC* v. *Capital Gains and Arleen Hughes. See* Investment Advisers Act Release 3060, *supra* footnote 15, at n.4 and accompanying text (citing *SEC* v. *Capital Gains, supra* footnote 2, and Arleen Hughes, *supra* footnote 18, as the basis of this language). Both of these cases emphasized that the adviser, as a fiduciary, should seek to avoid conflicts, but at a minimum must make full and fair disclosure of the conflict and obtain the client's informed consent. *See SEC* v. *Capital Gains, supra* footnote 2 ("The Advisers Act thus reflects . . . 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."); Arleen Hughes, *supra* footnote 18 ("Since loyalty to his trust is the first duty which a fiduciary owes to his principal, it is the general rule that a fiduciary must not put himself into a position where his own interests may come in conflict with those of his principal" but if a fiduciary "chooses to assume a role in which she is motivated by conflicting interests, . . . she may do so if, but only if, she obtains her client's consent after disclosure . . ."). We believe the Commission's reference to "seek to avoid" conflicts in the Form ADV Part 2 instructions is consistent with the Final Interpretation's statement that an adviser "must eliminate or at least expose all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested" as well as the substantively identical statements in *SEC* v. *Capital Gains, supra* footnote 2, and Arleen Hughes, *supra* footnote 18. While an adviser may satisfy its duty of loyalty by making full and fair disclosure of conflicts of interest and obtaining the client's informed consent, an adviser is prohibited from overreaching or taking unfair advantage of a client's trust.

[58] As noted above, an investment adviser's obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty. *See SEC* v. *Tambone, supra* footnote 23 (stating that Advisers Act section 206 "imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund . . . and *includes* an obligation to provide 'full and fair disclosure of all material facts' ") (emphasis added) (citing *SEC* v. *Capital Gains, supra* footnote 2). We describe above in this Final Interpretation how the application of an investment adviser's fiduciary duty to its client will vary with the scope of the advisory relationship. *See supra* section II.A.

[59] Arleen Hughes, *supra* footnote 18, at 4 and 8 (stating, "[s]ince loyalty to his trust is the first duty which a fiduciary owes to his principal, it is the general rule that a fiduciary must not put himself into a position where his own interests may come in conflict with those of his principal. To prevent any conflict and the possible subordination of this duty to act solely for the benefit of his principal, a fiduciary at common law is forbidden to deal as an adverse party with his principal. An exception is made, however, where the principal gives his informed consent to such dealings," and adding that, "[r]egistrant has an affirmative obligation to disclose all material facts to her clients in a manner which is clear enough so that a client is fully apprised of the facts and is in a position to give his informed consent."); *see also Hughes* v. *Securities and Exchange Commission,* 174 F.2d 969 (1949) (affirming the SEC decision in Arleen Hughes); General Instruction 3 to Part 2 of Form ADV (stating that an adviser's disclosure obligation "requires that [the adviser] provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest [the adviser has] and the business practices in which [the adviser] engage[s], and can give informed consent to such conflicts or practices or reject them"); Investment Advisers Act Release 3060, *supra* footnote 15; Restatement (Third) of Agency § 8.06 ("Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 [referencing the fiduciary duty] does not constitute a breach of duty if the principal consents to the conduct, provided that (a) in obtaining the principal's consent, the agent (i) acts in good faith, (ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and (iii) otherwise deals fairly with the principal; and (b) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship."). *See infra* footnotes 67–70 and accompanying text for a more detailed discussion of informed consent and how it is generally considered on an objective basis and may be inferred.

[60] We have brought enforcement actions in such cases. *See, e.g.,* In the Matter of The Robare Group, Ltd., et al., Investment Advisers Act Release No. 4566 (Nov. 7, 2016) (Commission Opinion) (finding, among other things, that adviser's disclosure that it *may* receive a certain type of compensation was inadequate because it did not reveal that the adviser actually had an arrangement pursuant to which it received fees that presented a potential conflict of interest); *aff'd in part and rev'd in part on other grounds Robare* v. *SEC, supra* footnote 20; *In re Grossman, supra* footnote 41 (indicating that "the use of the prospective 'may' in [the relevant Form ADV disclosures] is misleading because it suggested the mere possibility that [the broker] would make a referral and/or be paid 'referral fees' at a later point, when in fact a commission-sharing arrangement was already in place and generating income"). *Cf. Dolphin & Bradbury, Inc.* v. *SEC,* 512 F.3d 634, 640 (D.C. Cir. 2008) ("The Commission noted the critical distinction between disclosing the risk that a future event *might* occur and disclosing actual knowledge the event *will* occur.") (emphasis in original). For Form ADV Part 2 purposes, advisers are instructed that when they have a conflict or engage in a practice with respect to some (but not all) types or classes of clients, advice, or transactions, to indicate as such rather than disclosing that they "may" have the conflict or engage in the practice. General Instruction 2 to Part 2 of Form ADV.

actual conflicts to the point that a client cannot provide informed consent. On the other hand, the word "may" could be appropriately used to disclose to a client a potential conflict that does not currently exist but might reasonably present itself in the future.[61]

Whether the disclosure is full and fair will depend upon, among other things, the nature of the client, the scope of the services, and the material fact or conflict. Full and fair disclosure for an institutional client (including the specificity, level of detail, and explanation of terminology) can differ, in some cases significantly, from full and fair disclosure for a retail client because institutional clients generally have a greater capacity and more resources than retail clients to analyze and understand complex conflicts and their ramifications.[62] Nevertheless, regardless of the nature of the client, the disclosure must be clear and detailed enough for the client to make an informed decision to consent to the conflict of interest or reject it.

When allocating investment opportunities among eligible clients, an adviser may face conflicts of interest either between its own interests and those of a client or among different clients.[63] If so, the adviser must eliminate or at least expose through full and fair disclosure the conflicts associated with its allocation policies, including how the adviser will allocate investment opportunities, such that a client can provide informed consent.[64] When allocating investment opportunities, an adviser is permitted to consider the nature and objectives of the client and the scope of the relationship.[65] An adviser need not have *pro rata* allocation policies, or any particular method of allocation, but, as with other conflicts and material facts, the adviser's allocation practices must not prevent it from providing advice that is in the best interest of its clients.[66]

While most commenters agreed that informed consent is a component of the fiduciary duty, a few commenters objected to what they saw as subjectivity in the use of the term "informed" to describe a client's consent to a disclosed conflict.[67] The fact that disclosure must be full and fair such that a client can provide informed consent does not require advisers to make an affirmative determination that a particular client understood the disclosure and that the client's consent to the conflict of interest was informed. Rather, disclosure should be designed to put a client in a position to be able to understand and provide informed consent to the conflict of interest. A client's informed consent can be either explicit or, depending on the facts and circumstances, implicit.[68] We believe, however, that it would not be consistent with an adviser's fiduciary duty to infer or accept client consent where the adviser was aware, or reasonably should have been aware, that the client did not understand the nature and import of the conflict.[69] In some cases, conflicts may be of a nature and extent that it would be difficult to provide disclosure to clients that adequately conveys the material facts or the nature, magnitude, and potential effect of the conflict sufficient for a client to consent to or reject it.[70] In other cases, disclosure may not be specific enough for a client to understand whether and how the conflict could affect the advice it receives. For retail clients in particular, it may be difficult to provide disclosure regarding complex or extensive conflicts that is sufficiently specific, but also understandable. In all of these cases where an investment adviser cannot fully and fairly disclose a conflict of interest to a client such that the client can provide informed consent, the adviser should either *eliminate* the conflict or adequately *mitigate* (*i.e.*, modify practices to reduce) the conflict such that full and fair disclosure and informed consent are possible.

Full and fair disclosure of all material facts relating to the advisory relationship, and all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested, can help clients and prospective clients in evaluating and selecting investment advisers. Accordingly, we require advisers to deliver to their clients a "brochure," under Part 2A of Form ADV, which sets

[61] We have added this example of a circumstance where "may" could be appropriately used in response to the request of some commenters. *See, e.g.*, Pickard Letter; ICI Letter; Ropes & Gray Letter; IAA Letter.

[62] *Arleen Hughes, supra* footnote 18 (the "method and extent of disclosure depends upon the particular client involved," and an unsophisticated client may require "a more extensive explanation than the informed investor").

[63] *See* Restatement (Third) of Agency, § 8.01 General Fiduciary Principle (2006) ("Unless the principal consents, the general fiduciary principle, as elaborated by the more specific duties of loyalty stated in §§ 8.02 to 8.05, also requires that an agent refrain from using the agent's position or the principal's property to benefit the agent or a third party.").

[64] The Commission has brought numerous enforcement actions alleging that advisers unfairly allocated client trades to preferred clients without making full and fair disclosure. *See* Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011), *available at https://www.sec.gov/news/studies/2011/913studyfinal.pdf*, at 23–24 (citing enforcement actions). This Final Interpretation sets forth the Commission's views regarding what constitutes full and fair disclosure. *See, e.g., supra* text accompanying footnote 59; *see also* Barry Barbash and Jai Massari, *The Investment Advisers Act of 1940; Regulation by Accretion*, 39 Rutgers Law Journal 627 (2008) (stating that under section 206 of the Advisers Act and traditional notions of fiduciary and agency law, an adviser must not give preferential treatment to some clients or systematically exclude eligible clients from participating in specific opportunities without providing the clients with appropriate disclosure regarding the treatment).

[65] An adviser and a client may even agree that certain investment opportunities or categories of investment opportunities will not be allocated or offered to a client.

[66] In the Proposed Interpretation, we stated that "in allocating investment opportunities among eligible clients, an adviser must treat all clients fairly." Some commenters interpreted this statement to mean that it would be impermissible for an adviser to allocate a particular investment to one eligible client instead of a second eligible client, even when the second client had received full and fair disclosure and provided informed consent to such an investment being allocated to the first client. *See, e.g.*, Ropes & Gray Letter; SIFMA AMG Letter. We have removed that sentence from this Final Interpretation and replaced it with this discussion that clarifies our views regarding allocation of investment opportunities.

[67] *See, e.g.*, Comment Letter of LPL Financial LLC (Aug. 7, 2018); Ropes & Gray Letter.

[68] We do not interpret an adviser's fiduciary duty to require that full and fair disclosure or informed consent be achieved in a written advisory contract or otherwise in writing. For example, an adviser could provide a client full and fair disclosure of all material facts relating to the advisory relationship as well as full and fair disclosure of all conflicts of interest which might incline the adviser, consciously or unconsciously, to render advice that was not disinterested, through a combination of Form ADV and other disclosure and the client could implicitly consent by entering into or continuing the investment advisory relationship with the adviser.

[69] *See* Arleen Hughes, *supra* footnote 18 ("Registrant cannot satisfy this duty by executing an agreement with her clients which the record shows some clients do not understand and which, in any event, does not contain the essential facts which she must communicate."). In the Proposed Interpretation, we stated that inferring or accepting client consent to a conflict would not be consistent with the fiduciary duty where "the material facts concerning the conflict could not be fully and fairly disclosed." Some commenters expressed agreement with this statement. *See, e.g.*, CFA Letter (agreeing that "advisers should be precluded from inferring or accepting client consent to a conflict" where the material facts concerning the conflict could not be fully and fairly disclosed). Other commenters expressed doubt that such disclosure could be impossible. *See, e.g.*, Allianz Letter ("[W]e have not encountered a situation in which we could not fully and fairly disclose the material facts, including the nature, extent, magnitude and potential effects of the conflict."). In response to commenters, we have replaced the general statement about an inability to fully and fairly disclose material facts about the conflict with more specific examples of how advisers can make such full and fair disclosure. *See supra* text accompanying footnotes 59–66.

[70] As discussed above, institutional clients generally have a greater capacity and more resources than retail clients to analyze and understand complex conflicts and their ramifications. *See supra* text accompanying footnote 62.

out minimum disclosure requirements, including disclosure of certain conflicts.[71] Investment advisers are required to deliver the brochure to a prospective client at or before entering into a contract so that the prospective client can use the information contained in the brochure to decide whether or not to enter into the advisory relationship.[72] In a concurrent release, we are requiring all investment advisers to deliver to retail investors, at or before the time the adviser enters into an investment advisory agreement, a relationship summary, which would include, among other things, a plain English summary of certain of the firm's conflicts of interest, and would encourage retail investors to inquire about those conflicts.[73]

III. Economic Considerations

As noted above, this Final Interpretation is intended to reaffirm, and in some cases clarify, certain aspects of an investment adviser's fiduciary duty under the Advisers Act. The Final Interpretation does not itself create any new legal obligations for advisers. Nonetheless, the Commission recognizes that to the extent an adviser's practices are not consistent with the Final Interpretation provided above, the Final Interpretation could have potential economic effects. We discuss these potential effects below.

A. Background

The Commission's interpretation of the standard of conduct for investment advisers under the Advisers Act set forth in this Final Interpretation would affect investment advisers and their associated persons as well as the clients of those investment advisers, and the market for financial advice more broadly.[74] As of December 31, 2018, there were 13,299 investment advisers registered with the Commission with over $84 trillion in assets under management as well as 17,268 investment advisers registered with states with approximately $334 billion in assets under management and 3,911 investment advisers who submit Form ADV as exempt reporting advisers.[75] As of December 31, 2018, there are approximately 41 million client accounts advised by SEC-registered investment advisers.[76]

These investment advisers currently incur ongoing costs related to their compliance with their legal and regulatory obligations, including costs related to understanding the standard of conduct. We believe, based on the Commission's experience, that the interpretations set forth in this Final Interpretation are generally consistent with investment advisers' current understanding of their fiduciary duty under the Advisers Act.[77] However, we recognize that as the scope of the adviser-client relationship varies and in many cases can be broad, there may be certain current circumstances where investment advisers interpret their fiduciary duty to require something less, and other current circumstances where they interpret their fiduciary duty to require something more, than this Final Interpretation. We lack data to identify which investment advisers currently understand their fiduciary duty to require something different from the standard of conduct articulated in this Final Interpretation. Based on our experience over decades of interacting with the investment management industry as its primary regulator, however, we generally believe that it is not a significant portion of the market.

One commenter suggested that the Proposed Interpretation's discussion of how an adviser fulfills its fiduciary duty appeared to be based in the context of having as a client an individual investor, and not a fund.[78] This commenter indicated its concerns about the ability of a fund manager to infer consent from a client that is a fund, and that issues regarding inferring consent from funds could significantly increase compliance costs for venture capital funds.[79] Our discussion above in this Final Interpretation includes clarifications to address comments, and expressly acknowledges that while all investment advisers owe each of their clients a fiduciary duty, the specific application of the investment adviser's fiduciary duty must be viewed in the context of the agreed-upon scope of the adviser-client relationship.[80] This Final Interpretation, as compared to the Proposed Interpretation, includes significantly more examples of the application of the fiduciary duty to institutional clients, and clarifies the Commission's interpretation of what constitutes full and fair disclosure and informed consent, acknowledging a number of comments on this topic.[81] We believe that these clarifications will help address some of this commenter's concerns with respect to increased compliance costs for venture capital funds, in part by clarifying how the fiduciary duty can apply to institutional clients. We continue to believe, based on our experience with investment advisers to different types of clients, that advisers understand their fiduciary

[71] Investment Advisers Act Release 3060, *supra* footnote 15; General Instruction 3 to Part 2 of Form ADV ("Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship. As a fiduciary, you also must seek to avoid conflicts of interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship. This obligation requires that you provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest you have and the business practices in which you engage, and can give informed consent to such conflicts or practices or reject them."). *See also Robare* v. *SEC, supra* footnote 20 ("[R]egardless of what Form ADV requires, [investment advisers have] a fiduciary duty to fully and fairly reveal conflicts of interest to their clients.").

[72] Investment Advisers Act rule 204–3. *See* Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that, "A client may use this disclosure to select his or her own adviser and evaluate the adviser's business practices and conflicts on an ongoing basis. As a result, the disclosure clients and prospective clients receive is critical to their ability to make an informed decision about whether to engage an adviser and, having engaged the adviser, to manage that relationship."). To the extent that the information required for inclusion in the brochure does not satisfy an adviser's disclosure obligation, the adviser "may have to disclose to clients information not specifically required by Part 2 of Form ADV or in more detail than the brochure items might otherwise require" and this disclosure may be made "in [the] brochure or by some other means." General Instruction 3 to Part 2 of Form ADV.

[73] Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, Investment Advisers Act Release No. 5247 (June 5, 2019) ("Relationship Summary Adoption").

[74] *See* Relationship Summary Proposal, *supra* footnote 5, at section IV.A (discussing the market for financial advice generally).

[75] Data on investment advisers is based on staff analysis of Form ADV, particularly Item 5.F.(2)(c) of Part 1A for Regulatory Assets under Management. Because this Final Interpretation interprets an adviser's fiduciary duty under section 206 of the Advisers Act, this interpretation would be applicable to both SEC- and state-registered investment advisers, as well as other investment advisers that are exempt from registration or subject to a prohibition on registration under the Advisers Act.

[76] Item 5.F.(2)(f) of Part 1A of Form ADV.

[77] *See supra* section II.B.i. For example, some commenters asked that we clarify from the Proposed Interpretation that an adviser and its client can tailor the scope of the relationship to which the fiduciary duty applies, through contract. *See, e.g.,* MMI Letter; Financial Engines Letter; ABA Letter. *See supra* footnotes 67–69 and accompanying text, including clarifications addressing these commenters' concerns. More generally, some commenters requested clarifications from the Proposed Interpretation, and we are issuing this Final Interpretation to address those issues raised by commenters, as discussed in more detail above.

[78] *See* Comment Letter of National Venture Capital Association (Aug. 7, 2018) ("NVCA Letter").

[79] *Id.*

[80] *See supra* section II.A.

[81] In particular, this Final Interpretation expressly notes our belief that a client generally may provide its informed consent implicitly "by entering into or continuing the investment advisory relationship with the adviser" after disclosure of a conflict of interest. *See supra* footnote 68.

duty to be generally consistent with the standards of this Final Interpretation.

B. Potential Economic Effects

Based on our experience as the long-standing regulator of the investment adviser industry, the Commission's interpretation of the fiduciary duty under section 206 of the Advisers Act described in this Final Interpretation generally reaffirms the current practices of investment advisers. Therefore, we expect there to be no significant economic effects from this Final Interpretation. However, as with other circumstances in which the Commission speaks to the legal obligations of regulated entities, we acknowledge that affected firms, including those whose practices are consistent with the Commission's interpretation, incur costs to evaluate the Commission's interpretation and assess its applicability to them. Further, to the extent certain investment advisers currently understand the practices necessary to comply with their fiduciary duty to be different from those discussed in this Final Interpretation, there could be some economic effects, which we discuss below.

Clients of Investment Advisers

The typical relationship between an investment adviser and a client is a principal-agent relationship, where the principal (the client) hires an agent (the investment adviser) to perform some service (investment advisory services) on the principal's behalf.[82] Because investors and investment advisers are likely to have different preferences and goals, the investment adviser relationship is subject to agency problems, including those resulting from conflicts: That is, investment advisers may take actions that increase their well-being at the expense of investors, thereby imposing agency costs on investors.[83] A fiduciary duty, such as the duty investment advisers owe their clients, can mitigate these agency problems and reduce agency costs by deterring investment advisers from taking actions that expose them to legal liability.[84]

To the extent this Final Interpretation causes a change in behavior of those investment advisers, if any, who currently interpret their fiduciary duty to require something different from this Final Interpretation, we expect a potential reduction in agency problems and, consequently, a reduction of agency costs to the client.[85] For example, an adviser that, as part of its duty of loyalty, fully and fairly discloses[86] a conflict of interest and receives informed consent from its client with respect to the conflict may reduce agency costs by increasing the client's awareness of the conflict and improving the client's ability to monitor the adviser with respect to this conflict. Alternatively, the client may choose to not consent given the information the adviser discloses about a conflict of interest if the perceived risk associated with the conflict is too significant, and instead try to renegotiate the contract with the adviser or look for an alternative adviser or other financial professional. In addition, the obligation to fully and fairly disclose a current conflict may cause the adviser to take other actions, for example eliminating or adequately mitigating (*i.e.*, modifying practices to reduce) that conflict rather than taking the risk that the client will not provide informed consent or will look for an alternative adviser or other financial professional. The extent to which agency costs would be reduced by such a disclosure is difficult to assess given that we are unable to ascertain the total number of investment advisers that currently interpret their fiduciary duty to require something different from the Commission's interpretation,[87] and consequently we are not able to estimate the agency costs such advisers currently impose on investors. In addition, we believe that there may be potential benefits for clients of those investment advisers, if any, to the extent this Final Interpretation is effective at strengthening investment advisers' understanding of their obligations to their clients. Further, to the extent that this Final Interpretation enhances the understanding of any investment advisers of their duty of care, it may potentially raise the quality of investment advice and also lead to increased compliance with the duty to monitor, for example whether advice about an account or program type remains in the client's best interest, thereby increasing the likelihood that the advice fits with a client's objectives.

In addition, to the extent that this Final Interpretation causes some investment advisers to properly identify circumstances in which conflicts may be of a nature and extent that it would be difficult to provide disclosure to clients that adequately conveys the material facts or nature, magnitude, and potential effect of the conflict sufficient for clients to consent to it or reject it, or in which the disclosure may not be specific enough for clients to understand whether and how the conflict could affect the advice they receive, this Final Interpretation may lead those investment advisers to take additional steps to improve their disclosures or to determine whether adequately mitigating (*i.e.*, modifying practices to reduce) the conflict may be appropriate such that full and fair disclosure and informed consent are possible. This Final Interpretation may also cause some investment advisers to conclude in some circumstances that they cannot fully and fairly disclose a conflict of interest to a client such that the client can provide informed consent. We would expect that these advisers would either eliminate the conflict or adequately mitigate (*i.e.*, modify practices to reduce) the conflict such that full and fair disclosure and informed consent would be possible. Thus, to the extent this Final Interpretation would cause investment advisers to better understand their obligations and therefore to modify their business practices in ways that (i) reduce the likelihood that conflicts and other agency costs will cause an adviser to place its interests ahead of the interests of the client or (ii) help those advisers to provide full and fair disclosure, it would be expected to ameliorate the agency conflict between investment advisers and their clients. In

[82] *See, e.g.*, James A. Brickley, Clifford W. Smith, Jr. & Jerold L. Zimmerman, *Managerial Economics and Organizational Architecture* (2004), at 265 ("An agency relationship consists of an agreement under which one party, the principal, engages another party, the agent, to perform some service on the principal's behalf."); *see also* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 Journal of Financial Economics 305–360 (1976) ("Jensen and Meckling").

[83] *See, e.g.*, Jensen and Meckling, *supra* footnote 82.

[84] *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 Journal of Law & Economics 425–46 (1993).

[85] To the extent that this Final Interpretation clarifies the fiduciary duty for investment advisers, one commenter suggested it may then clarify what clients expect of their investment advisers. *See* Cambridge Letter (stating that "greater clarity on all aspects of an investment adviser's fiduciary duty will improve the ability to craft such policies and procedures, as well as support the elimination of confusion for retail clients and investment professionals").

[86] As discussed above, whether such a disclosure is full and fair will depend upon, among other things, the nature of the client, the scope of the services, and the conflict. *See supra* section II.C.

[87] One commenter did not agree that the discussion of fiduciary obligations in the Proposed Interpretation applied to advisers to funds as well as advisers to retail investors. *See* NVCA Letter. As discussed above, this Final Interpretation has clarified the discussion to address this commenter's concerns and acknowledges that the application of the fiduciary duty of an adviser to a retail client would be different from the specific application of the fiduciary duty of an adviser to a registered investment company or private fund.

turn, this may improve the quality of advice that the clients receive and therefore produce higher overall returns for clients and increase the efficiency of portfolio allocation. However, as discussed above, we would generally expect these effects to be minimal because we believe that the interpretations we are setting forth in this Final Interpretation are generally consistent with investment advisers' current understanding of their fiduciary duty under the Advisers Act. Finally, this Final Interpretation would also benefit clients of investment advisers to the extent it assists the Commission in its oversight of investment advisers' compliance with their regulatory obligations.

Investment Advisers and the Market for Investment Advice

In general, we expect this Final Interpretation to affirm investment advisers' understanding of the fiduciary duty they owe their clients under the Advisers Act, reduce uncertainty for advisers, and facilitate their compliance. Further, by addressing in one release certain aspects of the fiduciary duty that an investment adviser owes to its clients under the Advisers Act, this Final Interpretation could reduce investment advisers' costs associated with comprehensively assessing their compliance obligations. We acknowledge that, as with other circumstances in which the Commission speaks to the legal obligations of regulated entities, affected firms, including those whose practices are consistent with the Commission's interpretation, incur costs to evaluate the Commission's interpretation and assess its applicability to them. Moreover, as discussed above, there may be certain investment advisers who currently understand their fiduciary duty to require something different from the fiduciary duty described in this Final Interpretation. Those investment advisers would experience an increase in their compliance costs as they change their systems, processes, disclosures, and behavior, and train their supervised persons, to align with this Final Interpretation. However, this increase in costs would be mitigated by potential benefits in efficiency for investment advisers that are able to understand aspects of their fiduciary duty by reference to a single Commission release that reaffirms—and in some cases clarifies—certain aspects of the fiduciary duty.[88] In addition, and as discussed above, in the case of an investment adviser that believed it owed its clients a lower standard of conduct, there will be client benefits from the ensuing adaptation of a higher standard of conduct and related change in policies and procedures.

Moreover, to the extent any investment advisers that understood their fiduciary duty to require something different from the fiduciary duty described in this Final Interpretation change their behavior to align with this Final Interpretation, there could also be some economic effects on the market for investment advice. For example, any improved compliance may not only reduce agency costs in current investment advisory relationships and increase the value of those relationships to current clients, it may also increase trust in the market for investment advice among all investors, which may result in more investors seeking advice from investment advisers. This may, in turn, benefit investors by improving the efficiency of their portfolio allocation. To the extent it is costly or difficult, at least in the short term, to expand the supply of investment advisory services to meet an increase in demand, any such new demand for investment advisory services could put some upward price pressure on fees. At the same time, however, if any such new demand increases the overall profitability of investment advisory services, then we expect it would encourage entry by new investment advisers—or hiring of new representatives by current investment advisers—such that competition would increase over time. Indeed, the recent growth in the investment adviser segment of the market, both in terms of number of firms and number of representatives,[89] may suggest that the costs of expanding the supply of investment advisory services are currently relatively low.

Additionally, we acknowledge that to the extent certain investment advisers recognize, as a result of this Final Interpretation, that their fiduciary duty is stricter than the fiduciary duty as they currently interpret it, it could potentially affect competition. Specifically, this Final Interpretation of certain aspects of the standard of conduct for investment advisers may result in additional compliance costs for investment advisers seeking to meet their fiduciary duty. This increase in compliance costs, in turn, may discourage competition for client segments that generate lower revenues, such as clients with relatively low levels of financial assets, which could reduce the supply of investment advisory services and raise fees for these client segments. However, the investment advisers who already are complying with the understanding of their fiduciary duty reflected in this Final Interpretation, and who may therefore currently have a comparative cost disadvantage, could find it more profitable to compete for the clients of those investment advisers who would face higher compliance costs as a result of this Final Interpretation, which would mitigate negative effects on the supply of investment advisory services. Further, as noted above, there has been a recent growth trend in the supply of investment advisory services, which is likely to mitigate any potential negative supply effects from this Final Interpretation.[90]

One commenter discussed that, in its view, any statement in the Proposed Interpretation that certain circumstances may require the elimination of material conflicts, rather than full and fair disclosure or the mitigation of such conflicts, could lead to an effect on the market and costs to advisers, if such a requirement would cause advisers who had not shared that interpretation to change their business models or product offerings or the ways in which they interact with clients.[91] We disagree that this Final Interpretation includes a requirement to eliminate conflicts of interest. As discussed in more detail above, elimination of a conflict is one method of addressing that conflict; when appropriate advisers may also address the conflict by providing full and fair disclosure such that a client can provide informed consent to the

[88] As noted above, *supra* footnote 3, this Final Interpretation is intended to highlight the principles relevant to an adviser's fiduciary duty. It is not, however, intended to be the exclusive resource for understanding these principles.

[89] *See* Relationship Summary Proposal, *supra* footnote 5, at section IV.A.1.d.

[90] Beyond having an effect on competition in the market for investment adviser services, it is possible that this Final Interpretation could affect competition between investment advisers and other providers of financial advice, such as broker-dealers, banks, and insurance companies. This may be the case if certain investors base their choice between an investment adviser and another provider of financial advice, at least in part, on their perception of the standards of conduct each owes to their customers. To the extent that this Final Interpretation increases investors' trust in investment advisers' overall compliance with their standard of conduct, certain of these investors may become more willing to hire an investment adviser rather than one of their non-investment adviser competitors. As a result, investment advisers as a group may become more competitive compared to that of other types of providers of financial advice. On the other hand, if this Final Interpretation raises costs for investment advisers, they could become less competitive with other financial advice providers.

[91] *See* Dechert Letter.

conflict.[92] Further, we believe that any potential costs or market effects resulting from investment advisers addressing conflicts of interest may be decreased by the flexibility advisers have to meet their federal fiduciary duty in the context of the specific scope of services that they provide to their clients, as discussed in this Final Interpretation.

The commenter also drew particular attention to the question of whether the Commission's discussion of the fiduciary duty in the Proposed Interpretation applied to advisers to institutional clients as well as those to retail clients. The same commenter indicated that failing to accommodate the application of the concepts in the Proposed Interpretation to sophisticated clients could risk changing the marketplace or limiting investment opportunities for sophisticated clients, increasing compliance burdens for advisers to sophisticated clients, or chilling innovation. As explained above, this Final Interpretation, as compared to the Proposed Interpretation, discusses in more detail the ability of investment advisers and different types of clients to shape the scope of the relationship to which the fiduciary duty applies.[93] In particular, this Final Interpretation acknowledges that while advisers owe each of their clients a fiduciary duty, the specific obligations of, for example, an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client will be significantly different from the obligations of an adviser to an institutional client, such as a registered investment company or private fund, where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity.[94]

Finally, to the extent this Final Interpretation causes some investment advisers to reassess their compliance with their duty of loyalty, it could lead to a reduction in the expected profitability of advice relating to particular investments for which compliance costs would increase following the reassessment.[95] As a result, the number of investment advisers willing to advise a client to make these investments may be reduced. A decline in the supply of investment adviser advice regarding these types of investments could affect efficiency for investors; it could reduce the efficiency of portfolio allocation for those investors who might otherwise benefit from investment adviser advice regarding these types of investments and are no longer able to receive such advice. At the same time, if providing full and fair disclosure and appropriate monitoring for highly complex products (*e.g.*, those with a complex payout structure, such as those that include variable or contingent payments or payments to multiple parties) results in these products becoming less profitable for investment advisers, investment advisers may be discouraged from supplying advice regarding such products. However, investors may benefit from (1) no longer receiving inadequate disclosure or monitoring for such products, (2) potentially receiving advice regarding other, less complex or expensive products that may be more efficient for the investor, and (3) only receiving recommendations for highly complex or high cost products for which an investment adviser can provide full and fair disclosure regarding its conflicts and appropriate monitoring.

List of Subjects in 17 CFR Part 276

Securities.

Amendments to the Code of Federal Regulations

For the reasons set out above, the Commission is amending Title 17, chapter II of the Code of Federal Regulations as set forth below:

PART 276—INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT ADVISERS ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ 1. Part 276 is amended by adding Release No. IA–5428 and the release date of June 5, 2019, to the end of the list of interpretive releases to read as follows"

Subject	Release No.	Date	FR vol. and page
* * *	*	*	* *
Commission Interpretation Regarding Standard of Conduct for Investment Advisers.	IA–5248	June 5, 2019	[Insert FR Volume Number] FR [Insert FR Page Number].

By the Commission.

Dated: June 5, 2019.

Vanessa A. Countryman,

Acting Secretary.

[FR Doc. 2019–12208 Filed 7–11–19; 8:45 am]

BILLING CODE 8011–01–P

[92] *See supra* section II.C.

[93] *See supra* footnotes 78–81 and accompanying text.

[94] *See supra* section II.A.

[95] For example, such products could include highly complex, high cost products with risk and return characteristics that are hard for retail investors to fully understand, or where the investment adviser and its representatives receive complicated payments from affiliates that create conflicts of interest that are difficult for retail investors to fully understand.

Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 276

[Release No. IA–5249]

Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: The Securities and Exchange Commission (the "SEC" or the "Commission") is publishing an interpretation of a section of the Investment Advisers Act of 1940 (the "Advisers Act" or the "Act"), which excludes from the definition of "investment adviser" any broker or dealer that provides advisory services when such services are "solely incidental" to the conduct of the broker or dealer's business and when such incidental advisory services are provided for no special compensation.

DATES: Effective July 12, 2019.

FOR FURTHER INFORMATION CONTACT: James McGinnis, Senior Counsel, Investment Adviser Regulation Office, at (202) 551–6787 or *IArules@sec.gov;* and Benjamin Kalish, Attorney-Advisor, or

Parisa Haghshenas, Branch Chief, Chief Counsel's Office at (202) 551–6825 or *IMOCC@sec.gov,* Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is publishing an interpretation of the solely incidental prong of the broker-dealer exclusion in section 202(a)(11)(C) of the Advisers Act [15 U.S.C. 80b].[1]

Table of Contents

I. Introduction

The Advisers Act regulates the activities of certain "investment advisers," who are defined in section 202(a)(11) of the Advisers Act in part as persons who, for compensation, engage in the business of advising others about securities. Section 202(a)(11)(C) excludes from the definition of investment adviser—and thus from the application of the Advisers Act—a broker or dealer "whose performance of such advisory services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation" for those services (the "broker-dealer exclusion"). The broker-dealer exclusion shows, on the one hand, that at the time the Advisers Act was enacted Congress recognized broker-dealers commonly provided some investment advice to their customers in the course of their business as broker-dealers and that it would be inappropriate to bring broker-dealers within the scope of the Advisers Act because of this aspect of their business.[2] On the other hand, the limitations of the exclusion show that Congress excluded broker-dealer advisory services from the scope of the Advisers Act only under certain circumstances—namely, when those services are solely incidental to the broker-dealer's regular business as a broker-dealer (the "solely incidental prong") and when the broker-dealer receives no special compensation (the "special compensation prong").[3]

On April 18, 2018, the Commission proposed a rulemaking intended to enhance the standard of conduct for broker-dealers when providing recommendations.[4] The Commission also proposed an interpretation intended to reaffirm and in some cases clarify the standard of conduct for investment advisers,[5] as well as a rulemaking intended to provide retail investors with clear and succinct information regarding key aspects of their brokerage and advisory relationships.[6] The Reg. BI Proposal discussed the broker-dealer exclusion and requested comment on the scope of the exclusion as applied to a broker-dealer's exercise of investment discretion.[7] While some commenters addressed when a broker-dealer's advisory services are "solely incidental to the conduct of his business as a broker or dealer" in the context of the exercise of investment discretion, more commenters addressed this prong more generally.[8] For example, many commenters requested general guidance on or expressed views about the meaning of the solely incidental prong[9] and the permissibility under this prong of various broker-dealer activities that relate to the investment advice they provide in light of the Reg. BI Proposal and the Relationship Summary Proposal.[10] Other commenters suggested that our approach to the Reg. BI Proposal was inconsistent with the solely incidental prong of the broker-dealer exclusion. One commenter suggested that the Reg. BI Proposal, if adopted, would allow broker-dealers to provide investment advice beyond what the solely incidental prong should "reasonably be interpreted to permit," arguing that to qualify for exclusion from regulation under the Advisers Act, broker-dealers should only "be able to provide very limited advice. . . ."[11] Two commenters thought that the Commission's expressed support for maintaining the "broker-dealer model as an option for retail customers seeking investment advice"[12] was inconsistent with the solely incidental prong.[13]

[1] 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified.

[2] *Opinion of General Counsel Relating to Section 202(a)(11)(C) of the Investment Advisers Act of 1940,* Investment Advisers Act Release No. 2 (Oct. 28, 1940) ("Advisers Act Release No. 2").

[3] *See Regulation Best Interest,* Securities Exchange Act Release No. 83062 (April 18, 2018) [83 FR 21574 (May 9, 2018)] ("Reg. BI Proposal"), at n.343. The broker-dealer exclusion is conjunctive—that is, the broker-dealer must both provide investment advice that is solely incidental to the conduct of his business as a broker-dealer *and* the broker-dealer must receive no special compensation. In the event that a broker-dealer's investment advice fits within the guidance of this Release with respect to the solely incidental prong, that broker-dealer must also receive no special compensation for the advisory service to be consistent with the broker-dealer exclusion.

[4] *See id.*

[5] *Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation,* Investment Advisers Act Release No. 4889 (April 18, 2018) [83 FR 21203 (May 9, 2018)] (the "Proposed Fiduciary Interpretation").

[6] *See Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles,* Investment Advisers Act Release No. 4888 (April 18, 2018) [83 FR 21416 (May 9, 2018)] ("Relationship Summary Proposal"). Concurrently with this interpretation, we also are adopting the final versions of the rules and interpretations proposed in the Relationship Summary Proposal, the Reg. BI Proposal, and the Proposed Fiduciary Interpretation. *See Form CRS Relationship Summary; Amendments to Form ADV,* Investment Advisers Act Release No. 5247 (June 5, 2019) (the "Relationship Summary Adoption"); *Regulation Best Interest: The Broker-Dealer Standard of Conduct,* Exchange Act Release No. 86031 (June 5, 2019) ("Reg. BI Adoption"); and *Commission Interpretation Regarding Standard of Conduct for Investment Advisers,* Investment Advisers Act Release No. 5248 (June 5, 2019) ("Final Fiduciary Interpretation").

[7] *See* Reg. BI Proposal, *supra* footnote 3, at nn.342-67 and accompanying text.

[8] We considered comments submitted in File No. S7–07–18 (Reg. BI Proposal, *supra* footnote 3); File No. S7–08–18 (Relationship Summary Proposal, *supra* footnote 6); and File No. S7–09–18 (Proposed Fiduciary Interpretation, *supra* footnote 5). Those comments are available on the Commission's website at *https://www.sec.gov/comments/s7-07-18/s70718.htm, https://www.sec.gov/comments/s7-08-18/s70818.htm,* and *https://www.sec.gov/comments/s7-09-18/s70918.htm,* respectively.

[9] *See, e.g.,* Comment Letter of North American Securities Administrators Association, Inc. (Aug. 23, 2018) ("NASAA Letter"); Comment Letter of CFA Institute (Aug. 7, 2018) ("CFA Institute Letter") (noting the "need to give guidance" on the broker-dealer exclusion and noting that the Commission has legal authority to provide needed clarification); Comment Letter of the Institute for the Fiduciary Standard (Aug. 6, 2018) ("IFS Letter") (arguing that when a broker's investment advice is solely incidental to its business is one of a number of "questions the SEC should address"); Comment Letter of the Consumer Federation of America (Aug. 7, 2018) ("CFA Letter") (arguing that the Commission failed to "engage" on "just how far the 'solely incidental' exclusion stretches"); Comment Letter of the Investment Adviser Association (Aug. 6, 2018) ("IAA Letter") ("[T]he Commission should reconsider when broker-dealers should be able to rely on the Solely Incidental [prong]."); Comment Letter of Michael Kitces (Aug. 2, 2018) ("Kitces Letter") (arguing that the Commission's prior interpretations of the solely incidental prong are inconsistent with the plain meaning and legislative history of the term).

[10] *See, e.g.,* CFA Letter; Kitces Letter.

[11] *See* NASAA Letter.

[12] *See* Reg. BI Proposal, *supra* footnote 3, at text accompanying n.31.

[13] *See* CFA Letter (stating that certain aspects of the Relationship Summary Proposal and the Reg. BI Proposal indicated that broker-dealers were in an "advice relationship" in a manner that does not "remotely sound like advice that is 'solely incidental to' the conduct of their business as a broker or dealer"); Kitces Letter (arguing that referring to the broker-dealer model as a "model for advice" is in contravention of the broker-dealer exclusion because "advice can only be incidental if it occurs by chance, as a *consequence* of a product sale, or *without* intent to give advice").

Another commenter called the Commission's previously articulated interpretation of the solely incidental prong "vague." [14] The comments we received demonstrate that there is disagreement about when the provision of broker-dealer investment advice is consistent with the solely incidental prong.[15] In light of these comments, we are adopting this interpretation to confirm and clarify the Commission's position with respect to the solely incidental prong. To illustrate how the interpretation functions, we discuss its application to two advisory services that a broker or dealer may provide, namely: (i) Exercising investment discretion over customer accounts and (ii) account monitoring.[16] Our interpretation complements each of the rules and forms we are adopting, which, among other things, are intended individually and collectively to enhance investor understanding of the relationships and services offered by investment advisers and broker-dealers.[17]

II. Interpretation and Application

A. Historical Context and Legislative History

When the Advisers Act was enacted in 1940, broker-dealers regularly provided investment advice.[18] They did so in two distinct ways: As an auxiliary part of traditional brokerage services for which their brokerage customers paid fixed commissions and, alternatively, as a distinct advisory service for which their advisory clients separately contracted and paid a fee.[19] The advice that broker-dealers provided as an auxiliary component of traditional brokerage services was referred to as "brokerage house advice" in a leading study of the time.[20] "Brokerage house advice" was extensive and varied,[21] and included information about various corporations, municipalities, and governments; [22] broad analyses of general business and financial conditions; [23] market letters and special analyses of companies' situations; [24] information about income tax schedules and tax consequences; [25] and "chart reading." [26] The second way in which broker-dealers dispensed advice was to charge a distinct fee for advisory services, which typically were provided through special "investment advisory departments" within broker-dealer firms that advised customers for a fee in the same manner as firms whose sole business was providing "investment counsel" services.[27]

Between 1935 and 1939, the Commission conducted a congressionally mandated study of investment trusts and investment companies and in connection with this study surveyed investment advisers, including broker-dealers with investment advisory departments.[28] In a report to Congress (the "Investment Counsel Report"), the Commission informed Congress that the Commission's study had identified two broad classes of problems relating to investment advisers that warranted legislation: "(a) The problem of distinguishing between bona fide investment counselors and 'tipster' organizations; and (b) those problems involving the organization and operation of investment counsel

[14] *See* Comment Letter of Securities Arbitration Clinic, St. Vincent DePaul Legal Program, Inc., St. John's University School of Law (Aug. 7, 2018) ("St. John's Clinic Letter").

[15] Furthermore, interested parties have for years expressed their views to the Commission on what they believe the broker-dealer exclusion requires, including disagreements with the Commission's interpretation of the exclusion. *See, e.g.,* Comment Letter of Consumer Federation of America (Sept. 20, 2004) (arguing that the Commission should "define 'solely incidental' in a way that hews closely to what commenters described as Congress's clear intent to provide only a very narrow exclusion"), *available at https://www.sec.gov/rules/proposed/s72599/s72599-1101.pdf.*

[16] We received comments requesting guidance with respect to the solely incidental prong on both activities. *See infra* section II.C.

[17] *See* Reg. BI Adoption; Relationship Summary Adoption; Final Fiduciary Interpretation, *supra* footnote 6. We also received a few comments in response to the Reg. BI Proposal and the Relationship Summary Proposal requesting that the Commission provide guidance on the special compensation prong. *See, e.g.,* CFA Letter (arguing, among other points, that special compensation would constitute any compensation other than commissions for trade execution); Comment Letter of Coalition of Mutual Fund Investors (Aug. 8, 2018) ("Mutual Fund Investors Letter") (arguing that special compensation should include all asset-based compensation and third-party fees from mutual funds and their advisers). We are not providing guidance on the special compensation prong in this Release as we do not believe our views on this prong require additional clarification. The Commission has considered the meaning of the special compensation prong on previous occasions. *See, e.g., Interpretive Rule Under the Advisers Act Affecting Broker-Dealers,* Investment Advisers Act Release No. 2652 (Sept. 24, 2007) ("2007 Proposing Release"); *Certain Broker-Dealers Deemed Not to Be Investment Advisers,* Investment Advisers Act Release No. 2376 (Apr. 12, 2005) ("2005 Adopting Release," in which, as discussed *infra* at footnote 38 and accompanying text, the Commission adopted a rule that a court vacated on grounds that did not address our interpretive positions relating to the solely incidental prong). The comments we received in response to requests for comment to the Reg. BI Proposal and the Relationship Summary Proposal did not demonstrate that there is significant disagreement with our interpretation of that prong.

[18] For an extensive discussion of broker-dealer practice in the years leading up to enactment of the Advisers Act, from which this summary is drawn, *see* 2005 Adopting Release, *supra* footnote 17; *Certain Broker-Dealers Deemed Not to Be Investment Advisers,* Investment Advisers Act Release No. 2340 (Jan. 6, 2005) ("2005 Proposing Release").

[19] *See, e.g., Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Committee on Banking and Currency,* 76th Cong., 3d Sess. 736 (1940) ("Hearings on S. 3580") (testimony of Dwight C. Rose, president of the Investment Counsel Association of America) ("Most . . . investment dealers . . . and brokers advise on investment problems, either as an auxiliary service without charge, or for specific charges allocated to this specific function.").

[20] *See* Twentieth Century Fund, The Security Markets (1935) ("Security Markets") at 633–46 (discussing "brokerage house advice"); *see also* Charles F. Hodges, Wall Street (1930) ("Wall Street") at 253–85; SEC, Report on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services (1939) (H.R. Doc. No. 477) ("Investment Counsel Report") at n.1.

[21] *See, e.g.,* Report of Public Examining Bd. on Customer Protection to N.Y. Stock Exchange (Aug. 31, 1939), at 3: The customer entrusts the broker with information regarding his financial affairs and dealings which he expects to be kept in strict confidence. Frequently he looks to the broker to perform a whole series of functions relating to the investment of his funds and the care of his securities. Although he could secure similar services at his bank, he asks his broker, as a matter of choice and convenience, to hold credit balances of cash pending instructions; to retain securities in safekeeping and to collect dividends and interest; to advise him respecting investments; and to lend him money on suitable collateral.

[22] Security Markets, *supra* footnote 20, at 633; Wall Street, supra footnote 20, at 254 ("This information includes current and comparative data for a number of years on earning and earnings records, capitalization, financial position, dividend record, comparative balance sheets and income statements . . . production and operating statistics, territory and markets served, officers and directors of the company and much other information of value to the investor in appraising the value of a security.").

[23] Security Markets, *supra* footnote 20, at 634; Wall Street, supra footnote 20, at 254.

[24] Security Markets, *supra* footnote 20, at 640–43; Wall Street, supra footnote 20, at 277–85.

[25] Security Markets, *supra* footnote 20, at 641.

[26] *Id.* at 643 (defining "chart reading" as "the study of the charted course of prices and volume of trading over a long period of time in order to discover typical conformations recurring in the past with sufficient frequency to be utilized in the present as a basis of judgment as to impending price changes").

[27] *See* Advisers Act Release No. 2, *supra* footnote 2; *see also* Security Markets, supra footnote 20, at 646, 653 (referring to "investment supervisory departments" and "special investment management departments" of broker-dealers). In general, contemporaneous literature used the term "investment counsel" or "investment counselor" to refer to those who provided investment advice for a fee and whose advisory relationship with clients had a supervisory or managerial character. *See id.* at 646 (defining "investment counselor" as "an individual, institution, organization, or department of an institution or organization which undertakes for a fee to advise or to supervise the investment of funds by, and on occasion to manage the investment accounts of, clients"). Under the Advisers Act, "investment counsel" is a defined subset of the "investment advisers" to whom the Act applies. *See* section 208(c) of the Act.

[28] Investment Counsel Report, *supra* footnote 20, at 1. The study was conducted pursuant to section 30 of the Public Utility Holding Company Act of 1935 [15 U.S.C. 79z–4]; *see* Hearings on S. 3580, *supra* footnote 19, at 995–96.

institutions."[29] Based on the findings of the Investment Counsel Report, representatives of the Commission testified at the congressional hearings on what ultimately became the Advisers Act in favor of regulating the persons engaged in the business of providing investment advice for compensation.

Congress responded by passing the Advisers Act. Section 202(a)(11) of the Act defined "investment adviser"—those subject to the requirements of the Act—broadly to include "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. . . ." In adopting this broad definition, Congress necessarily rejected arguments presented during its hearings that legitimate investment counselors[30] should be free from any oversight except, perhaps, by the few states that had passed laws regulating investment counselors and by private organizations, such as the Investment Counsel Association of America.[31] Instead, in responding to such views, congressional committee members repeatedly observed that those whose business was limited to providing investment advice for compensation were subject to little if any regulatory oversight, and questioned why they should not be subject to regulation even though other professionals were.[32]

Conversely, the Advisers Act specifically excluded persons, among others, from the broad definition of "investment adviser" to the extent that such persons rendered investment advice incidental to their primary business.[33] Broker-dealers were among these excluded persons, as section 202(a)(11)(C) of the Act excludes from the definition of "investment adviser" a broker-dealer who provides investment advice that is "solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor"—*i.e.*, the broker-dealer exclusion.

B. Scope of the Solely Incidental Prong of the Broker-Dealer Exclusion

The Commission and its staff have on several occasions discussed the scope of the broker-dealer exclusion.[34] In adopting a rule regarding fee-based brokerage accounts in 2005, for example, the Commission stated that investment advisory services are "solely incidental to" the conduct of a broker-dealer's business when the services are offered in connection with and are reasonably related to the brokerage services provided to an account.[35] The interpretation was consistent with the Commission's contemporaneous construction of the Advisers Act as excluding broker-dealers whose investment advice is given "solely as an incident of their regular business."[36] The 2005 interpretation stated that the importance or frequency of the investment advice was not a determinant of whether the solely incidental prong was satisfied; the Commission rejected the view that only minor, insignificant, or infrequent advice qualifies for the broker-dealer exclusion, noting that the advice broker-dealers gave as part of their brokerage services in 1940 was often substantial and important to customers.[37]

On March 30, 2007, the Court of Appeals for the District of Columbia Circuit in *Financial Planning Association* v. *SEC* vacated the rule regarding fee-based brokerage accounts, but not on grounds that addressed our interpretive positions relating to the solely incidental prong.[38] In September 2007, we proposed to reinstate these interpretive positions.[39]

Since that time, a federal appellate court has addressed the solely incidental prong. In 2011, in *Thomas* v. *Metropolitan Life Insurance Company,* the Court of Appeals for the Tenth Circuit addressed the scope of the broker-dealer exclusion in the context of a private suit alleging that a broker had violated the Advisers Act by failing to disclose incentives to sell proprietary products.[40] As part of its analysis of the exclusion, the court looked to the interpretation of the solely incidental prong that we advanced in 2005 and 2007. The court found these interpretations to be "persuasive" in light of its own analysis of the text of the solely incidental prong of the broker-dealer exclusion as well as the legislative history and historical background of the Advisers Act.[41] The court concluded that a broker-dealer's investment advice is solely incidental to its conduct as a broker-dealer if the advice is given "only in connection with the primary business of selling securities."[42] Thus, the court explained, "broker-dealers who give advice that is not connected to the sale of securities—or whose primary business consists of giving advice—do not meet the [solely incidental] prong" of the broker-dealer exclusion.[43] The court also agreed with the Commission's interpretations that the solely incidental prong does not

[29] Investment Counsel Report, *supra* footnote 20, at 27.

[30] Hearings on S. 3580, *supra* footnote 19, at 745–48; *see also* 2005 Adopting Release, *supra* footnote 17, at n.62.

[31] Hearings on S. 3580, *supra* footnote 19, at 716–18, 736–38, 740–41, 744–45, 760, 763.

[32] *Id.* at 738–39, 745–49, 751–53 (Senators Wagner and Hughes). David Schenker, chief counsel for the Commission's study, offered the following observations in response to investment counselors' arguments against the registration and regulation required by the Act: Then there is another curious thing, Senator, that those people who are subject to supervision by some authoritative body of some kind, such as securities dealers or investment bankers have to register with us as brokers and dealers. People, who are brokers and members of stock exchanges and are supervised by the stock exchanges. Curiously enough, the people in the investment-counsel business who are supervised are not eligible for membership in the investment counsel association; because the association says that if you are in the brokerage or banking business you cannot be a member of the association. So the situation is that if you take their analysis, the only ones who would not be subject to regulation by the SEC. would be the people who are not subject to regulation by anybody at all. These investment counselors who appeared here are no different from the over-the-counter brokers and dealers or the members of the New York Stock Exchange. *Id.* at 995–96. Eventually, members of the investment counsel industry agreed with the proposed legislation. *See id.* at 1124; *Investment Trusts and Investment Companies: Hearings on H.R. 10065 Before a Subcomm. of the House Committee on Interstate and Foreign Commerce,* 76th Cong., 3d Sess. (1940) ("Hearings on H.R. 10065"); *see also* S. Rep. No. 76–1775, 76th Cong., 3d Sess. 21 (1940); H.R. Rep. No. 76–2639, 76th Cong., 3d Sess. 27 (1940).

[33] The exclusion for certain professionals in Advisers Act section 202(a)(11) is very similar to certain state-law provisions governing investment counselors at the time, which excepted "brokers, attorneys, banks, savings and loan associations, trust companies, and certified public accountants." *See* Statutory Regulation of Investment Advisers (prepared by the Research Department of the Illinois Legislative Council) reprinted in Hearings on S. 3580, *supra* footnote 19, at 1007. That report stated that "the investment advice furnished by these excepted groups would seem to be merely incidental to some other function being performed by them." *Id.*

[34] *See, e.g.,* Advisers Act Release No. 2, *supra* footnote 2; *Applicability of the Investment Advisers Act to Certain Brokers and Dealers; Interpretation of the Term 'Special Compensation',* Investment Advisers Act Release No. 640 (Oct. 5, 1978); *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services,* Investment Advisers Act Release No. 1092 (Oct. 8, 1987).

[35] 2005 Adopting Release, *supra* footnote 17; 2005 Proposing Release, *supra* footnote 18.

[36] *See* Advisers Act Release No. 2, *supra* footnote 2; *see also* 2005 Adopting Release, *supra* footnote 17.

[37] *See* 2005 Adopting Release, *supra* footnote 17, at nn.139–42 and accompanying text.

[38] *See* 482 F.3d 481 (D.C. Cir. 2007).

[39] 2007 Proposing Release, *supra* footnote 17.

[40] 631 F.3d 1153 (10th Cir. 2011).

[41] *Id.* at 1163–64.

[42] *Id.* at 1164.

[43] *Id.*

hinge upon "the quantum or importance" of a broker-dealer's advice but on its relationship to the broker-dealer's primary business.[44] In the court's view, "[t]he quantum or importance of the broker-dealer's advice is relevant only insofar as the advice cannot supersede the sale of the product as the 'primary' goal of the transaction or the 'primary' business of the broker-dealer." [45]

Based on the text and history of the solely incidental prong, our previous interpretations of the prong, the *Thomas* decision, and the comments we have received, we are providing the following interpretation.[46] We interpret the statutory language to mean that a broker-dealer's provision of advice as to the value and characteristics of securities or as to the advisability of transacting in securities [47] is consistent with the solely incidental prong if the advice is provided in connection with and is reasonably related to the broker-dealer's primary business of effecting securities transactions.[48] If a broker-dealer's primary business is giving advice as to the value and characteristics of securities or the advisability of transacting in securities, or if the advisory services are not offered in connection with or are not reasonably related to the broker-dealer's business of effecting securities transactions, the broker-dealer's advisory services are not solely incidental to its business as a broker-dealer.[49] Whether advisory services provided by a broker-dealer satisfy the solely incidental prong is assessed based on the facts and circumstances surrounding the broker-dealer's business, the specific services offered, and the relationship between the broker-dealer and the customer.

The quantum or importance of investment advice that a broker-dealer provides to a client is not determinative as to whether or not the provision of advice is consistent with the solely incidental prong. Advice need not be trivial, inconsequential, or infrequent to be consistent with the solely incidental prong. Indeed, our simultaneous adoption of (i) Regulation Best Interest, which raises the standard of conduct that applies to broker-dealer recommendations, and (ii) the relationship summary, which provides information about broker-dealer recommendation services to customers, underscores that broker-dealer investment advice can be consequential even when it is offered in connection with and reasonably related to the primary business of effecting securities transactions.

To illustrate the application of this interpretation in practice, we provide the following guidance on the application of the interpretation to (i) exercising investment discretion over customer accounts and (ii) account monitoring.

C. Guidance on Applying the Interpretation of the Solely Incidental Prong

1. Investment Discretion

The Commission has for many years considered issues related to a broker-dealer's exercise of investment discretion over customer accounts and the extent to which such practices could be considered solely incidental to the business of a broker-dealer.[50] The Commission has stated that discretionary brokerage relationships "have many of the characteristics of the relationships to which the protections of the Advisers Act are important." [51] In particular, the Commission has explained that when a broker-dealer exercises investment discretion, it is not providing *advice* to customers that is in connection with and reasonably related to effecting securities transactions; rather, the broker-dealer is making investment *decisions* relating to the purchase or sale of securities on behalf of customers on an ongoing basis.[52] At the same time, the Commission has taken the position that some limited exercise of discretionary authority by broker-dealers could be considered solely incidental to their business.[53]

We requested comment in the Reg. BI Proposal on a broker-dealer's exercise of investment discretion over customer accounts and the extent to which the exercise of investment discretion should be considered solely incidental to the business of a broker-dealer.[54] Commenters agreed that the exercise of unlimited discretion should not be considered "solely incidental" investment advice.[55] Commenters expressed varying views, however, on the extent to which the exercise of temporary or limited discretion could be considered solely incidental to the business of a broker-dealer. Several commenters suggested that the exercise of any investment discretion should be governed by the Advisers Act.[56] One commenter suggested that the Commission should interpret the solely incidental prong through the lens of the definition of "investment discretion" in section 3(a)(35) of the Securities Exchange Act of 1934 (the "Exchange Act"),[57] noting that section 3(a)(35)

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[44] *Id.* at 1163.

[45] *Id.* at 1166. In *Thomas,* the brokerage firm's representative had conducted an analysis of the plaintiffs' financial situation and advised them to purchase a particular financial product based in part on that analysis. The plaintiffs alleged that the firm's policy "required [representatives] to provide investment advice to potential customers as a means to sell more proprietary products" and that this policy was "so pervasive that [representatives] allegedly gave financial advice to every customer to whom they sold a product." *Id.* at 1157. The Court rejected the plaintiffs' contention that these facts rendered the advice so central to the transaction that it could not be considered "solely incidental" to it. Because the representative's advice "was closely related to the sale of the [product] and selling the [product] was the primary object of the transaction," the Court concluded, the advice was "solely incidental" to the representative's conduct as a broker. *Id.* at 1167.

[46] To the extent that this interpretation is inconsistent with the Commission's prior interpretations with respect to the solely incidental prong, this interpretation supersedes those interpretations.

[47] *See* Advisers Act section 202(a)(11) (definition of "investment adviser").

[48] *Cf.* 2005 Adopting Release, *supra* footnote 17 ("In general, investment advice is 'solely incidental to' the conduct of a broker-dealer's business within the meaning of section 202(a)(11)(C) and to 'brokerage services' provided to accounts . . . when the advisory services rendered are in connection with and reasonably related to the brokerage services provided."). We have modified the wording of our interpretation to make clear that the broker-dealer's primary business must also be effecting securities transactions.

[49] Nothing in this interpretation alters the Commission's 2006 interpretation of section 28(e) of the Exchange Act, which, in the context of a client commission arrangement that otherwise satisfies section 28(e), permits a broker-dealer to be paid out of a pool of commissions for its research even if that broker-dealer did not effect a securities transaction. *See* Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 54165 (July 18, 2006), 71 FR 41978 (July 24, 2006).

[50] *See* Reg. BI Proposal, *supra* footnote 3, at nn.343–62 and accompanying text.

[51] *Final Extension of Temporary Exemption from the Investment Advisers Act for Certain Brokers and Dealers,* Investment Advisers Act Release No. 626 (Apr. 27, 1978) ("Advisers Act Release No. 626").

[52] *See* 2005 Proposing Release, *supra* footnote 18.

[53] *See* Reg. BI Proposal, *supra* footnote 3, at nn.355–62 and accompanying text. *Cf.* NASD rule 2510 (allowing discretion only if a customer "has given prior written authorization to a stated individual or individuals . . . in accordance with [FINRA] rule 3010").

[54] *See* Relationship Summary Proposal, *supra* footnote 6, at nn.363–67 and accompanying text; *see also id.* at nn.343–62 and accompanying text for a description of the Commission's historical approaches.

[55] *See, e.g.,* Comment Letter of Financial Planning Coalition (Aug. 7, 2018) ("FPC Letter") ("[A] broker-dealer's provision of unfettered discretionary investment advice should never be considered 'solely incidental' to its business as a broker-dealer." (emphasis removed)); CFA Letter; IFS Letter.

[56] *See, e.g.,* Comment Letter of Invesco Advisers, Inc. (Aug. 7, 2018) ("Discretionary management over an account, whether or not temporary, is not within the scope of the 'solely incidental' exclusion."); IAA Letter; CFA Institute Letter.

[57] Under Exchange Act section 3(a)(35), a person exercises "investment discretion" with respect to

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focuses on "the level of authority, decision-making ability, influence—and ultimately, control—an intermediary has over another's money" and arguing that those with section 3(a)(35) investment discretion have a heightened likelihood of mismanagement and abuse of another's money.[58] Another commenter suggested that, while discretion generally should subject a broker-dealer to the Advisers Act, there are certain cases where temporary or limited discretion does not have the supervisory or managerial character of the investment discretion warranting the protections of the Advisers Act.[59]

Applying our interpretation of the solely incidental prong, a broker-dealer's exercise of unlimited discretion[60] would not be solely incidental to the business of a broker-dealer consistent with the meaning of section 202(a)(11)(C).[61] It would be inconsistent with the solely incidental prong for broker-dealers to exercise "investment discretion" as that term is defined in section 3(a)(35) of the Exchange Act with respect to any of its accounts, except for certain instances of investment discretion granted by a customer on a temporary or limited basis, as discussed below. A broker-dealer with unlimited discretion to effect securities transactions possesses ongoing authority over the customer's account indicating a relationship that is primarily advisory in nature; such a level of discretion by a broker-dealer is so comprehensive and continuous that the provision of advice in such context is not incidental to effecting securities transactions.

We recognize, however, that there are situations where a broker-dealer may exercise temporary or limited discretion in a way that is not indicative of a relationship that is primarily advisory in nature. Generally, these are situations where the discretion is limited in time, scope, or other manner and lacks the comprehensive and continuous character of investment discretion that would suggest that the relationship is primarily advisory. The totality of the facts and circumstances would be relevant to determining whether temporary or limited discretion is consistent with the solely incidental prong. Taking into consideration specific examples that commenters have suggested in the past, instances of temporary or limited investment discretion that, standing alone, would not support the conclusion that a relationship is primarily advisory—and therefore outside the scope of the solely incidental prong—include discretion: (i) As to the price at which or the time to execute an order given by a customer for the purchase or sale of a definite amount or quantity of a specified security; (ii) on an isolated or infrequent basis, to purchase or sell a security or type of security when a customer is unavailable for a limited period of time; (iii) as to cash management, such as to exchange a position in a money market fund for another money market fund or cash equivalent;[62] (iv) to purchase or sell securities to satisfy margin requirements, or other customer obligations that the customer has specified; (v) to sell specific bonds or other securities and purchase similar bonds or other securities in order to permit a customer to realize a tax loss on the original position; (vi) to purchase a bond with a specified credit rating and maturity; and (vii) to purchase or sell a security or type of security limited by specific parameters established by the customer. We view these examples of temporary or limited discretion as typically consistent with the broker-dealer exclusion because they are in connection with and reasonably related to a broker-dealer's business of effecting securities transactions and do not suggest that the broker-dealer's primary business is providing investment advice.

We have previously described a similar list of situations that we would consider temporary or limited discretion that may be consistent with the solely incidental prong.[63] We make three refinements.

First, we are not including authority for a period "not to exceed a few months" relating to the time a broker-dealer may purchase or sell a security or type of security when a customer is unavailable for a limited period of time. Depending on the facts and circumstances, a period of discretion lasting a few months may be indicative of a business or customer relationship that is primarily advisory in nature.

Second, we would view it as consistent with our interpretation of the solely incidental prong for broker-dealers to purchase or sell securities to satisfy margin requirements, *or other customer obligations that the customer has specified* (new wording italicized). In our view, there may be similar obligations to a broker-dealer or a third party whereby a broker-dealer may be authorized to make a purchase or sale, such as a sale to satisfy a collateral call.

Third, we would view it as consistent with our interpretation of the solely incidental prong for broker-dealers to sell specific bonds *or other securities* in order to permit a customer to realize a tax loss on the original position (new wording italicized). We see no distinction between bonds or other securities in this particular context.

2. Account Monitoring

We received several comments regarding the extent to which a broker-dealer may monitor the status and

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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 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 the rules and regulations thereunder. 15 U.S.C. 78c(a)(35).

[58] *See* FPC Letter (noting also that several federal and state courts have used factors similar to those in section 3(a)(35) to impose a fiduciary standard). Another commenter also suggested using Exchange Act section 3(a)(35) "investment discretion" as a basis for establishing whether discretion is not solely incidental for purposes of the broker-dealer exclusion, with an exception for investment discretion "that a customer grants on a temporary or limited basis." *See* Comment Letter of Pickard Djinis and Pisarri (Aug. 14, 2018) ("Pickard Letter").

[59] *See* Comment Letter of the Securities Industry and Financial Markets Association (Aug. 7, 2018) ("SIFMA Letter").

[60] We view unlimited investment discretion as a person having the ability or authority to buy and sell securities on behalf of a customer without consulting the customer—*i.e.*, having responsibility for a customer's trading decisions.

[61] The Commission has in the past stated that the quintessentially supervisory or managerial character of investment discretion warrants the protection of the Advisers Act. *See Amendment and Extension of Temporary Exemption from the Investment Advisers Act for Certain Brokers and Dealers,* Investment Advisers Act Release No. 471 (Aug. 20, 1975); *see also* 2005 Proposing Release, *supra* footnote 18; 2005 Adopting Release, *supra* footnote 17.

[62] Certain changes to money market fund regulation and operations have been implemented since our prior interpretations. *See Money Market Fund Reform; Amendments to Form PF,* Investment Company Act Release No. 31166 (Jul. 23, 2014) (removing an exemption that permitted institutional non-government money market funds to maintain a stable net asset value, while maintaining such exemption for certain other money market funds, and applying certain fees and gates reforms to institutional non-government money market funds and retail money market funds but not to government money market funds, among other changes). In light of these changes, differently categorized money market funds may have different investment characteristics. Accordingly, we anticipate that FINRA will be reviewing the application of the rules that apply to the exercise of broker-dealer discretion in this context. The Commission staff also will evaluate broker-dealer exercise of discretionary cash management to consider whether additional measures may be necessary.

[63] *See* 2005 Adopting Release, *supra* footnote 17, at nn.178–81 and accompanying text; 2007 Proposing Release, *supra* footnote 17, at n.13 and accompanying text.

performance of a customer's account while relying on the broker-dealer exclusion. Some commenters suggested that a broker-dealer's agreement to provide ongoing monitoring for the purpose of recommending changes to a customer's investments is not an advisory service that is solely incidental to the primary securities transaction business of a broker-dealer and thus the broker-dealer exclusion should not be available to broker-dealers who provide such services.[64] Another commenter suggested that broker-dealers providing personalized investment advice about securities on an ongoing basis should not be able to rely on the broker-dealer exclusion.[65] Commenters also suggested that providing services that cause overseen assets to meet the definition of "regulatory assets under management" under Form ADV (*i.e.,* securities portfolios for which the broker-dealer provides "continuous and regular supervisory or management services") should subject a broker-dealer to the Advisers Act.[66]

We disagree with commenters who suggested that *any* monitoring of customer accounts would not be consistent with the solely incidental prong. A broker-dealer that agrees to monitor[67] a retail customer's account on a periodic basis for purposes of providing buy, sell, or hold recommendations may still be considered to provide advice in connection with and reasonably related to effecting securities transactions.[68] In contrast, when a broker-dealer, voluntarily and without any agreement with the customer, reviews the holdings in a retail customer's account for the purposes of determining whether to provide a recommendation to the customer—and, if applicable, contacts that customer to provide a recommendation based on that voluntary review—the broker-dealer's actions are in connection with and reasonably related to the broker-dealer's primary business of effecting securities transactions. Absent an agreement with the customer (which would be required to be disclosed pursuant to Regulation Best Interest), we do not consider this voluntary review to be "account monitoring."[69]

We decline to delineate every circumstance where agreed-upon monitoring is and is not solely incidental to a broker-dealer's brokerage business. Broker-dealers may consider adopting policies and procedures that, if followed, would help demonstrate that any agreed-upon monitoring is in connection with and reasonably related to the broker-dealer's primary business of effecting securities transactions. For example, broker-dealers may include in their policies and procedures that a registered representative may agree to monitor a customer's account at specific time frames (*e.g.,* quarterly) for the purpose of determining whether to provide a buy, sell, or hold recommendation to the customer.[70] However, such policies and procedures should not permit a broker-dealer to agree to monitor a customer account in a manner that in effect results in the provision of advisory services that are not in connection with or reasonably related to the broker-dealer's primary business of effecting securities transactions, such as providing continuous monitoring.[71] Additionally, dually registered firms may similarly consider adopting policies and procedures that distinguish the level and type of monitoring in advisory and brokerage accounts.[72]

The Commission will consider further comment on its interpretation of the solely incidental prong of the broker-dealer exclusion and its application to certain brokerage activities to evaluate whether additional guidance might be appropriate in the future. Based on any comments received, the Commission may, but need not, supplement this interpretation.

III. Economic Considerations

The Commission's interpretation above is intended to advise the public of its understanding of the solely incidental prong of the broker-dealer exclusion. The interpretation does not itself create any new legal obligations for broker-dealers. Nonetheless, the

[64] *See* FPC Letter ("[B]roker-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. . . goes beyond advice that is solely incidental to the conduct of business as a broker-dealer. . . ."); IAA Letter (same quotation as the FPC Letter); IAA Letter ("[A] broker-dealer that agrees to provide a retail customer ongoing monitoring for purposes of recommending changes in investments would not be providing services that are solely incidental to its business as a broker-dealer under the 2007 interpretation."); Fisher Letter ("Brokers can give ongoing investment advice . . . yet still not be required to register as an investment adviser. . . . [T]he boundaries [between brokers and investment advisers] have practically been erased.").

[65] *See* Mutual Fund Investors Letter ("[The SEC] should . . . subject broker-dealers to the Advisers Act when they are providing personalized investment advice about securities on an ongoing basis . . . The term 'solely incidental' should be interpreted narrowly and only include personalized investment advice that is one-time, temporary, or limited in scope.").

[66] *See* IAA Letter; Pickard Letter.

[67] The guidance in this section applies when a broker-dealer agrees to monitor a customer's account. *See* Reg. BI Adoption, *supra* footnote 6, at section II.B.2 for a discussion of what constitutes such an agreement.

[68] *See id.* Monitoring agreed to by the broker-dealer would result in a recommendation to purchase, sell, or hold a security each time the agreed-to monitoring occurs and would be covered by Regulation Best Interest. *See id.* ("For example, if a broker-dealer agrees to monitor the retail customer's account on a quarterly basis, the quarterly review and each resulting recommendation to purchase, sell, or hold, will be a recommendation subject to Regulation Best Interest.").

In agreeing to provide any monitoring services, broker-dealers should also consider that a broker-dealer that separately contracts or charges a separate fee for advisory services is providing investment advice that is inconsistent with the broker-dealer exclusion. *See, e.g.,* 2005 Adopting Release, *supra* footnote 17. Broker-dealers should also consider that, even where such monitoring is consistent with the solely incidental prong, the broker-dealer must also receive no special compensation for the activity to be eligible for the broker-dealer exclusion. Broker-dealers receive special compensation where there is a clearly definable charge for investment advice. *See* Advisers Act Release No. 626, *supra* footnote 51; *see also* Advisers Act Release No. 2, *supra* footnote 2; 2007 Proposing Release, *supra* footnote 17 (describing this interpretation as the Commission's "longstanding view").

[69] *See* Reg. BI Adoption, *supra* footnote 6, at section II.B.2.b. Any recommendation made to the retail customer as a result of such voluntary review would be subject to Regulation Best Interest. *See id.*

[70] As noted in the Reg. BI Adoption, and consistent with the relationship summary adopted in the Relationship Summary Adoption, the scope and frequency of a broker-dealer's monitoring is a material fact relating to the type and scope of services provided to a retail customer and thus is required to be disclosed under Regulation Best Interest. *See id.* at section II.B.2; *cf.* Relationship Summary Adoption, *supra* footnote 6. A broker-dealer disclosing to a customer that the broker-dealer will provide monitoring constitutes an agreement to monitor. *See supra* footnote 67.

[71] The two examples of advisory services we discuss in this Release—investment discretion and monitoring—cannot be viewed and interpreted in isolation. For example, it would not be consistent with the solely incidental prong for a broker-dealer to exercise unlimited investment discretion over a customer account even if its monitoring activities do comport with the solely incidental prong. Thus, any policies and procedures that a broker-dealer adopts to ensure that the broker-dealer's activities are in connection with and reasonably related to the broker-dealer's primary business of effecting securities transactions similarly should not grant the broker-dealer the ability or authority to buy and sell securities on behalf of a customer as part of periodic account monitoring, except in circumstances of temporary or limited discretion that would be consistent with the solely incidental prong, as discussed above.

[72] In the Final Fiduciary Interpretation, we note that investment advisers may consider whether written policies and procedures relating to monitoring would be appropriate under Advisers Act rule 206(4)–7. *See* Final Fiduciary Interpretation, *supra* footnote 6, at section II.B.3.

Additionally, the Reg. BI Adoption confirms that a dual registrant is an investment adviser solely with respect to those accounts for which a dual registrant provides investment advice or receives compensation that subjects it to the Advisers Act. *See* Reg. BI Adoption, *supra* footnote 6, at section II.B.3.d. Determining the capacity in which a dual registrant is making a recommendation is a facts and circumstances test. *See id.*

Commission recognizes that to the extent a broker-dealer's practices are not consistent with this interpretation of the solely incidental prong, the interpretation could have potential economic effects. We discuss these effects below.

A. Background

The Commission's interpretation regarding the solely incidental prong of the broker-dealer exclusion would affect broker-dealers and their associated persons as well as the customers of those broker-dealers, and the market for financial advice more broadly.[73] As of December 2018, there were approximately 3,764 registered broker-dealers with over 140 million customer accounts. In total, these broker-dealers have over $4.3 trillion in total assets, which are total broker-dealer assets as reported on Form X–17a–5.[74] Of the broker-dealers registered with the Commission as of December 2018, 363 broker-dealers were dually registered with the Commission as investment advisers.[75] Dual registrant firms hold over 90 million (63%) of the overall 140 million customer accounts held by broker dealers.[76] As part of the Reg. BI Proposal, we requested data and other information related to the nature and magnitude of discretionary services offered by broker-dealers,[77] but did not receive any data or information to inform our analysis of potential economic effects stemming from this interpretation.

B. Potential Economic Effects

Broker-dealers currently incur ongoing costs related to compliance with their legal and regulatory obligations, including costs related to understanding their practices and structuring their practices to be consistent with the solely incidental prong of the broker-dealer exclusion. This interpretation generally confirms the scope of the solely incidental prong of the broker-dealer exclusion.

Generally, we believe that few, if any, broker-dealers take the view that they act consistently with the solely incidental prong with respect to any accounts over which the broker-dealer exercises more than temporary or limited investment discretion.[78] As with other circumstances in which the Commission speaks to the legal obligations of regulated entities, we acknowledge that affected firms, including those whose practices are consistent with the Commission's interpretation, incur costs to evaluate the Commission's interpretation and assess its applicability to them. Further, to the extent certain broker-dealers currently understand the scope of permissible monitoring or other permissible advisory activities under the solely incidental prong to be different from what is set forth in this interpretation, there could be some economic effects.[79]

This interpretation may produce economic effects to the extent that it causes any broker-dealers to recognize that their practices are inconsistent with the solely incidental prong and to adjust their practices to make them consistent. In particular, broker-dealers that have interpreted the solely incidental prong to conduct more advisory activities than this interpretation permits may choose to no longer provide such services to customers. This could result in a loss of certain customers, a reduction in certain business activities, and could preclude those broker-dealers from further developing certain services for their customers, except to the extent those broker-dealers are dually registered firms and their customers are also advisory clients. This may, in turn, result in decreased competition in the market for certain services, increased fees for those services, or a diminished number of broker-dealers offering commission-based services to investors.[80]

To the extent any broker-dealers have been providing advisory services beyond the scope of this interpretation, their customers may receive fewer advisory services if these broker-dealers choose not to register as investment advisers and adjust their business practices in light of this interpretation. To the extent that this interpretation would lead to a decline in the supply of certain services offered by broker-dealers (or a decline in broker-dealers offering services to particular customers), it could reduce the efficiency of portfolio construction for those investors who might otherwise benefit from broker-dealers providing investment advice with respect to their account and would find similar advice from investment advisers to be too costly or unattainable (*e.g.,* due to account minimum requirements). For example, certain broker-dealers may incur costs to adopt or revise policies and procedures to ensure that the account monitoring that they may agree to provide their customers is consistent with this interpretation and may choose instead to stop offering such monitoring services. Further, to the extent that any broker-dealers determine that their services are not consistent with this interpretation, they may choose to register as investment advisers with the Commission, or one or more states, as applicable. Such broker-dealers would bear costs in choosing to register as investment advisers to continue providing those services, and their clients may face higher fees as a result. Alternatively, broker-dealers that have investment adviser affiliates may seek to place existing customers in advisory accounts instead of brokerage accounts.

Broker-dealers that determine they must change business practices as a

[73] *See* Relationship Summary Adoption, *supra* footnote 6, at section IV.B (discussing the market for financial advice generally).

[74] Assets are estimated by Total Assets (allowable and non-allowable) from Part II of the FOCUS filings (Form X–17A–5 Part II, *available at https://www.sec.gov/files/formx-17a-5_2.pdf*) and correspond to balance sheet total assets for the broker-dealer. The Commission does not have an estimate of the total amount of customer assets for broker-dealers. We estimate broker-dealer size from the total balance sheet assets as described above.

[75] For purposes of this analysis, a dual registrant is any firm that is dually registered with the Commission as an investment adviser and a broker-dealer. Because this number does not include the number of broker-dealers who are also registered as state investment advisers, the number undercounts the full number of broker-dealers that operate in both capacities.

[76] Some broker-dealers may be affiliated with investment advisers without being dually registered. From Question 10 on Form BD, 2,098 broker-dealers report that directly or indirectly, they either control, are controlled by, or under common control with an entity that is engaged in the securities or investment advisory business. Comparatively, 2,691 (19.57%) SEC-registered investment advisers report an affiliate that is a broker-dealer in Section 7A of Schedule D of Form ADV, including 1,916 SEC-registered investment advisers that report an affiliate that is a registered broker-dealer. Approximately 74% of total assets under management of investment advisers are managed by these 2,691 investment advisers.

[77] *See* Reg. BI Proposal, *supra* footnote 3.

[78] *See* Comment Letter of UBS (noting that broker-dealers have existing arrangements where they exercise temporary or limited discretion, such as discretion as to time and price, and that those types of discretion "do not present the sort of risks about which the SEC is concerned with respect to the exercise of *unfettered discretion*") (emphasis added); SIFMA Letter (noting that there are instances in which temporary or limited discretion, such as discretion as to prices at which securities can be purchased, does not have the supervisory or managerial character of the investment discretion warranting the protections of the Advisers Act).

[79] The above application of our interpretation of the solely incidental prong to the exercise of investment discretion is generally consistent with the position taken in the 2005 Adopting Release and preliminarily taken in the 2007 Proposing Release. We believe that many broker-dealers changed their practices with respect to investment discretion in light of those releases, and thus those practices likely are consistent with our interpretation of the solely incidental prong.

[80] For example, to the extent that broker-dealers respond to the interpretation by limiting the levels of discretion that they provide for their customers, execution quality (including the execution price) may be affected due to the delays encountered when the broker-dealer must contact a customer to proceed with a transaction.

result of this interpretation will choose their responses based on their circumstances. For example, if broker-dealers with affiliated advisers are able to utilize their existing regulatory infrastructure and compliance policies and procedures to account for activities that are inconsistent with the solely incidental exclusion they may face lower costs associated with migration of brokerage accounts and activities to investment advisory accounts. By contrast, we expect the costs of regulatory registration and compliance to be greater for any standalone broker-dealers that choose to become registered investment advisers, as they are more likely to need to undertake new systems, procedures, and policies.

To the extent that broker-dealers choose to discontinue providing certain services, register as investment advisers, or encourage migration of customer's brokerage accounts to advisory accounts of affiliates, this interpretation could result in a shift in the demand for the services of different types of financial service providers, decreasing the demand for services of broker-dealers and increasing the demand for the services of investment advisers.[81]

This interpretation may also produce some overall economic effects to the extent that it causes any broker-dealers that to date have avoided performing limited discretion and other activities to recognize that they may perform such activities consistent with the solely incidental prong of the broker-dealer exclusion. Such broker-dealers may respond to this interpretation by increasing the amount of limited discretionary services or monitoring services that they agree to provide to their customers. Investors that have established relationships with such broker-dealers may benefit from more efficient access to these services and may demand these services from broker-dealers rather than becoming clients of investment advisers. While additional provision of these services by broker-dealers also raises the risk of regulatory arbitrage because similar activities would be regulated under different regimes, we believe this risk will be mitigated by the adoption of rules that enhance the standard of conduct that applies to broker-dealer recommendations.

List of Subjects in 17 CFR Part 276

Securities.

Amendments to the Code of Federal Regulations

For the reasons set out above, the Commission is amending title 17, chapter II of the Code of Federal Regulations as set forth below:

PART 276—INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT ADVISERS ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ 1. Part 276 is amended by adding Release No. IA–5249 and the release date of June 5, 2019, to the end of the list of interpretive releases to read as follows:

Subject	Release No.	Date	FR vol. and page
* * *	*	*	* *
Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser.	IA–5249	June 5, 2019	[Insert FR Volume Number] FR [Insert FR Page Number]

By the Commission.

Dated: June 5, 2019.

Vanessa A. Countryman,

Acting Secretary.

[FR Doc. 2019–12209 Filed 7–11–19; 8:45 am]

BILLING CODE 8011–01–P

[81] To the extent this interpretation results in altered compliance costs for standalone broker-dealers, non-affected standalone broker-dealers (*i.e.*, those standalone broker-dealers that already are in compliance with the solely incidental prong as we have interpreted it), dual registrants, investment advisers, and other financial intermediaries that are not required to register as investment advisers (such as banks, trust companies, insurance companies, commodity trading advisers, and municipal advisors) may to a varying degree gain business at these affected broker-dealers' expense.

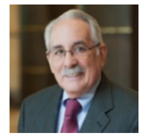
Morgan Lewis

SEC STANDARDS OF CONDUCT FOR RETAIL ADVICE
CONTACTS

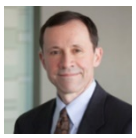
RETAIL ADVICE REGULATION COUNSELING AND POLICY ADVOCACY

John V. Ayanian
Partner
Washington, DC
+1.202.739.5946
john.ayanian@morganlewis.com

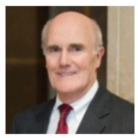
Chris Cox
Partner and President, Morgan Lewis Consulting
Orange County
+1.714.830.0606
chris.cox@morganlewis.com



Mark D. Fitterman
Senior Counsel
Washington, DC
+1.202.739.5019
mark.fitterman@morganlewis.com



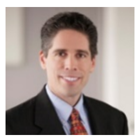
Thomas S. Harman
Partner
Washington, DC
+1.202.373.6725
thomas.harman@morganlewis.com



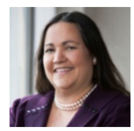
Charles M. Horn
Partner
Washington, DC
+1.202.739.5951
charles.horn@morganlewis.com

Lindsay B. Jackson
Partner
Washington, DC
+1.202.739.5120
lindsay.jackson@morganlewis.com

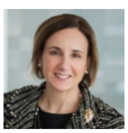
Jennifer L. Klass
Partner
New York
+1.212.309.7105
jennifer.klass@morganlewis.com



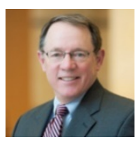
Daniel R. Kleinman
Partner
Washington, DC
+1.202.739.5143
daniel.kleinman@morganlewis.com



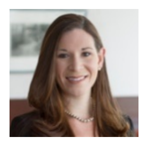
Marla J. Kreindler
Partner
Chicago
+1.312.324.1114
marla.kreindler@morganlewis.com



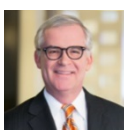
Amy Natterson Kroll
Partner
Washington, DC
+1.202.739.5746
amy.kroll@morganlewis.com



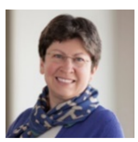
Timothy P. Lynch
Senior Director
Washington, DC
+1.202.739.5263
timothy.lynch@morganlewis.com



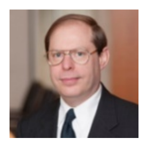
Christine M. Lombardo
Partner
Philadelphia
+1.215.963.5012
christine.lombardo@morganlewis.com



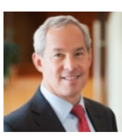
Brian T. Ortelere
Partner
Philadelphia
+1.215.963.5150
brian.ortelere@morganlewis.com



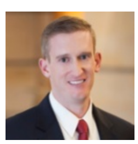
Monica L. Parry
Of Counsel
Washington, DC
+1.202.373.6179
monica.parry@morganlewis.com



Michael B. Richman
Partner
Washington, DC
+1.202.739.5036
michael.richman@morganlewis.com

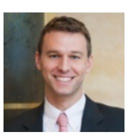


Steven W. Stone
Partner
Washington, DC
+1.202.739.5453
steve.stone@morganlewis.com



Brian J. Baltz
Associate
Washington, DC
+1.202.739.5665
brian.baltz@morganlewis.com

Eric L. Perelman
Associate
New York
+1.212.309.6735
eric.perelman@morganlewis.com



Kyle D. Whitehead
Associate
Washington, DC
+1.202.739.5717
kyle.whitehead@morganlewis.com

Morgan Lewis

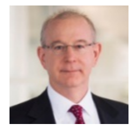
SEC STANDARDS OF CONDUCT FOR RETAIL ADVICE

CONTACTS

RETAIL ADVICE ENFORCEMENT AND LITIGATION DEFENSE

Michael D. Blanchard
Partner
Hartford
+1.860.240.2945
michael.blanchard@morganlewis.com

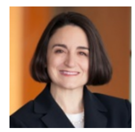
Jeremy P. Blumenfeld
Partner
Philadelphia
+1.215.963.5258
jeremy.blumenfeld@morganlewis.com



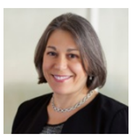
David C. Boch
Partner
Boston
+1.617.951.8485
david.boch@morganlewis.com

Timothy P. Burke
Partner
Boston
+1.617.8620
timothy.burke@morganlewis.com

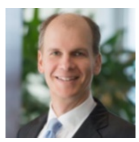
Peter K.M. Chan
Partner
Chicago
+1.312.324.1179
peter.chan@morganlewis.com



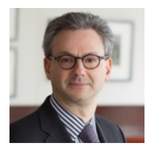
Susan F. DiCicco
Partner
New York
+1.212.309.6640
susan.dicicco@morganlewis.com



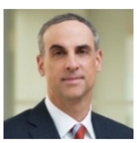
Amy J. Greer
Partner
Washington, DC
+1.202.739.5076
amy.greer@morganlewis.com



Ivan P. Harris
Partner
Washington, DC
+1.202.739.5692
ivan.harris@morganlewis.com



Ben A. Indek
Partner
New York
+1.212.309.6109
ben.indek@morganlewis.com



Jason S. Pinney
Partner
Boston
+1.617.951.8684
jason.pinney@morganlewis.com

T. Peter R. Pound
Partner
Boston
+1.617.951.8728
peter.pound@morganlewis.com

Morgan Lewis

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