



December 6, 2018

Mr. Brent J. Fields  
Secretary  
United States Securities & Exchange Commission  
100 F Street, NE  
Washington, DC 20549

RE: Investor Testing of Form CRS Relationship Summary:  
S7-08-18, S7-09-19 and S7-07-18

Dear Mr. Fields:

Thank you for this opportunity to offer comments on the investor testing of Form CRS Relationship Summary. The Institute for the Fiduciary Standard applauds the SEC for its efforts to try to get Form CRS right. The investor roundtables offered some important investor feedback. The Institute discussed key findings from these roundtables in September in the attached paper, below.

The RAND Corporation's November testing of Form CRS with investors sought their "Opinions, preferences, attitudes, and level of self-assessed comprehension" and offers additional feedback. RAND further notes, regarding its research design, "The survey was not designed to objectively assess comprehension of the document." Unfortunately, this feedback is largely useless. It is misleading.

This research design sharply constricts the meaning and significance of the testing. By not assessing actual investor comprehension, basic questions are raised as to the intent of Form CRS itself and the purpose of this testing. To start, these questions include:

1. Is Form CRS intended to increase investors actual comprehension of what brokers and advisers do and how they differ?

It's unclear. The purpose of the survey testing does not include actual investor comprehension. Alternatively, RAND suggests the purpose of the testing is to identify what parts of the disclosure investors like, in their subjective views. RAND suggests it's very important that "Nearly 90% of survey respondents opined" the disclosure would help them make more informed decisions. In other words, the disclosure makes investors *feel* better informed. This is a positive result -- if, and only if, the disclosure *actually does make* investors better informed. This is a positive result if the subjective "opinions" or feelings of investors measured here match their actual comprehension. If this is not the case, the disclosure may actually mislead investors by having investors believe they are better informed when, in fact, they are not better informed. Because the survey does not measure comprehension, we don't know.

Survey testing does not measure actual comprehension. Yet, interviews of "several" investors do. Some investors, according to RAND, "Developed a good understanding of the differences," others "Demonstrated significant misunderstandings," or "Seemed to misunderstand the differences between

account types.” These findings appear to parallel findings discussed in the Institute paper from the SEC roundtables, noted below.

2. The RAND survey research design raises the question of the importance of actual investor comprehension in disclosure. Does required disclosure that is misunderstood by investors meet a best interest or fiduciary standard?

According to an SEC case cited in the Reg BI release, In the Matter of Arlene W. Hughes (<https://www.sec.gov/litigation/opinions/ia-4048.pdf>, at p. 100) actual investor comprehension does matter. In the Hughes case, a core argument of the SEC against Hughes is that the customers of Ms Hughes did not understand the nature and material facts of the principal trades she recommended. Specifically:

*“Some clients did not clearly understand that the registrant was selling her own securities... certain clients did not understand that registrant consistently proposed to, and in fact did, sell her own securities to them. Accordingly, registrant did not fulfill her affirmative obligation to disclose the capacity in which she acted, a duty which even she concedes she must perform.”*

## Conclusion

The RAND survey is fundamentally flawed. It treats Form CRS as Proctor & Gamble might treat a new laundry detergent. It tests for consumer “opinions” and “attitudes. It tests *feelings*. It does not test whether the disclosure actually serves its central purpose, as the SEC clearly articulated in its excellent opinion in the Hughes case of seventy years ago. Unfortunately, this research should not be considered in evaluating Form CRS.

Sincerely,

*Knut A. Rostad*

Knut A. Rostad  
President

## Attachments Below:

**September 17 Paper on SEC Investor Roundtables**

**Form CRS Relationship Summary**

In the Form CRS Relationship Summary, proposed hypothetical disclosures describing advisers and brokers is offered. To review and offer specific recommendations, the Institute recruited The Plain Language Group to weigh in on this disclosure. The Plain Language Group is experienced in financial services. The comments and recommended alternative of its principal, Deborah Bosley are shown in Appendix A.

September 17, 2018

## SEC Investor Roundtables Reveal Investors Often Do Not Understand Form CRS

*“What we are finding out...is if you handed this to your  
lawyer, oh, this makes a lot of sense” ...*

*“No. I am a lawyer.”*

- SEC Chairman Jay Clayton and Investor Thirteen  
July 9, 2018, University of Miami

**Knut A. Rostad and Darren M. Fogarty\***

### **Executive Summary**

On April 18, 2018, the Securities and Exchange Commission (SEC) released a proposed Form CRS Relationship Summary that aims to increase clarity of investment professionals’ business models for investors. Form CRS is a hypothetical 4-page disclosure document that highlights the differences between broker dealers and registered investment advisors.

SEC Chairman Jay Clayton has set a high standard for Reg BI and Form CRS. He has said they should match reasonable investor expectations, maintain choice, address investor confusion, and offer “clear answers.” Does Form CRS meet this standard?

The SEC’s investor roundtables suggest the answer is, “no”. Even highly educated investors with careers in the financial, legal, and writing professions say the language in Form CRS is “poorly written,” “ambiguous,” and “need[s] more clarity.” Lawyers have difficulty making sense of it.

Assistant Director to the SEC’s Investment Adviser Regulation Office, Sara Cortes says, “[Y]ou need to tell people about [your conflict], and you need to tell people about it in a way...that’s sufficient that they can understand it.”<sup>1</sup> 41% of investors who spoke at the largest Investor Roundtable expressed

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\* Knut A Rostad is president and founder of the Institute for the Fiduciary Standard. Darren M. Fogarty is a Research Analyst at the Institute. The Institute is a non-profit that exists to advance the fiduciary standard through research, education and advocacy. For more information see [www.thefiduciaryinstitute.org](http://www.thefiduciaryinstitute.org).

<sup>1</sup> Washington, DC Investor Roundtable, July 12, 2018, <https://www.sec.gov/comments/s7-07-18/s70718-4194466-172808.pdf>, at 15.

dissatisfaction, views suggesting that Form CRS did not meet this standard. This whitepaper contains excerpts from all six roundtables of ordinary investors objecting to how Form CRS is written.

**Houston, June 4, 2018**<sup>2</sup>

*“How are you going to be able to put fee information into that form...[so] that it has any meaning? ... Why is it too difficult to [have brokerages and advisory fees outline their fees]?”*

*How are you going to be able to put fee information into that form to a degree that it has any meaning? For example, those of us who have brokerage agreements with large brokerages, they may have hundreds of different fund families that each have their own individual fees. And all I can see, visualize, is seeing, "fund families may have additional fees," something very general. I don't know how that really affects me.*

*... Compare that to whenever you buy a house. Prior to your closing, you will have a closing statement that clearly identifies every dollar and where it is going to. Why shouldn't brokerages and advisory fees have the ability to take a transaction, one account, and outline these are going to be the fees that you will either incur at the time of closing the transaction, ongoing, or at sale? Why is it too difficult to do something like that? And it's not something you can do on a four-page document.*

*Investor Nine, at pgs. 46-47*

*“Advisers are adept at ... not putting [answers] in writing.”*

*A lot of advisers are pretty adept at answering a question verbally but not putting it in writing...I've heard the stories of how they dance around it and [do] not really [address] the question.*

*Investor Two, at pgs. 49-50*

**Atlanta, June 13**<sup>3</sup>

*“I'm not sure I understand totally...what the broker's obligation to me is under the best interest rule versus the investment adviser's under the fiduciary rule.”*

*“I'm not sure I understand totally or with any real understanding if I'm dealing with on a particular transaction what the broker's obligation to me is under the best interest rule versus the investment adviser's under the fiduciary rule how it kind of – how that may or may not differ or how they're going to deal with me on an individual transaction. For instance, if I buy a mutual fund and there are a couple of mutual funds that are equally suitable for me but may have different fees, under the best interest can a broker sell any of those to me? Is that consistent with that?”*

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<sup>2</sup> Memorandum of June 4, 2018 Houston Roundtable Regarding Standards of Conduct for Investment Professionals, Available at: <https://www.sec.gov/comments/s7-07-18/s70718-4144931-172001.pdf>

<sup>3</sup> Memorandum of June 13, 2018 Atlanta Roundtable Regarding Standards of Conduct for Investment Professionals, <https://www.sec.gov/comments/s7-07-18/s70718-4144932-172001.pdf>

*Investor Four, at pg. 42*

**Miami, July 9**<sup>4</sup>

*“This is supposed to be a very plain English document. It was written by lawyers.”*

*SEC’s Lourdes Gonzalez, at pg. 55*

*“But if you had to have this, this is not clear. This is not well written...[T]his is the sort of thing where my brain shuts down. Maybe it's age... I am a lawyer... And a professional writer.*

*Investor Thirteen, at pgs. 55-56*

*“It is not clear. It is poorly written. I mean, we are college graduates but we are also professional writers and educators. Can't understand it. ... I think people, if they are given an idea of the actual monetary amount of the fee, sort of like a concrete example. When they're talking to an adviser, you can hand them this. This doesn't mean much to them.”*

*Investor Eight, at pgs. 55-57*

*“What we are finding out through these town halls is if you handed this to your lawyer, oh, this makes a lot of sense.”*

*Chairman Clayton, at pg. 56*

**Washington DC, July 12**<sup>5</sup>

*“The information is generally very valuable, but I was very confused and actually put off by the lack of context.”*

*I think that the information is generally very valuable, but I was very confused and actually put off by the lack of context. And what Chairman Clayton had to say provided that context for me. Which is, what I thought a fiduciary was is not what, in the industry, a fiduciary is. And I think saying that very clearly is crucial, because when I read all of this it was, frankly, with a jaundiced eye saying why are they muddying the distinction between suitability standard and a fiduciary standard...So I think that –*

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<sup>4</sup> Memorandum of July 9, 2018 Miami Roundtable Regarding Standards of Conduct for Investment Professionals, Available at: <https://www.sec.gov/comments/s7-07-18/s70718-4168880-172060.pdf>

<sup>5</sup> Memorandum of July 12, 2018 Washington, DC Roundtable Regarding Standards of Conduct for Investment Professionals, <https://www.sec.gov/comments/s7-07-18/s70718-4194466-172808.pdf>

*putting that context in there, that Mr. or Ms. Consumer – what you think of as a fiduciary standard is not what the industry thinks it is.*

*Investor Six, at pg. 17*

### **Philadelphia, July 17**<sup>6</sup>

*“The vast majority of retail investors really don’t have enough knowledge to understand what this form is...People don’t read four pages.”*

*I have been doing pro bono work on investor education for 20, 25 years. The vast majority of retail investors really don't have enough knowledge to understand what this form is...So to the extent that you can have a brief summary that actually talks about what the conflicts are, what type of an account it is and what are the fees specifically for the services offered, that kind of summary on page one will actually help investors really understand. Because people don't read four pages.*

*Investor Six, at pg. 19*

### **Denver, July 25, 2018**<sup>7</sup>

*“[W]hat is the difference between ‘fiduciary’ and ‘best interest,’ if there is [one], and...why use two different terms? ...[T]his industry is bombarded with these terms, and I think that’s part of the problem with investors.”*

*“So I have a question and then sort of an observation. So my question is, you know, where you talk about the term “fiduciary” and then you’re talking about “best interest”, and we’re using two different terms for what I’m hearing you guys say is very similar, if not identical concepts. And so it’s kind of a two-fold question. First is what is the difference, if there is, and second is, why use two different terms? Because I find this industry is just bombarded with these terms, and I think that’s part of the problem with investors is if there was just one terminology that people can just rely on and this is it, it would make things a lot simpler versus, you know, having to be a compliance expert or a regulator or -- and I hate to say even people in the industry don’t even know the terms.*

*Investor Six, at pgs. 59-60*

## **Investors Just Do Not Understand Form CRS**

The SEC’s proposed 4-page hypothetical disclosure seeks to address investor confusion by communicating important information about how brokers and advisers differ. In addition to identifying specific investor concerns from all six roundtables, the Institute also further reviewed the transcript of the July

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<sup>6</sup> Memorandum of July 17, 2018 Philadelphia Roundtable Regarding Standards of Conduct for Investment Professionals, <https://www.sec.gov/comments/s7-07-18/s70718-4168820-171878.pdf>

<sup>7</sup> Memorandum of July 25, 2018 Denver Roundtable Regarding Standards of Conduct for Investment Professionals, <https://www.sec.gov/comments/s7-07-18/s70718-4201139-172822.pdf>

12 Washington DC Roundtable for a sense of investors' general satisfaction and approval. This was the largest of the six roundtables with 38 investors attending. We found that of the 17 investors who are recorded speaking at the roundtable, seven investors either:

- (1) Did not understand something about Form CRS;
- (2) Believed others would not understand something in it; or
- (3) Were dissatisfied with its' language (i.e. use of term 'best interest' or purposeful omission of the word 'fiduciary')

Seven of 17 investors at this SEC roundtable expressed significant dissatisfaction with the disclosure. Dissatisfaction due to either misunderstanding the content or disagreeing the content was correct. The question becomes whether this 41% (7 of 17) failure rate, the rate that this group of investors failed to master the material, is acceptable. What about other analyses of Form CRS's effectiveness?

Independent usability testing conducted on behalf of AARP, Consumer Federation of America (CFA), and the Financial Planning Coalition also indicate that Form CRS leaves much to be desired.<sup>8</sup> The testing found that participants:

- “[D]id not understand disclosures regarding the differing legal obligations that apply to brokerage and advisory accounts”;
- Were confused about what was meant by a fiduciary standard and had mixed understanding of what ‘best interest’ meant
- “[V]iewed the CRS as portraying brokerage accounts in a more favorable light than advisory accounts” in terms of which business model had to act in the customer’s best interest;
- “[W]ere deeply confused by disclosures regarding fees and costs”; and
- [T]hought conflicts would not impact them.

The study summarized its research by concluding that,

*“[D]espite favorable testing conditions that required participants to read the documents more carefully than most would on their own, few participants were able to consistently comprehend the information within a single section of the CRS. Fewer still were able to integrate and synthesize the information provided in the document as a whole.”*

## Conclusion

Form CRS fails to address investor confusion of how broker dealers and investment advisers differ. It fails to effectively communicate key distinctions, such as compensation and the nature and scope of conflicts of interest. Its language, is written by lawyers and, as Chairman Clayton seems to suggest, for lawyers. Investors, even those who have advanced technical degrees in law or finance, expressed difficulty comprehending the material.

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<sup>8</sup> Independent Testing Shows SEC's Proposed Customer Relationship Summary Form May Add to Investor Confusion, September 12, 2018, <https://press.aarp.org/2018-9-12-Independent-Testing-Shows-SECs-Proposed-Customer-Relationship-Summary-Form-May-Add-Investor-Confusion>



*Making written information easy to understand.*



“Explaining the differences between broker dealers and investment advisors means using language that is clear, concise, and accurate. A hypothetical comparison must always keep the investor in mind. This is what we have done in the example attached as Appendix A. In contrast, what the SEC has presented as a hypothetical description is overly complex, redundant, and (at times) vague about the differences. That means the investor is left to figure out the distinctions instead of being presented with information that makes their choices easy.”

- Deborah S Bosley, Ph.D., Owner and Principal,  
The Plain Language Group  
<http://www.theplainlanguagegroup.com/>



Appendix A: The Plain Language Group’s Form CRS Relationship Summary Hypothetical Disclosure

**Broker or Adviser. Which is Right for You?**

	Broker-Dealer Services, Brokerage Accounts*	Investment Advisory Services, Advisory Accounts*
<b>What kind of advice do we give?</b>	By law, if you open a brokerage account, we only give you incidental advice related to the products you buy through us.	By law, if you open an advisory account, we must give you fiduciary advice in your best interest at all times.
<b>Who do we represent?</b>	We represent issuers or underwriters (called “manufacturers”) who sell financial products. We do not represent you. Our relationship is three parties: manufacturers, ourselves, and the customer.	We only represent you. You pay our fees and we advise you. Period. Ours is a two-party relationship.
<b>Why?</b>	Brokers are hired and trained to sell products offered by issuers or underwriters (manufacturers).	Advisers are hired and trained to give fiduciary advice.
<b>How are we paid?</b>	<b>Commissions.</b> We get commissions when you buy or sell financial products, based on the product and what we negotiate. Sometime we also get payments from third parties. Ask us what your 1 <sup>st</sup> year all-in fees/costs will be.	<b>Fees.</b> We generally get a fee, that’s hourly, fixed, or based on the value of the cash and investments in your advisory account(s). Fees depend on our services and what we negotiate. Ask us what your 1 <sup>st</sup> year all-in fees/costs will be.
<b>What about conflicts of interest?*</b>	Because manufacturers pay us to sell financial products to you, we have built-in conflicts that may influence our recommendations to you.	When we are paid fees just by you, we don’t have conflicts with manufacturers. If we have a conflict, we’ll explain it so you can understand it. You can decide if you want to work with us.
<b>What do we do about conflicts?</b>	We must tell you about the conflict’s and reduce the conflict’s harms or eliminate it.	We are paid by you to give you advice. Still, if we have a conflict, we will tell you so you understand what it means and make sure it’s okay for you to proceed.
<b>Where do you go for additional information?</b>	For more information about our brokers and services, 1) visit Investor.gov or <a href="http://BrokerCheck.Finra.org">BrokerCheck</a> (BrokerCheck.Finra.org), 2) our website (SampleFirm.com), and 3) your account agreement.	For more information on advisory services, ask us for our Form ADV brochure and any brochure supplement.
<b>How do you research our firm?</b>	Visit <a href="http://Investor.gov">Investor.gov</a> for a free, simple search tool to research our firm and our financial professionals.	Visit <a href="http://Investor.gov">Investor.gov</a> for a free, simple search tool to research our firm and our financial professionals.
<b>How do you report a problem with our firm?</b>	To report a problem to 1) the SEC, visit Investor.gov or call the SEC’s toll-free investor assistance at (800) 732-0330; 2) FINRA, call [ ]. If you have a problem with your investments, account or financial professional, contact us in writing at [ ].	

\* For a discussion on how the SEC addresses conflicts of interest, see: <http://www.thefiduciaryinstitute.org/wp-content/uploads/2015/08/SECandConflictsApril62015.pdf>.