



# BETTER MARKETS

August 7, 2018

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

Re: 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)

Dear Mr. Fields:

Better Markets<sup>1</sup> appreciates the opportunity to comment on the above-captioned proposals (“Proposal” or “Rule Proposal” or “Release”) issued for comment by the Securities and Exchange Commission (“SEC” or “Commission”).

The Proposal, if approved as released, would, (1) require SEC-registered broker-dealers and investment advisers to provide to retail investors certain new, multi-page disclosures; (2) prohibit brokers from using the titles “adviser” or “advisor;” subject to some exceptions; and (3) require all SEC-registered representatives or investment advisers to clearly communicate to their clients their “regulatory status” (*e.g.*, whether they are a “broker-dealer” or an “investment adviser”). The Commission believes that the Proposals, together with the accompanying release proposing a new “Regulation Best Interest” (Release No. 34-83062), would help eliminate investor confusion and protect investors against the corrosive effects of conflicts of interests among advisers.

We appreciate the immense amount of time and effort that must have been expended to develop the Proposal. However, we do not agree with the Commission’s preliminary conclusion that the Proposal is sufficient to significantly reduce investor confusion or mitigate the extensively documented and proven harm investors suffer from conflicts of interest under the current regulatory regime. As many at the SEC know, over the years, we have very actively advocated for a strong fiduciary duty to better protect retail investors who rely on advisers. We were engaged

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<sup>1</sup> Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

with the Department of Labor (“DOL”) over the years as it developed its 2016 fiduciary duty rule, and we have also shared our views on the need for a strong fiduciary duty over time with the SEC as well.<sup>2</sup>

Based on our knowledge of these matters, we do not believe that investors would be less confused or better protected under this Proposal. In fact, we fear that the Proposal will create more investor confusion, potentially resulting in further investor harm. We also have concerns that under the Proposal, investors may be subjected to even more harmful investment recommendations by advisers who would use the veneer of additional disclosure to peddle even more costly and less optimal products, maximizing their fees and commissions while risking the financial health and future of American investors. We urge the Commission to change course for the benefit of investors, not the intermediaries who all too often take advantage of their clients.

## **SUMMARY**

- The Proposal does not convincingly show how the average retail investor would be able or inclined to read, comprehend, absorb, ask questions about, or make informed investment decisions in light of the information contained in the Form CRS as proposed. Therefore, before this or **any** new disclosure rules are finalized, the SEC must take the following steps: (1) distill the most investor-friendly suggestions solicited through this comment process and then create as many alternative versions of Form CRS as practicable, including graphical and computer and smartphone-friendly versions; (2) conduct a robust, objective, and irreproachable investor-testing of these draft Form CRSs; and (3) share the results, data, and methodologies used in a re-proposal of Rule Form CRS for public comment. Only following this sequence of policymaking steps would the investing public (and the regulated industry) have confidence that revised Form CRS would truly reduce confusion and thereby help mitigate the impact of adviser conflicts of interests. Otherwise, the form is likely to serve as just another lengthy, confusing, and even counterproductive disclosure.
- SEC should flatly prohibit broker-dealers from “holding themselves out” as investment advisers, regardless of the specific language used, unless they are indeed investment advisers and registered with the SEC as such. Simply prohibiting broker-dealers from employing the two words “adviser” or “advisor” as part of their titles would do little to

<sup>2</sup> Better Markets, Inc., Comment Letter on Duties of Brokers, Dealers, and Investment Advisers (July 5, 2013), available at <https://bettermarkets.com/rulemaking/better-markets-comment-letter-sec-duties-brokers-dealers-and-investment-advisers>; Better Markets, Inc., Comment Letter on Definition of the Term “Fiduciary” – Proposed Delay of Applicability Date (Apr. 17, 2017), available at <https://bettermarkets.com/rulemaking/better-markets-comment-letter-dol-definition-term-fiduciary-proposed-delay-0>; Better Markets, Inc., Comment Letter on Definition of the Term “Fiduciary”; Better Markets, Inc., Comment Letter on Conflict of Interest Rule – Retirement Investment Advice (Sept. 24, 2015), available at <https://bettermarkets.com/rulemaking/better-markets-second-comment-letter-dols-best-interest-fiduciary-duty-rule>; Better Markets, Inc., Comment Letter on Definition of the Term “Fiduciary; Conflict of Interest Rule – Retirement Investment Advice (July 21, 2015), available at <https://bettermarkets.com/rulemaking/better-markets-comment-letter-dols-proposed-fiduciary-duty-rule>; Better Markets, Inc., Letter to the Securities and Exchange Commission “The Need to Propose and Finalize a Strong Fiduciary Duty Rule Without Delay” (March 20, 2018), available at <https://bettermarkets.com/sites/default/files/Better%20Markets%20letter%20re%20Fiduciary%20Duty%203-20-18%20.pdf>.

curb the practice among brokers of portraying themselves as financial experts who will serve the best interest of their client. The opportunities for evasion will be limitless under the Proposal, as brokers will use innumerable other words and phrases to paint essentially the same misleading picture.

- In addition to requiring registered broker-dealers and investment advisers to display in all of their communications with their clients, including on their business cards, their regulatory status, they should also have to provide a permanent, short-form URL that would link to their FINRA BrokerCheck profile or to the SEC's own Investment Adviser Public Disclosure ("IAPD") website.

## **COMMENTS**

### **Brief Description of the Proposal**

The Proposal would require SEC-registered investment advisers and registered broker-dealers to provide clients with a new, multi-page disclosure document, described as a "brief relationship summary," to inform them about "the relationships and services the firm offers, the standard of conduct and the fees and costs associated with those services, specified conflicts of interest, and whether the firm and its financial professionals currently have reportable legal or disciplinary events."<sup>3</sup>

In particular, the Form CRS is proposed to be four pages long, and contain eight separate items: "(i) introduction; (ii) relationships and services the firm provides to retail investors; (iii) 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); (vi) conflicts of interest; (vii) where to find additional information, including whether the firm and its financial professionals currently have reportable legal or disciplinary events and who to contact about complaints; and (viii) key questions for retail investors to ask the firm's financial professional."<sup>4</sup> To help investors more easily compare financial firms, the Proposal would require "firms to present this information under prescribed headings in the same order."<sup>5</sup> As detailed below, we believe the proposed Form CRS is likely to increase rather than alleviate confusion, and that the only reliable and credible approach to disclosure under the circumstances is to conduct robust investor testing of various alternatives and issue them for public comment.

The Proposal would also prohibit broker-dealers "or any natural person who is an associated person of such broker or dealer, when communicating with a retail investor, from using as part of its name or title the words "adviser" or "advisor" unless such broker or dealer is registered as an investment adviser under the Advisers Act or with a state, or such natural person who is an associated person of a broker or dealer is a supervised person of an investment adviser registered under section 203 of the Advisers Act or with a state, and such person provides

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<sup>3</sup> Release at 21416.

<sup>4</sup> Release at 21421.

<sup>5</sup> Release at 21422.

investment advice on behalf of such investment adviser.”<sup>6</sup> The Commission argues that limiting use of the terms “adviser” or “advisor” would “reduce investor confusion related to the use of certain terms in firm names and professional titles and prevent retail investors from potentially being misled that their firm or financial professional is an investment adviser, resulting in investor harm.”<sup>7</sup> We agree with the Commission that investors are indeed misled and harmed when broker-dealers pretend to be advisors, but we disagree with the Commission that the Proposal would solve this problem. We discuss our concerns below and urge that the Commission improve upon the Proposal by more generally prohibiting the broker practice of falsely portraying themselves as investment advisers.

Finally, the Proposal would require broker-dealers and investment advisers to “prominently disclose that [the firm or individual] is registered as a broker-dealer or investment adviser, as applicable, with the Commission in print or electronic retail investor communications,” including on their business cards and email signatures.<sup>8</sup> We agree with this requirement but urge the Commission to strengthen it by facilitating client access to their advisers’ on-line disciplinary histories.

The Proposed Form CRS is Unclear, Too Long, Framed Too Much in Legalese, and Untested. Only After Extensive Investor-Testing Should the Commission Re-Propose and Finalize Any New Disclosure Requirements.

In the hundreds of pages of the Proposal, the Commission fails to convincingly show that the average retail investor would actually read the proposed Form CRS, understand its legalese, ask the suggested “key questions” (or any questions at all), and ultimately use the information to make more informed decisions with respect to his or her investment choices and financial well-being.

As a threshold matter, the Commission unjustifiably and unfortunately remains too reliant on a disclosure regime. A disclosure regime by itself is little more than a modified version of “buyer beware.” Disclosures can easily be designed, for example, to obscure the real significance of an adviser’s conflicts of interest, and consent can easily be extracted from clients who feel pressured and confused, or worse, falsely comforted. In fact, studies show that regulation by disclosure alone can actually undermine investor protection goals 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. Investor and consumer literature is replete with studies, surveys, and other analysis showing that average retail investors often lack the basic knowledge necessary to understand complicated financial and investment matters, and that financial professionals enjoy informational asymmetry vis-à-vis the investor.<sup>9</sup>

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<sup>6</sup> Release at 21501.

<sup>7</sup> *Id.*

<sup>8</sup> Release at 21467.

<sup>9</sup> For example, there is a growing consensus among experts that mere disclosure is not an effective cure for the ills posed by conflicts of interest and that a fiduciary duty is a more effective solution. See Angela Hung et al., *Effective Disclosures in Financial Decision-making* (2015), available at [https://www.rand.org/pubs/research\\_reports/RR1270.html](https://www.rand.org/pubs/research_reports/RR1270.html); George Loewenstein et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 *American Economic Review*:

Given this backdrop, the onus is on the Commission to prove that any new disclosures would effectively eliminate or at least substantially reduce investor confusion. This Proposal fails to show that the new disclosures would actually be read, understood, and found useful and informative by average retail investors for the purposes of making financial decisions. As proposed, Form CRS's language is not sufficiently clear, as it is couched in "legalese." The proposed items within Form CRS are not appropriately salient, and nothing in the Proposal shows why the suggested length of four pages is optimal. While the Proposal does discuss some generic benefits of disclosure requirements, which are necessary because disclosing "parties may lack private incentives to voluntarily disclose or standardize relevant information,"<sup>10</sup> it fails to prove that this particular Form CRS would be meaningfully more investor-friendly and useful to investors.

Most importantly, the Proposal lacks the necessary empirical data and investor-testing that would have provided confidence to the investing public and those required to produce the disclosures that these new requirements would benefit investors and our financial markets. A recent letter to the Commission from consumer and investor-oriented groups makes the point well:

A fundamental premise of the Commission's proposed regulatory approach is that a summary disclosure document can be developed that will enable investors to better understand the differences between brokerage accounts and advisory accounts, including the legal standards that apply, and make an informed choice among the available accounts and services. Until testing verifies that this is a reasonable assumption – including with regard to the least financially sophisticated investors most in need of enhanced protections – we cannot fairly evaluate the Commission's proposal to maintain separate and unequal standards for securities professionals the Commission has deemed to be providing essentially the same service, investment advice, through different business models."<sup>11</sup>

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Papers and Proceedings 423 (2011); Robert Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 Wis. L. Rev. 1059 (2011) (concluding that disclosures do not give sufficient information to investors and may even cause brokers to give more biased advice); Omri Ben-Shahar & Carl Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647 (2011) (finding that disclosure as a regulatory tool has a history of being ineffective); Daylian Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. of Legal Studies 1 (2005). Similar findings were presented at a recent meeting of the SEC's Investor Advisory Committee's on December 7, 2017, where four panelists discussed the limitations and sometimes the counterproductive effects of disclosures as a remedy to conflicts of interests. See Meeting of the Securities and Exchange Commission Investor Advisory Committee (Dec. 7, 2017), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac120717-agenda.htm>; Sunita Sah et al., *The Burden of Disclosure: Increased Compliance with Distrusted Advice*, 104 J. of Personality and Social Psychology 289 (2013) (describing 6 experiments revealing that disclosure can increase pressure to comply with advice if the advisees feel obliged to satisfy their advisors' personal interests).

<sup>10</sup>

Release at 21485.

<sup>11</sup>

See Letter from public interest organizations to SEC Chairman Jay Clayton (May 21, 2018) (requesting that the Commission delay the comment deadline for its "Best Interest" regulatory proposal, as well as the proposed Customer Relationship Summary, until 90 days after testing results for the proposed Form CRS disclosures are made public), available at <https://consumerfed.org/testimonial/public-interest-groups-call-on-sec-to-delay-comment-deadline-for-best-interest-regulatory-proposal/>.

We agree with this view and call on the SEC to empirically verify and validate the reasonableness of the assumptions that underlie the Proposal. We urge the Commission to, after receiving comments on this Proposal, distill the most investor-friendly suggestions into as many versions of Form CRSs as practicable, including versions in computer, web-friendly, graphical, and info-graphical formats, and conduct robust and irreproachable investor testing of the resulting options. The Commission should at a minimum test:

- whether investors understand the differences between sales recommendations offered by broker-dealers and the advice offered by investment advisers;
- whether they understand what the requirement to act in the customer's best interest means and how that differs from a fiduciary duty and a suitability standard;
- whether they understand the implications of the fact that broker-dealers do not typically have an ongoing duty of care;
- whether the information provided on costs and fees is meaningful;
- whether investors understand what conflicts of interests mean as it relates to financial advice and transactions;
- whether the discussion of conflicts helps investors to understand how those conflicts might influence the recommendations or advice they receive;
- whether disclosures about adviser conflicts of interest leave investors feeling confident about what choices to make and what alternatives to pursue in light of those disclosures; and
- when investors would need to receive the disclosures in order to incorporate them into their selection of providers.

After this investor testing is complete, the SEC should set forth its findings, data, methodology, and other relevant analysis as part of a re-Proposal of Form CRS for public comment. We believe that unless the Commission follows these steps, it cannot credibly promulgate new disclosure requirements.

#### The Commission Must Prohibit Broker-Dealers from "Holding Themselves Out" as Advisers.

For years, too many advisers have deployed promotional devices, including advertisements and titles, that deceive investors and lull them into believing that they are dealing with an adviser who has their best interest at heart. Prominent among them is the widespread uses of titles such as "financial adviser" or "financial consultant." Whether intentionally or not, these titles connote the very different category of "investment adviser," who is subject to at least some form of the fiduciary duty. These titles conjure the notion of a professional who is not only an expert in financial matters but also someone who will offer advice and recommendations that serve the



client’s best interest. In fact, these titles are misleading because those “advisers” and “consultants” are not currently subject to the standards of trust and loyalty embodied in the fiduciary duty.

The Proposal fails to adequately address this misuse and abuse of titles, as it takes the extraordinarily modest step of simply prohibiting the use of the words “adviser” or “advisor” by broker-dealers absent dual registration. Instead, the Commission should prohibit broker-dealers from “holding themselves out” as advisers through the use of any language. Accordingly, in any final rule, the SEC must prohibit the use of any and all titles that convey these misleading impressions and ensure that anyone using them—along with anyone else providing investment advice to a client about securities, regardless of title—is registered as an investment adviser with the Commission.

The Proposal itself discusses the significant benefits of this alternative:

This approach could encompass a broker-dealer and its associated natural persons representing or implying through any communication or other sales practice (including through the use of names or titles) that they are offering investment advice subject to a fiduciary relationship with an investment adviser. This approach would reduce the risk that by only proscribing “adviser” and “advisor,” or any other specific names and titles, new names and titles could arise with similar, confusing connotations. Moreover, this alternative could promote informed investor choices by focusing more comprehensively on broker-dealer marketing and titles that may confuse or mislead investors into believing that a brokerage relationship is an advice relationship of the type provided by investment advisers. Relative to either the baseline or the proposed rule, the “holding out” alternative could have a broader application because it could capture any communication or other sales practices that may lead to confusion by investors in believing that their firms or financial professionals provide more or different services than they provide. As a result, investor confusion and associated costs may be reduced more compared to the proposed rule.<sup>12</sup>

The Commission rejected this approach for reasons that are unsupported and unconvincing, citing possible confusion among brokers about the exact scope of a prohibition against “holding out,” potential confusion among investors, and even the dire and unfounded supposition that brokers confronted with such a rule might even abandon the advice business altogether thus “shutting out” investors from the advice market entirely.<sup>13</sup> We cannot accept the Commission’s decision to focus solely on the words “adviser” and “advisor” when it knows full-well that broker-dealers will simply switch to other words that connote the same or similar meaning. The Commission has a clear alternative that promises a much better solution to the problem of misleading titles, and it should reject the narrow approach in the Proposal.

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<sup>12</sup> Release at 21512.

<sup>13</sup> *Id.*

The Commission Should Require Links to the BrokerCheck and/or IAPD URL on All Retail Investor Communications.

We agree with the Proposal's requirement that all broker-dealers and investment advisers disclose in all of their communications, including business cards and email signatures, their registration status. However, we believe investors would benefit further if they could more readily access the regulatory and disciplinary histories of their financial professionals. We therefore recommend that the Commission further require that broker-dealers and investment advisers provide, in all their communications, a permanent, short-form URL that would link to their FINRA BrokerCheck profile or to the SEC's own IAPD website.

**CONCLUSION**

We hope these comments are helpful.

Sincerely,

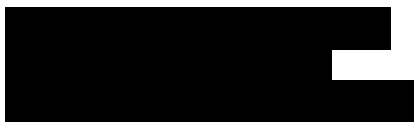


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