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December 4, 2023

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Chair
Broker-Dealer Market and Regulatory Policy and Review Project Group
North American Securities Administrators Association

James Nix, Esq.
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North American Securities Administrators Association

Re: **NASAA Proposed Model Rule on Dishonest or Unethical Business Practices of Broker-Dealers and Agents**

Dear Ms. Kopelton and Mr. Nix:

Cetera Financial Group ("Cetera") submits the following comments regarding proposed amendments to the NASAA Model Rule on Dishonest or Unethical Business Practices of Broker-Dealers and Agents, otherwise known as the "Business Practices Rule", or "BPR". (We will refer to the proposed revisions to the existing BPR and accompanying text collectively as the "Proposal"), which would make substantive changes in a number of areas governing recommendations to purchase or sell securities and engage in investment strategies. We are sending copies of this letter to NASAA, to Ms. Kopelton in her capacity as Chair of the Broker-Dealer Market and Regulatory Policy and Review Project Group (the "Project Group"), and to Mr. Nix in his capacity as Chair of the NASAA Broker-Dealer Section.

Cetera is the corporate parent of five broker-dealers and three investment advisers. We operate in all 50 states and provide securities brokerage and investment advisory services to more than 1 million customers through some 12,000 financial professionals. The majority of our customers are individuals and small businesses who seek advice in investing for retirement, funding education for their children and grandchildren, and providing financial legacies for their families. Our financial professionals perform a critical role in that process, and we are vitally interested in anything that would adversely impact access to advice and investment products for our customers. We are extremely concerned that the Proposal will do exactly that, and will produce negative effects that have not been fully considered by the drafters.

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The Proposal begins with the stated goal of incorporating the standards applicable to broker-dealers in SEC Regulation Best Interest ("Reg. BI")[1] into the BPR. We endorse that goal and the simple way in which the Proposal would accomplish it through the addition of Revision Set #1. Creating consistency among states and with federal regulations should be a primary goal of all NASAA model rules, and harmonizing state rules with Reg. BI would be an important step in that direction.

Unfortunately, in Revision Set #2, the Proposal veers dramatically away from its stated goal, establishing a number of additional standards that are novel and often in conflict with those of Reg. BI. The Proposal recites its intent to "fill in the gaps" in SEC guidance regarding aspects of Reg. BI, but instead plunges headlong into a number of unprecedented revisions with far-ranging negative implications.

All of that is bad enough, but even worse is the fact that the Proposal provides virtually no objective evidence to establish that this vast departure from existing NASAA standards and Reg. BI is necessary or would be beneficial for investors. As we will discuss in more detail below, the Proposal will increase costs and restrict access to advice and investment products for investors, increase the cost and complexity of compliance efforts for providers of investment advice and products, and cause huge disruption to business practices for broker-dealers, all without any measurable benefits. We will offer suggestions with regard to specific provisions in the Proposal and how they might be clarified or amended to better meet its stated goals, but it is so fundamentally flawed in its current form that we do not believe it can be salvaged. The Project Group and the Broker-Dealer Section should return to the drawing board and start over with this entire initiative, preferably with advance input from the industry and other affected constituents.

I. Impacts on Policy Relating to Capital Formation and Investor Access to Investment Products and Advice

A. The markets for capital and investment advice are national and global in nature. In order to function efficiently for both investors and providers of investment advice, regulations of all agencies with jurisdiction must be as consistent as possible. The Proposal completely ignores this concept in crucial respects:

- It offers a "menu" of different provisions and suggests that each state pick and choose which to adopt. A primary goal of all NASAA model rules should be to create as much uniformity as possible among state regulations. It is hard to imagine the approach taken by the Proposal producing that result.

- It goes far beyond the provisions of Reg. BI and creates standards that the SEC specifically considered and rejected. Several parts of the Proposal directly conflict with Reg. BI and create compliance burdens that will inevitably cause providers of financial advice to limit their services and product offerings.

[1] 17 CFR Section 240.15l1

B. All broker-dealers in the United States are already subject to the provisions of Reg. BI. The addition of Revision Set #1 into the BPR is appropriate, in particular because it updates the existing NASAA "suitability" rule to better comport with Reg. BI. The SEC, FINRA, and individual states already have all authority necessary to enforce this standard. Adoption of the Proposal would only magnify the potential for confusion and conflict among federal law and that of the states.

C. Several aspects of the Proposal represent giant leaps into the unknown, with little or no objective evidence to justify them or any substantive analysis of the costs and benefits that would accrue to the affected constituencies. The changes that would be wrought are so far-reaching that we cannot begin to estimate the costs to broker-dealers, investors, or capital markets in general, and we suspect that the same can be said for the drafters of the Proposal. A fundamental principle guiding adoption of administrative regulation is that it must consider the impact on all affected parties and seek to balance the benefits and burdens. Beyond superficial references to reports that appear to have been produced by NASAA primarily to justify the provisions of the Proposal, we have not seen the kind of detailed analysis that should be required in connection with such radical changes.

In order to be adopted by individual states, the Proposal would generally require the state agency proposing it to conduct its own review of the costs and benefits. However, we submit that NASAA has not done either itself or its members any favors by failing to undertake even a basic assessment of the economic impacts that it will produce. Before proceeding further with any aspect of the Proposal, a much more fulsome review should be undertaken with input from all affected constituents.

D. Several provisions in the Proposal directly conflict with the provisions of both the National Securities Markets Improvement Act[2] ("NSMIA") and the Employee Retirement Income Security Act ("ERISA")[3]. The "savings" clause in Subpart 1(d)8 makes an ineffective attempt to cure this problem, but the simple fact is that many provisions of the Proposal are patently inconsistent with both NSMIA and ERISA. Merely stating otherwise is meaningless. In particular, the Proposal would create a number of new requirements for broker-dealers to make and retain records in connection with recommendations to purchase securities or engage in investment strategies. This is specifically prohibited by NSMIA, and will not withstand a legal challenge.

E. If adopted, the Proposal would fundamentally alter the business models of broker-dealers operating in the United States. It would restrict or eliminate existing revenue streams, favor certain investment products over others, and force providers of financial advice to radically modify their economic arrangements with sponsors of investment products, fees and charges to customers, and compensation arrangements for agents. The ultimate effect will be to increase the cost and reduce access to

[2] National Securities Markets Improvement Act of 1996 – Pub. L. 104-2901.
[3] Employee Retirement Income Security Act of 1974 – 29 U.S.C. Section 1001, et. seq.

investment-related services for all investors. Any such dramatic change should be debated at a national level by Congress and administrative agencies that have jurisdiction over all of the affected constituents, not on a state-by-state basis. A patchwork of inconsistent regulations will produce negative outcomes for everyone.

F. Reg. BI represented the most far-reaching revision to broker-dealer and agent conduct standards in more than 50 years. It was adopted after many years of study by the SEC, multiple rounds of comments from all affected constituencies (including NASAA), and consideration of a wide range of alternatives. Regulations of any type rarely please everyone, and Reg. BI is certainly no exception. However, it represented the most comprehensive effort by the agency with the broadest reach over the provision of investment products and advice in the United States. Barely three years later, with relatively little in the way of examination and enforcement experience or other concrete justification on which to draw, the Proposal simply pronounces that Reg. BI is insufficient to meet the goals of investor protection and charges forward.

G. The text accompanying the Proposal states that it is incorporating guidance from the SEC staff with respect to interpretation of Reg. BI. As noted throughout our comments, the Proposal takes a great deal of liberty in interpreting the views of the SEC staff, and also does not take note of the fact that it is intended only to offer its own views on interpreting statutes and SEC regulations. The Commission itself specifically disclaims staff guidance as representing either the views of the Commission or authority for any action on the Commission's behalf.[4]

II. Many Provisions of the Proposal are Fundamentally Incompatible with Reg. BI, and Will Create Standards That Cannot Be Complied with Absent Radical Change to Broker-Dealer Sales Practices and Business Models

A. Subpart 1d(1) – Compliance and Disclosure – Presumption that Conflicts of Interest Cannot be Satisfied Through Disclosure Alone

Standing on its own, the statement that conflicts of interest cannot be satisfied through disclosure alone may seem to be an innocuous restatement of the Disclosure and Conflicts Obligations in Reg. BI. However, when read and considered in context, the Proposal goes much further. Reg. BI establishes a regime in which different types of conflicts are managed in different ways. It contemplates a continuum of conflicts

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[4] SEC staff bulletins generally include the following disclaimer: *This staff bulletin and other staff documents (including those cited herein) represent the views of the staff of the Securities and Exchange Commission ("Commission") and are not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of these documents and, like all staff statements, they have no legal force or effect, do not alter or amend applicable law, and create no new or additional obligations for any person.*

and management practices including disclosure, mitigation, and in rare instances elimination of a specific practice, depending on the nature and severity of the conflict. Reg. BI does not, however, include a blanket declaration to the effect that disclosure would be inadequate to address any species of conflict other than those that are specifically prohibited. This is not a subtle distinction. The Proposal would veer significantly away from the Reg. BI framework and create a presumption against disclosure as a viable method of conflict management without any guidance whatsoever about how that presumption might be overcome. This is at best confusing for both broker-dealers and customers.

Reg. BI specifically recognizes that there are different types of conflicts of interest that are appropriately managed though different methods. For example, some conflicts arise primarily at the point of sale between the customer and the individual financial professional, and others exist primarily for the firm. This distinction is largely due to the fact that the firm and individual financial professionals have different economic incentives arising from the ways in which they are compensated. The individual financial professional's compensation usually consists of a portion of the sales charge or commission applicable to a transaction, while the firm often also receives other types of revenue in which the individual agent does not share. In adopting Reg. BI, the SEC recognized this difference, and specifically endorsed the idea that different types of conflicts can and should be managed differently. Indeed, with respect to many firm-level conflicts, the SEC stated that disclosure is appropriate and possibly the most effective method in these circumstances.

If this portion of the Proposal went on to incorporate the SEC's framework of a spectrum or continuum of conflicts and management techniques, it might be workable. However, in its current form, it makes only a sweeping statement that disclosure alone is insufficient to manage any type of conflict, and provides no guidance on what factors might be involved in either determining which conflicts require additional levels of management or how the presumption might be overcome. Broker-dealers and customers would have no idea what to expect.

We have a drafting suggestion that would solve this problem. The language of the section could be revised to provide as follows:

> **1d (1)** ***The obligations set forth in this section cannot always be satisfied through disclosure alone. Broker-dealers must review and assess material conflicts between their financial and other interests and those of their customers, and must address all such conflicts through an appropriate combination of disclosure, mitigation, or elimination based on the firm's evaluation of the conflict. There shall be no presumption that disclosure is insufficient to manage any conflict of interest except with respect to any activity that is specifically prohibited by this regulation.***

B. Subpart 1d(2)a. – Efforts to Avoid or Eliminate Conflicts of Interest

This provision requires the broker-dealer or agent to make all reasonable efforts to avoid or eliminate conflicts of interest. Those that cannot reasonably be avoided or eliminated must be disclosed and mitigated. It goes on to state that mitigating a conflict of interest means that it must be "neutralized" to reduce the potential for harm or adverse impact to the customer.

As discussed above, Reg. BI establishes a framework in which broker-dealers are required to assess all material conflicts of interest with their customers. At a minimum, they must be disclosed, and depending on the type and severity of the conflict, may also need to be mitigated or eliminated.

The Proposal goes far beyond the Reg. BI framework in several key ways:

- It requires broker-dealers to "make all reasonable efforts to avoid or eliminate conflicts of interest." Reg. BI does not include any similar requirement to "make all reasonable efforts". Perhaps more importantly. the Proposal provides no guidance on what "all reasonable efforts" might consist of. "Reasonable" is always in the eye of the beholder, and without further explanation, this is nothing more than a recipe for ongoing confusion for both investors and broker-dealers.

- It requires broker-dealers to "neutralize" conflicts of interest to reduce the potential for harm or adverse impact to customers. This raises several issues, both semantic and practical:

  - The concept of eliminating conflicts is novel and unworkable in this context, but at least it is capable of interpretation. We cannot say the same with respect to "neutralization". Indeed, we are unable to locate other instances in which the term "neutralize" appears, much less describe what it entails.

  - "Reducing the potential for harm or adverse impact to the customer" are equally amorphous and difficult to interpret. With the benefit of hindsight, the manner in which any conflict of interest was managed can always be criticized. Unfortunately, conflict management must be conducted in the present, not based on hindsight. This standard is completely unworkable.

C. Subpart 1d(2)b. – Conflicts of Interest – Presumption That Certain Revenue Sources are Presumed Not to be in the Best Interest of the Customer

On an initial reading, the thrust of this provision is to create a presumption that participation in practices generally referred to as "sales contests" would not be in the best interest of the customer. With this, we heartily agree. Sales contests create incentives for agents that are difficult to manage, have a high potential for harm to customers, and do not legitimately further the interests of customers, broker-dealers,

or agents. Reg. BI essentially prohibits only one sales practice, and this is it. FINRA has long had rules limiting the ability of member firms to participate in sales contest, and we do not believe that many people in the industry publicly defend them.

If it was the intention of the drafters to provide that broker-dealers and agents would not be acting in the best interest of their customers by participating in sales contests, the Proposal should simply say so and stop. Sales contests and any compensation that is received in connection with them, including sales commissions, are not consistent with the best interest of the customer. However, in its current form, it is not clear that this subpart is intended to be limited to compensation received in connection with sales contests. The accompanying text speaks in broad terms about the imagined evils inherent in other forms of compensation to broker-dealers, even providing a laundry list of offensive revenue sources. When read in context, this provision could be interpreted to provide that broker-dealers and agents receiving compensation other than selling commissions would **always** be deemed not to be acting in the best interest of the customer whether the compensation was received in connection with a sales contest or not. If this was not the intent, his provision should be clarified to provide that activities that are functionally equivalent to sales contests are deemed not to be in the best interest of the customer. The rest of the text is superfluous and only creates confusion.

If, on the other hand, it was the intention of the drafters to apply this presumption more broadly to state that receipt of other compensation under any circumstances would not be in the best interest of the customer, this is a very different issue. Such a provision would fundamentally change the basic economics of broker-dealers, many of whom receive payments other than selling commissions in connection with customer purchases, sales, and holdings of investment products.

At most broker-dealers, individual financial professionals receive a portion of the selling commission in commission with a transaction and the firm retains the balance. However, broker-dealers also receive other sources of revenue, including payments from investment product sponsors based on sales and assets under management at the product sponsor (generally referred to as "revenue-sharing"), payments to defray the cost of advertising and education of customers and agents ("marketing assistance"), and markups and markdowns on principal trading conducted with customers. In addition, individual agents often receive loans or other financial consideration from the broker-dealer when joining the firm (recruiting loans, bonuses, and other transition assistance payments), and marketing assistance payments from sponsors in connection with events for customers and prospective customers.

Broker-dealers have established economic models, and anything that limits their ability to receive payments in addition to selling commissions will require dramatic adjustments to their cost structure, fees and charges to customers, and compensation arrangements with agents. Perhaps more importantly, such a provision suggests that

ancillary revenues are somehow nefarious and bad for customers. We note the following:

- Reg. BI includes extensive discussions about compensation arrangements between investment product sponsors, broker-dealers, and agents. It specifically recognizes the existence of these arrangements and considers in depth how the conflicts of interest they create should be managed. It is interesting to note that the SEC generally concluded that since the conflict of interest created by practices such as revenue-sharing and marketing reimbursements occur that the firm level as opposed to at the agent level, disclosure would often be the most effective method for managing them. For the Proposal to even suggest that the receipt of ancillary payments should be presumed not to be in the best interest of the customer in any circumstances other than in connection with sales contests flies directly in the face of Reg. BI.

- ERISA applies to certain recommendations made to investors to purchase or sell securities or engage in investment strategies in retirement plans. ERISA has been said to create the "highest form of fiduciary duty" to investors. Despite that elevated standard, receipt of virtually all forms of compensation are specifically sanctioned under ERISA and the Prohibited Transaction Exemptions that allow providers of investment advice to receive compensation in connection with investment recommendations.[5] For the Proposal to even suggest otherwise completely ignores common and longstanding business practices.

D. Subpart 1(d)3 – The Standard of Care, Skill, and Diligence

This subpart would require that the broker-dealer or agent exercise the "care, skill, and diligence that a person acting in a like capacity would use". On the surface, this seems innocuous enough. However, it departs notably from the Care Obligation in Reg. BI, which specifies that the firm and agent shall:

> "*Exercise 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.*"

[5] See, for example, ERISA Prohibited Transaction Exemption 2020-02.

The Proposal deviates significantly from the Reg BI "reasonable diligence" standard, instead applying a different "person acting in a like capacity" approach. The latter is much more similar to the prudence standard associated with the duty of fiduciaries under ERISA than to that in Reg. BI. When adopting Reg BI, the SEC specifically considered and rejected a prudence standard, opting instead to require "reasonable diligence, care, and skill". The Commission concluded that the inclusion of a prudence standard "creates legal uncertainty and confusion, and it is redundant of what [the Commission] intended in requiring a broker-dealer to exercise 'diligence, care, and skill."[6]

In addition to the SEC's approach in adopting Reg. BI, the law of most states does not apply a fiduciary standard to recommendations from broker-dealers and agents to customers. At a minimum, the Proposal creates potential for inconsistency with Reg. BI. Multiple standards applicable to the same conduct performed by the same actors creates confusion for investors and broker-dealers and makes compliance extraordinarily difficult. This provision should be deleted.

E. Subpart 1(d)(3)a.2. - Facts and Circumstances to be Considered by the Broker-Dealer in Making Recommendations

This provision would require that broker-dealers and agents consider "securities and investment strategies that can achieve the customer's objectives with "less risk or less cost". This may sound similar to the Reg. BI standard, but it omits important elements. Reg. BI requires that the agent compare the recommended investment or investment strategy to the "reasonably available alternatives", considering objective factors including expected return, relative risk, and cost. The formulation in the Proposal deviates from this by elevating cost and risk without consideration of other factors, particularly expected return. One of the foundational elements of Reg. BI is its recognition that every investor and their circumstances are different, and that one size does not fit all. The duty to compare reasonably available alternatives to any investment recommendation requires that the broker-dealer or agent consider all of these factors in weights that depend on the subjective needs and desires of the customer. The formulation in the Proposal slants this analysis in an unjustified way.

The explicit requirement to consider investments with less risk or lower cost could also create an obligation for agents to consider investments or investment strategies that are not available to them. It is a standard practice for broker-dealers to establish "approved product" lists and require that agents recommend only securities that appear on that list. This provision could be interpreted to require agents to consider investments that they are not allowed to offer. Similar to the situation created by Subpart (1)d(3)b (discussed in more detail below), this creates unresolvable dilemmas for both the firm and the agent.

[6] 84 FR 33372.

F. Subpart 1d(3)a4. - "Any Other Relevant Information"

Reg. BI and FINRA rules establish what is referred to as the "customer profile". It is a foundational element, and generally requires the broker-dealer or agent to obtain and consider a number of specific items of information before making recommendations to a customer.[7] The customer profile include elements such as the customer's age, investing experience, risk tolerance, and liquidity needs, in addition to others. The important point is that all of the elements are specified. There is no "catch-all" provision such as that in the Proposal requiring the broker-dealer or agent to consider "all other relevant information."

Many of the concepts in the BPR require interpretation. It deals with subjects that do not always lend themselves to simple explanations and a certain amount of uncertainty is to be expected. We suggest, however, that any term such as "all other relevant information" is so broad and amorphous as to be incapable of consistent interpretation by either broker-dealers or customers. The information required by FINRA to be included in the customer profile has been standardized and worked effectively for investors for nearly15 years. There is no reason to change it now.

G. Subpart 1d(3)b – Products and Services Furnished by Agents in Other Capacities

The Proposal would require that the broker-dealer or agent make reasonable inquiry regarding lower-cost and lower-risk securities and investment strategies that are available to the agent if they also are engaged in other businesses such as investment advisers or insurance agents. This raises many of the issues noted above, specifically elevating costs and risk over other factors relevant to investment recommendations. In addition, it would effectively create an unmanageable supervisory obligation for broker-dealers that have agents who conduct business away from the broker-dealer as investment advisers, insurance agents, or otherwise.

Under existing regulations and the law of most states, individual agents are permitted to conduct business activities away from the broker-dealer, and commonly do so. With limited exceptions relating to activities conducted through unaffiliated investment advisers, broker-dealers do not supervise activities conducted through these other entities. FINRA rules require agents to notify broker-dealers of activities conducted for profit through other firms (generally referred to as "Outside Business Activities" or "OBAs"), but so long as they do not involve recommendations to purchase securities, the broker-dealer is under no obligation to supervise the OBA or even know the products or services that the agent may offer or have available.

Consider the following example: An agent of a broker-dealer also offers non-security investment products such as fixed and fixed-indexed annuities through an Insurance

[7] See, for example, FINRA Rules 2090 and 2111 and FINRA Regulatory Notice 11-02.

Marketing Organization ("IMO") or entity other than the broker-dealer. The Proposal would require the agent to consider other investment products or services that they may offer in their capacity as insurance agents when making a recommendation to purchase an investment or pursue an investment strategy through the broker-dealer, but the broker-dealer would not know which products were available through the other firm. It is completely unrealistic to expect the broker-dealer to perform oversight or supervision of investment recommendations under those circumstances.

This provision creates a very slippery slope for both broker-dealers and agents. However, there is an easy way to solve it. If the drafters feel it necessary to expand the universe of investment products that must be considered by an agent to include those offered through firms not affiliated with the broker-dealer, this provision should be revised to specifically state that broker-dealers are under no obligation to be aware of or participate in the comparison of products or services that are not offered through them.

H. Subpart 1d(4) – Costs Associated with Investment Recommendations

The Care obligation in Reg. BI requires that broker-dealers and agents consider reasonably available alternatives to investments that they recommend, based on objective criteria such as expected return, relative risk, and costs. For this purpose, the cost of an investment includes all expenses that a customer would incur as a direct result of purchasing and holding it. This includes selling commissions and ongoing charges such as 12b-1 fees, as well as management fees for investment products such as mutual funds and similar pooled investment vehicles. Other investment products such as variable annuities and variable insurance products include charges for items such as death benefits, policy-related fees, and specific policy options referred to as "riders".

The common thread is that all of these costs are directly related to the purchase and ownership of the security. However, Subpart 1d(4)a would go far beyond this and require the firm and agent to also consider other "costs" that have absolutely nothing to do with the recommended investment or strategy. These include account fees, costs arising from tax considerations, and costs associated with payments for order flow and cash sweep programs. This creates a number of problems:

- Revenue derived by broker-dealers from arrangements such as such as cash sweep programs are not "costs" to customers. They are features of accounts that many firms provide. They are offered for the convenience of the customer, who may elect to utilize them or not.

- The categories of costs which could potentially be borne by the customer is broad and not capable of easy categorization. More importantly, costs and other account features change constantly. Under the regime set forth in the Proposal, broker-dealers would be required to assume a hypothetical holding period for an investor,

apply all manner of items that may or may not even be "costs", and consider them in formulating the recommendation. This is an invitation to speculate on things that cannot easily be determined and is much more likely to create confusion than enlightenment for investors.

In 2016, the Department of Labor ("DOL") adopted what has become known as the Fiduciary Rule. It has since been invalidated by an appellate court decision, but in an early version, it included a requirement that the broker-dealer consider and disclose to customers all costs associated with an investment recommendation. Upon further consideration, the DOL abandoned this concept as impractical. The drafters of the Proposal should consider the experience of the DOL and do the same.

I. Subpart 1(d)5 – Definition of the Term "Recommendation"

Portions of the Proposal diverge dramatically from Reg. BI, but Subpart 1(d)5 leaves them all behind in its sheer audacity. It states that the BPR does not to apply to unsolicited transactions, but pushes boldly forward to proclaim that:

> "If the broker-dealer or agent utilized **any means, method, or mechanism to feature or promote** an account type, specific security, or investment strategy to a retail customer, **whether directly or through a third party,** then that transaction will not be deemed an unsolicited transaction, but rather will be deemed a recommendation to which all of the foregoing obligations set forth in this section apply." [Emphasis added]

This provision obliterates the provisions of Reg. BI, FINRA rules, and 75 years of applicable law to create a regime in which any form of communication to any individual or group of individuals may be deemed a recommendation, regardless of whether or not it was not made by the firm or agent, and whether or not the individual receiving the communication was even an intended recipient. Dramatic stuff, to say the least.

The scope of what constitutes a "recommendation" is one of the fundamental concepts in Reg. BI. It requires that the customer undertake an investment transaction or strategy in reliance on the advice of the financial professional. The obligations in Reg. BI do not attach unless the communication has been made to the customer with the intent that they rely upon it. This has been referred to as the "call to action" to the customer, and has been an integral part of the rules applicable to suitability and best interest for more than 75 years. The Proposal would expand the field of covered activities to all manner of communications to customers and prospective customers, whether or not the communication is particularized or directed to any particular individual.

This vast expansion creates at least three major substantive problems:

- With respect to any communication that is not delivered in person by the agent, there is no way for the firm or the agent to know who received it or even who originated it. Particularly with respect to communications such as advertising, public-facing websites and social media posts, and third-party endorsements, the sender of the communication would have no idea if any given individual received it. This would produce an environment in which customers or prospective customers would have an incentive to look back at communications attributed to broker-dealers or agents and allege that they were recommendations on which the customer relied in making an investment whether or not they actually did so.

- Even assuming that the firm or agent knows who received the communication, determining the subjective interpretation of the recipient would be literally impossible. In the current framework, a recommendation is usually delivered by the agent directly to the customer. It includes detail, context, and an opportunity for the customer to ask questions. The approach taken by the Proposal does not give the broker-dealer or agent an opportunity to assess whether or not the customer or prospective customer might consider it something they would rely on in making an investment decision.

- Customers or prospective customers who receive communications that are not individualized and not specifically directed to them should not legitimately expect to be the beneficiaries of all of the regulatory obligations placed on broker-dealers and agents in the BPR. This is not merely an academic or speculative concern. The BPR, Reg. BI, and FINRA rules all mandate a level of specificity and a call to action to the customer for a reason: These regulations require the broker-dealer to know the customer and their circumstances before making recommendations. The customer is generally entitled to feel comfortable that the person making the recommendation has assumed these responsibilities and is acting in their best interest if they have some level of pre-existing connection with the broker-dealer or agent. Absent such a connection and the information that comes with it, the agent cannot be expected to meet the obligations set forth in the Proposal.

In general, regulatory agencies have considerable leeway in defining terms and applications in their regulations, but it is not unlimited. There comes a point where the agency ceases to define a term and effectively creates an entirely new concept. Securities regulators do not have jurisdiction over all activities conducted by broker-dealers. Such jurisdiction must be reasonably derived from the text of the statutes granting them authority, which in this case is recommendations to purchase securities or engage in investment strategies. Administrative agencies do not have the ability to create jurisdiction covering activities that are clearly beyond their statutory mandate out of thin air. We cannot recall a clearer example than this.

The terms “recommendation” and “call to action” are objective and well-understood concepts. Rejecting them in favor of subjective and vague terms such as “means, method, or mechanism” would be inconsistent with historical precedent, create significant challenges for the establishment and implementation of effective compliance policies and procedures, and likely produce different results for different investors based solely on what they could allege with the benefit of hindsight. This is severely misguided and should be removed from the Proposal.

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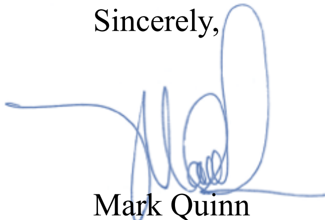
Thank you for this opportunity to share our views on this important matter. If we can offer any additional assistance or provide further information, please let me know.

Sincerely,



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