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Making Advisers' Voices Heard on Capitol Hill

SEC Adoption of Final Standards of Conduct Rules Package

After two decades of deliberations, the SEC on June 5 issued its Standards of Conduct rulemaking package, which is intended to raise the standard of conduct for broker-dealers, reaffirm the fiduciary duty under the Advisers Act, and reduce investor confusion as to the services offered by and standards applicable to their financial professional. The IAA has long advocated that all financial professionals who provide investment advice about securities to clients should be required to act pursuant to fiduciary principles. While we continue to absorb and analyze the 1,400 page package, we offer the following observations:

Regulation Best Interest

The centerpiece of the package, Regulation Best Interest includes some improved investor protection measures for customers of broker-dealers. Reg BI applies to the moment that a transaction is recommended, while the fiduciary duty applies throughout an adviser's relationship with its clients. Because of this and other differences, it is critical that customers understand whether they are hiring an adviser or a broker and whether they are receiving ongoing services. We are pleased that the Commission has, in essence, prohibited standalone brokerage firms and representatives from using the terms "adviser" and "advisor." While the Commission did not go as far as we wanted with respect to the titles, as well as brokers "holding out" as advisers, the Commission has emphasized that brokers should take care in their marketing materials to not hold themselves out in a misleading manner. We will have to see how these provisions are implemented over time and whether the changes to Reg BI truly alleviate — or exacerbate — investor confusion.

Form CRS – Relationship Summary Document

Because investment advisers already provide full and fair disclosure in Form ADV regarding their services, fees, compensation, conflicts of interest, and disciplinary history, we did not believe additional disclosure was necessary for advisers. However, we commend the Commission for requiring new disclosures for brokers and also for addressing a number of serious concerns regarding the relationship summary document that will be provided to clients and customers. The revised form is a significant improvement from the proposal and we will work with our members as they implement the requirement.

Investment Advisers' Fiduciary Duty

The IAA has steadfastly maintained that a new interpretation of the Investment Advisers Act fiduciary duty is unnecessary because that duty is widely understood and established in law, regulation, and professional practice. We are pleased that the final interpretation reaffirms the special relationship of trust and confidence an adviser has with its clients. As fiduciaries, investment advisers have an overarching duty to act in clients' best interests, as well as the affirmative duties of care and loyalty. Investment advisers must make full and fair disclosure of their conflicts of interest and ensure that their conflicts do not taint their advice. These standards — affirmed by the Commission — have served investors, the capital markets, the economy, and our profession well for decades and will continue to do so.

Interpretation of "Solely Incidental"

We have concerns regarding the Commission's interpretation of the "solely incidental" exclusion for broker-dealers from the definition of investment adviser. While the Commission has confirmed its earlier position that ongoing discretionary advice cannot be solely incidental to the business of a broker-dealer, the Commission's general definition of "solely incidental" is so broad that it is logically at odds with the word "solely." The Commission should have taken this opportunity to more clearly delineate the essential differences between brokerage activities and advisory activities and further address investor confusion. The Commission has invited comment on this interpretation and we will engage with the SEC on this important issue.

Conclusion

It will take time to fully explore all aspects of this rulemaking package. However, it appears to be a thoughtful, if modest, step toward improved investor protection. Unfortunately, the rulemaking is not likely to resolve investor confusion about the financial services marketplace, especially in light of the Commission's narrow reading of activities that are "solely incidental." We will continue to educate policymakers and the public about the key differences between brokers and advisers and the services they provide.

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