On April 18, 2018, the U.S. Securities and Exchange Commission (SEC) released for comment three proposals intended to enhance the standard of conduct for investment professionals and to reaffirm and clarify the terms of existing relationships between investors and investment professionals. The proposals represent a significant milestone for the SEC under Chairman Jay Clayton because the possibility of similar proposals has been discussed for more than two decades. The Commissioners’ comments on the proposals were less than harmonious and identify significant issues. Moreover, while the request for comment facilitates the dialogue around the disclosure of conflicts of interest and defining relationships between investors and investment professionals, the proposals are not well defined and lack clarity.

The SEC issued for comment the following three proposals:

- **Regulation Best Interest** — a new rule that would require broker-dealers and associated persons to act in the best interest of a retail customer when recommending a securities transaction or investment strategy involving securities to a retail customer. The proposal would require broker-dealers to act without placing the financial or other interests of the broker-dealer or associated person ahead of the customer when making an investment recommendation.

- **Investment Adviser Interpretation** — an interpretation of the fiduciary standard of conduct for investment advisers, including a duty of care and a duty of loyalty. The SEC also requested comment on proposals that would require licensing and continuing education requirements for personnel of SEC-registered investment advisers; delivery of account statements to clients with investment advisory accounts; and new financial responsibility requirements for SEC-registered investment advisers.

- **Form CRS/Relationship Summary** — a new rule that would require broker-dealers and registered investment advisers to provide a brief relationship summary to investors at the beginning of a relationship and in connection with any material changes. The summary would address the relationships and services the firm offers, the standard of conduct and the fees and costs of the services, specified conflicts of interest and whether the firm and its financial professionals have reportable legal or disciplinary events.

This Update provides an overview of the nearly 1,000 pages of the proposal releases.
Regulation Best Interest Proposal

Regulation Best Interest

The SEC proposed “Regulation Best Interest,” which would require that broker-dealers, and their associated persons who are natural persons, act in the best interest of the retail customer at the time a recommendation is made without placing the financial or other interest of the broker-dealer or natural person who is an associated person making the recommendation ahead of the interest of the retail customer.” This obligation would be satisfied if the broker-dealer does all of the following:

- Reasonably discloses, in writing, to the retail investor the material facts both with regard to the scope and terms of their relationship and with respect to any specific investment recommendation (Disclosure Obligation).
- Exercises reasonable diligence, care, skill, and prudence with regard to the broker-dealer’s recommendations (Care Obligation).
- Establishes and maintains conflict of interest policies that, at a minimum, (1) disclose, or eliminate, all material conflicts of interest associated with the recommendation and (2) disclose and mitigate, or eliminate, material conflicts arising from financial incentives associated with the recommendation (Conflict of Interest Obligations).

Under the proposal, a “retail customer” is defined 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.”

Considerations for Investment Professionals: Unlike the existing suitability obligations under self-regulatory organization rules, the best interest standard would not apply to any recommendations that are related to business or commercial purposes. The proposal notes that an account opened for a non-natural person can still be treated as a “retail customer” if a broker-dealer makes recommendations “primarily for personal, family, or household purposes.” It is unclear how

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2 The SEC proposed to define “natural person who is an associated person” as a natural person who is an associated person under Section 3(a)(18) of the Exchange Act: “any partner, officer, 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 ....” See Regulation Best Interest Proposal at 71–72.

3 The term “recommendation” is not defined. Instead, the SEC proposed that it be interpreted consistently with “factors that have historically been considered in the context of broker-dealer suitability obligations[, which] 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 …’ as well as to activity that has been interpreted as ‘implicit recommendations.’ ” See Regulation Best Interest Proposal at 74–75.

4 See Regulation Best Interest Proposal at 83–84. The SEC proposes to extend the Section 913 definition beyond natural person to “any persons,” provided the recommendation is primarily for personal, family or household purposes. For example, this would cover non-natural persons (such as trusts that represent the assets of a person).
broadly this would be defined; for example, it could pick up family investment vehicles or, theoretically, business accounts of closely held family companies that are investing the family’s assets. There is also no carve-out for very wealthy and sophisticated individuals, apparently even if represented by an investment adviser, bank trust department or family office.

Though four SEC Commissioners voted to propose Regulation Best Interest, the Commissioners indicated that in its current form, the proposed regulation would not garner enough votes for adoption. One of the issues that some Commissioners identified is the lack of a clear definition of the term “best interest.” Commissioner Kara Stein, for example, stated:

So what does the proposed rule do? Let’s start with its name — Regulation Best Interest. This name implies that when broker-dealers give advice they will be required to put their customers’ interests ahead of their own. Unfortunately, this is not the case under today’s proposal. Despite repeated requests to define what best interest means in the rule text, it was decided that there was no need to define it.

Regulation Best Interest does not define what it means to “act in the best interest” of a customer; rather, the SEC believes that it will turn on the facts and circumstances of a broker-dealer’s recommendation to a particular retail client and how the components of the rule are satisfied.

The Disclosure Obligation

The broker-dealer or associated person must, “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 and all material conflicts of interest associated with the recommendation.” As such, under Regulation Best Interest, broker-dealers would provide retail customers with two sets of written disclosures:

- A short, four page, high-level relationship summary (Relationship Summary, as discussed further below).
- A more specific and comprehensive disclosure reflecting (1) detailed fees relevant “to the recommendation to the retail customer and the particular brokerage account for which recommendations are made” and (2) “all material conflicts of interest related to the recommendation to the retail customer.”

The SEC indicated that “material facts” should include disclosure as to the capacity in which the broker-dealer is acting when making the recommendation, applicable fees and charges, type of services provided by the broker-dealer, and all material conflicts of interest associated with such recommendation. The term “material conflict of interest” is not defined in the proposal. The SEC indicated that it proposes to

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6 See Statement of Commissioner Stein, supra note 5.

7 See Regulation Best Interest Proposal at 52.

8 See id. at 97.

9 See id. at 101–103.
interpret “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.”\(^\text{10}\) The SEC at least conceded that the obligation to disclose material conflicts of interest does not require disclosure of "any conflicts of interest' that a broker-dealer may have with the retail customer.”\(^\text{11}\) The SEC did not provide specific guidance on how to interpret materiality in this context, referring generically to case law under the antifraud provisions.

The Disclosure Obligation requires that the disclosure be provided prior to or at the time of the recommendation. A broker-dealer would therefore have to provide disclosure of each material conflict of interest before making an initial recommendation. While there is no obligation to provide updated disclosures with each new transaction, because the Disclosure Obligation is product-specific, a broker-dealer would have to make a new disclosure each time a new product is sold to the client. Disclosure in a trade confirmation would not meet the “prior to or at the time of” standard; the release suggests that during a telephone call, the broker-dealer would have to send the client an email to meet the "in writing" standard for specific investment recommendations.

**Considerations for Investment Professionals:** While the Disclosure Obligation requires that a broker-dealer or associated person provide “reasonable” written disclosure prior to or at the time of a recommendation, it is up for discussion what concrete disclosures a broker-dealer or associated person must actually make. Furthermore, the standards for what constitutes a “material conflict of interest” are quite broad and seem to require an understanding of the unconscious motivations of a broker-dealer in making a recommendation. The SEC did not provide many limiting principals for what should be considered “material” in this context.

Because the Disclosure Obligation requires a broker-dealer to provide a written disclosure prior to making a recommendation (i.e., a verbal disclosure is insufficient), this new approach to disclosure may have a significant impact on the services offered by, and utility of, call centers operated by broker-dealers to provide recommendations to clients over the phone.

**The Care Obligation**

Under the Care Obligation, broker-dealers or associated persons must exercise reasonable diligence, care, skill and prudence\(^\text{12}\) to:

- 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.
- 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.
- 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.\(^\text{13}\)

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\(^\text{10}\) See id. at 110.

\(^\text{11}\) See id. at 111.

\(^\text{12}\) The SEC believes the term “prudence” conveys the fundamental importance of conducting a proper evaluation of any securities recommendation in accordance with an objective standard of care. However, the SEC seeks comments on whether the term is adequate in the context of Regulation Best Interest.

\(^\text{13}\) See Regulation Best Interest Proposal at 133.
These components are intended to require that broker-dealers or associated persons have a reasonable basis to believe that recommendations are in the best interest of a particular retail customer rather than based on the broker-dealer or associated person’s financial or other interests. The proposal states that this would result in recommendations that "is in the 'best interest' of (rather than 'suitable for') the retail customer." However, the standard apparently does not expressly require that the recommendation be the "best possible" choice for the customer. While the best interest standard is not the same as the fiduciary standard applicable to investment advisers, the SEC noted that the proposed Care Obligation "is designed to be similar to the standard of conduct that has been imposed on broker-dealers found to be acting in a fiduciary capacity."15

In determining whether the Care Obligation has been met, the SEC would look at the facts and circumstances of a given situation and the importance of each factor as applied to a particular recommendation.

Considerations for Investment Professionals: Disclosure alone will not meet the obligations under the Care Obligation. For example, a firm that sells a proprietary product that is identical to a lower-cost equivalent nonproprietary product cannot meet the obligation simply by disclosing that there may be lower-priced versions of the product on the market. This is likely to put further pressure on the pricing of proprietary products and limit the ability of large broker-dealers to create proprietary products.

**The Conflict of Interest Obligations**

The proposed Conflict of Interest Obligations would require a broker-dealer to "establish, maintain and enforce written policies and procedures reasonably designed to:

1. identify and at a minimum disclose, or eliminate, all material conflicts of interest associated with the recommendation; and

2. identify and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with the recommendation."18

Considerations for Investment Professionals: The proposal raises questions with regard to how broker-dealers can manage the potential conflicts involved not only with sales contests but also in setting production quotas and providing recruiting incentives, taking compensation from third parties (for example, the manager of a sponsored product) and managing unrelated business lines (for example, subaccounting or administrative services provided to a mutual fund). It is yet to be

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14 See id. at 142.

15 See id. at 134.

16 Factors that should be considered include the costs and financial incentives associated with a recommendation as well as the product’s or strategy’s investment objectives, characteristics, liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions. See id. at 147–148.

17 “Financial incentives” includes but is not limited to compensation practices; employee compensation or employment incentives; compensation practices involving third parties, including compensation to the broker-dealer for providing services to third parties, even if unrelated to the relevant recommendation; receipt of commissions or sales charges, 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; and transactions that would be effected by the broker-dealer in a principal capacity. See id. at 169.

18 See id. at 112; see also id. at 166–167.
determined how conflicts will be reasonably managed by broker-dealers that are part of large, integrated financial institutions.

The SEC made clear, however, that Regulation Best Interest would not per se prohibit a firm from selling complex products (for example, structured products, hedge funds, private equity funds and other alternative investments). These products have historically been subject to enhanced suitability and disclosure requirements and are likely to be a key focus under Regulation Best Interest. Under Regulation Best Interest, a firm would need to continue to meet these requirements, as well as confirm that it did not have any conflicts in structuring or offering these products that would undermine the value of the investment or make it unsuitable. It would seem to be difficult (if not impossible) for a firm to recommend a proprietary product that was identical but more expensive than a third-party version.

The proposed Conflict of Interest Obligations would apply only to the broker or dealer entity and not to the natural persons associated with the broker-dealer. Further, the facts and circumstances test would also apply to the Conflict of Interest Obligations. While there is no “one size fits all” framework, the SEC believes that it would be reasonable for a broker-dealer to use and implement a risk-based compliance and supervisory system as a method for ensuring compliance with Regulation Best Interest. It is possible that the SEC could cite a broker-dealer for a deficient compliance and supervisory system even if the broker-dealer could prove that no retail customer suffered any harm.

In connection with Regulation Best Interest, the SEC also proposes to amend Rule 17a-3 under the Securities Exchange Act of 1934 (Exchange Act) to require broker-dealers to retain all the information collected from or provided to each retail customer pursuant to Regulation Best Interest for six years.

Revival of SEC Proposal Regarding Exercise of Discretion

The proposal requests comment on an interpretive rule to exclude from the Investment Advisers Act of 1940 (Advisers Act) a broker-dealer that provides limited discretionary investment advice considered solely incidental to the conduct of its business as a broker-dealer. The SEC previously proposed but did not adopt a similar interpretive rule in 2007.

Proposed Investment Adviser Interpretation

Proposed Interpretation of the Investment Adviser Standard of Conduct

The SEC requested comment on a proposed interpretive release that would clarify the SEC’s views on registered investment advisers’ fiduciary duty under the Advisers Act. While the SEC’s proposed interpretive release does not appear to differ significantly from its previous statements on the federal fiduciary standard, it provides further insight into the SEC’s interpretation of the fiduciary standard and on investment advisers’ obligation to act in the best interest of their clients.

19 See id. at 53.
20 See id. at 196–199.
22 Other regulators, including the U.S. Department of Labor and other federal agencies, as well as state regulators, may impose different standards than those imposed and enforced by the SEC. See id. at 8, n. 22.
23 The interpretations discussed in the release apply generally to SEC-registered investment advisers, including automated advisers (known as robo-advisers). See id. at 9, n. 23.
**Duty of Care**

According to the proposal:

- An investment adviser has a duty to provide advice that it reasonably believes is suitable for the client and in the client's best interest,\(^{24}\) including a duty to make a reasonable inquiry into, and periodically update, a client's investment profile.\(^{25}\) This duty also includes an obligation to reasonably investigate an investment opportunity before recommending it to a client.\(^{26}\)
- Where an investment adviser has the responsibility to select broker-dealers to execute client trades, it has a duty to seek best execution of a client's transactions.\(^{27}\) This duty includes "periodically and systematically" evaluating the execution the adviser is receiving for the client.\(^{28}\)
- Particularly where an investment adviser and client have a continuing relationship, the investment adviser has a duty to provide ongoing advice and monitoring of the client's account(s) over the course of the relationship at a frequency that is in the best interest of the client and consistent with the scope agreed to by the client and the adviser.\(^{29}\)

Importantly, the SEC indicated that the scope of advisory services included in a client-adviser relationship can be contractually tailored to fit the needs of the specific arrangement, so long as any such adjustments do not seek to waive the fiduciary aspect of the relationship.\(^{30}\)

**Considerations for Investment Professionals:** The SEC's position that an investment adviser has a duty to provide ongoing advice and monitoring is especially significant given the SEC's recent focus on "wrap fee" programs.\(^{31}\) In light of the SEC's position, an investment adviser should obtain explicit acknowledgements from a client in the advisory contract in circumstances where the adviser will not engage in ongoing, continuous monitoring of client accounts. Advisers may

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\(^{24}\) See id. at 11.

\(^{25}\) See id. at 10–11. This obligation would not apply in the case of a one-time financial plan or other investment advice that is not provided on an ongoing basis. Id. at 10, n. 28.

\(^{26}\) See id. at 12–13. However, there are several ways by which an investment adviser may meet the requirement that an investment be in the best interest of the client. The SEC expressly noted that "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 high fees if other factors about the fund, such as its diversification and potential performance benefits, cause [the investment] to be in the client’s best interest."

\(^{27}\) See id. at 13.

\(^{28}\) See id. at 14.

\(^{29}\) See id. at 14–15.

\(^{30}\) See id. at 15 (“[T]he steps needed to fulfill [the duty of care] may be relatively circumscribed for the adviser and client that have agreed to a relationship of limited duration via contract (for example, a financial planning relationship where the adviser is compensated with a fixed, one-time fee commensurate with the discrete, limited-duration nature of the advice provided.’’); see also id., at 8 (“The [federal fiduciary] duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship through contract when the client receives full and fair disclosure and provides informed consent. Although the ability to tailor the terms means that the application of the fiduciary duty will vary with the terms of the relationship, the relationship in all cases remains that of a fiduciary to a client.”) (citations omitted).

\(^{31}\) See SEC 2018 National Exam Program Examination Priorities (Feb. 7, 2018), available here.
seek to expressly delimit their obligations under the advisory contract but will have to tailor such limitations to avoid any provision that could be deemed a waiver of their fiduciary obligations.

Duty of Loyalty

According to the proposal:

- An investment adviser has a duty to put the interests of its clients above its own interests and to treat all clients fairly and equitably. 32
- An investment adviser must make “full and fair disclosure” to its clients of all material facts relating to the advisory relationship, including all material conflicts of interest that could affect the client-adviser relationship.33
- Where a conflict exists, the client must provide informed consent that is sufficient based on the facts and circumstances of the conflict being disclosed.34

Proposed Enhancements to Investment Adviser Regulations

The SEC requested comment on three possible enhancements to registered investment advisers’ legal obligations under the Advisers Act. The enhancements are designed to create investor protections applicable to investment advisers that are consistent with those already in effect under the current broker-dealer framework:

Federal Licensing and Continuing Education
- The SEC is seeking comment on whether to establish federal licensing and continuing education requirements for personnel of investment advisers designed to address minimum and ongoing competency requirements similar to those required of investment adviser representatives under most state laws as well as of registered broker-dealers under the regulatory structure of the Financial Industry Regulatory Authority (FINRA).35

Provision of Account Statements
- While recognizing that many investment advisers already provide some form of account statement to clients, the SEC is seeking comment on whether to require delivery of periodic account statements specifying the dollar amounts of fees and expenses to clients with investment advisory accounts, similar to the detailed transaction confirmations and account statements provided to clients by broker-dealers.36 The SEC is considering whether to require advisers to provide account statements regardless of whether the adviser is deemed to have custody of client assets under Advisers Act Rule 206(4)-2 or the adviser is a sponsor (or a designee of a sponsor) of a managed account program relying on the safe harbor in Rule 3a-4 under the Investment Company Act of 1940 (Investment Company Act).37

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32 See id. at 16–17.

33 See id. at 15 (citing “Amendments to Form ADV,” Investment Advisers Act Release No. 3060 (July 28, 2010)).

34 See id. at 17–18.

35 See id. at 28–29. SEC Staff recommended in a 2011 study that the SEC consider imposing federal continuing education and licensing requirements on investment adviser representatives. See id. at 28 (citing Staff of the SEC, “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 here.

36 See id. at 31–32.

37 See id. at 32–33. The SEC noted that Advisers Act Rule 206(4)-2(a)(3) requires investment advisers with custody of a client’s assets to have a reasonable basis for believing that the qualified custodian is sending an account
Financial Responsibility

- The SEC is seeking comment on new financial responsibility requirements for investment advisers along the lines of those that apply to broker-dealers, such as net capital requirements similar to those imposed under Exchange Act Rule 15c3-1, customer asset segregation requirements similar to those imposed under Exchange Act Rule 15c3-3 and/or a fidelity bond requirement similar to that imposed by FINRA under FINRA Rule 4360.

However, the SEC did not formally propose rules on any of these concepts; to move forward, it would have to issue a separate proposing release.

Considerations for Investment Professionals: These concepts likely are subject to change given the reservations expressed by some Commissioners. Nevertheless, investment advisers should consider the potential effect of these possible requirements on employees and business operations as well as their financial implications.

Form CRS Proposal and Related Disclosures

Form CRS

The Form CRS Proposal would require registered investment advisers and registered broker-dealers to deliver a relationship summary (Relationship Summary) to retail investors. For investment advisers, delivery of the Relationship Summary would be required before or at the time the firm enters into an investment advisory agreement with the retail investor. For broker-dealers, delivery would need to occur before or at the time the retail investor first engages the firm’s services. The Relationship Summary would be limited to four pages (or equivalent limit if in electronic format) containing eight sections, as described below. The Relationship Summary in Form CRS would be in addition to, and not in lieu of, current disclosure and reporting requirements for broker-dealers and investment advisers.

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statement to the client at least quarterly. See id. at 32, n. 73. Separately managed account programs relying on Rule 3a-4 under the Investment Company Act are required to ensure that the program sponsor (or sponsor’s designee) provides clients statements containing specified information at least quarterly. Id. at 32–33.

38 See id. at 33–34. These additional financial requirements are intended, in part, to compensate clients in the event of investment adviser fraud or bankruptcy. See id. at 34–35 (describing, e.g., the protections offered to the clients of broker-dealers by the Securities Investor Protection Corporation (SIPC)).

39 See supra note 5.

40 “Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles,” Exchange Act Release No. 34-83063 (April 18, 2018), available here (Form CRS Proposal).

41 For investment advisers, Form CRS would be required by Form ADV Part 3 and Rule 204-5 under the Advisers Act. For broker-dealers, the Form CRS Proposal would establish a new Rule 17a-14 under the Exchange Act to require a new Form CRS for registered broker-dealers.

42 We observe that while the definition of retail investor in the Form CRS Proposal and the definition of retail customer in Regulation Best Interest differ, we anticipate that the terms will be interpreted in a consistent manner. See also supra note 4.

43 Dual registrants would deliver the relationship summary at the earlier of entering into an investment advisory agreement with the retail investor or the retail investor engaging the firm’s services.
Introduction
- Highlights the types of investment services and accounts the firm offers to retail investors, with a brief explanation. The SEC prescribes specific language to help retail investors understand and make choices among account types and services.

Relationships and Services
- Provides specific information about the nature, scope and duration of the firm’s relationships and services to retail investors.

Obligations to the Retail Investor — Standard of Conduct
- Describes the firm’s legal standard of conduct to the retail investor in SEC-prescribed wording.

Summary of Fees and Costs
- Explains the types of fees the firm will charge retail investors, including whether the firm’s fees vary and are negotiable, and the other factors that would help a reasonable retail investor understand the fees that he or she is likely to pay.

Comparisons
- Required disclosures for stand-alone investment advisers and broker-dealers to compare their services with typical advisory and brokerage services.

Conflicts of Interest
- Summarizes firms’ conflicts of interests related to certain financial incentives.

Additional Information
- Encourages retail investors to seek out further information about the firm and gives instructions on where investors can find more about a firm’s disciplinary events, services, fees and conflicts.

Key Questions
- Includes a set of required questions that retail investors should ask the firm to encourage conversations with their financial professionals about the firm’s services, fees, conflicts and disciplinary events.

Broker-dealers would have to disclose the differences between their services and those of investment advisers, and vice versa. The SEC believes that Form CRS would alert retail investors to important information to consider when choosing a firm/financial professional and would prompt retail investors to ask informed questions. The content of the Relationship Summary would facilitate comparisons across firms that offer the same or substantially similar services. The SEC believes that Form CRS would deter potentially misleading sales practices by helping retail investors make more informed choices among the available types of firms and services.

Considerations for Investment Professionals: While firms will be required to include firm-specific information in Form CRS, they will have limited discretion in the scope and presentation of that information, and many of the disclosures require use of SEC-mandated language, some of which (to keep the form to a manageable length) is of questionable accuracy. For example, the form would require a broker-dealer to disclose that investment advisers charge asset-based fees (in fact some charge flat fees) and provide ongoing monitoring of accounts (in fact many financial planners do not provide ongoing monitoring).

The Form CRS Proposal would require firms to electronically file the Relationship Summary and any updates with the SEC. Investment advisers would file on the Investment Adviser Registration Depository (IARD), and broker-dealers would file on the SEC’s Electronic Data Gathering, Analysis and Retrieval System (EDGAR). Dual registrants would file on both IARD and EDGAR.
Restrictions on the Use of Certain Names and Titles; Required Disclosures

In addition to requiring Form CRS, the proposal would (1) restrict the use of the terms “adviser” and “advisor” by broker-dealers and their associated financial professionals and (2) require broker-dealers and investment advisers to disclose in retail investor communications the firm’s registration status while also requiring their associated financial professionals to disclose their association with such firm.

Specifically, the Form CRS Proposal would restrict any broker-dealer (and any associated person) from using the words “adviser” or “advisor” in its name or title unless such broker-dealer is a registered investment adviser (under the Advisers Act or with a state) and such person provides investment advice on behalf of such investment adviser.44 Further, the Form CRS Proposal would require a broker-dealer and a registered investment adviser to prominently disclose that it is SEC-registered when communicating to investors through print or electronic media.

Conclusion

We believe that reviewing and commenting on the proposals would be worthwhile for many of our clients; the SEC appears open to input on how the proposals could be improved. Four of the five SEC Commissioners expressed concern with the lack of specificity in the definition of the “best interests” standard. Although four of the five Commissioners believed it was worthwhile to put the proposals out for public comment, there did not appear to be any consensus about what the final rules should contain. All of the Commissioners indicated that testing the proposed disclosures with actual investors would be helpful.

The comment period will close 90 days from their May 9, 2018 publication in the Federal Register (i.e., August 7, 2018) if the SEC does not choose to extend the comment period.

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44 Use of “adviser” or “advisor” would also be allowed for supervised persons of registered investment advisers.