To Our Clients and Friends

Memorandum

SEC Adopts Rules and Interpretive Guidance Addressing Standards of Conduct for Broker-Dealers and Investment Advisers

On June 5, 2019, the Securities and Exchange Commission (the "SEC") voted 3-1 to adopt the highly anticipated rulemaking package addressing investment adviser and broker-dealer standards of conduct. The package includes final versions of (i) the SEC's interpretation of the standard of conduct for investment advisers ("Final Interpretation"),[1] (ii) new rules to require registered advisers and registered broker-dealers to provide to retail investors a relationship summary ("Form CRS"),[2] (iii) a new rule establishing a standard of conduct for broker-dealers when making recommendations to retail customers ("Regulation Best Interest"),[3] and (iv) the SEC's interpretation of the "solely incidental" prong of the broker-dealer exclusion from the definition of investment adviser ("Broker-Dealer Exclusion Interpretation") in the Investment Advisers Act of 1940 (the "Advisers Act").[4] We discuss each of the rules and interpretations below.

The Fiduciary Duty Interpretation

As with the proposed interpretation of the standard of conduct for investment advisers (the "Proposed Interpretation"),[5] the Final Interpretation includes a discussion of existing SEC guidance and case law regarding an investment adviser's federal fiduciary duty. This fiduciary duty, which is made enforceable by the antifraud provisions of the Advisers Act, consists of a duty of care and a duty of loyalty. An adviser's duty of care includes the duty to provide advice that is in the client's best interest, including a duty to provide advice that is suitable for the client, as well as a duty to seek best execution (if applicable) and a duty to provide advice and monitoring over the course of the relationship (as applicable and agreed upon with the client). An adviser's duty of loyalty includes the duty to not subordinate a client's interests to

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1 Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248 (June 5, 2019).

2 Form CRS Relationship Summary; Amendments to Form ADV, Release Nos. 34-86032; IA-5247 (June 5, 2019).

3 Regulation Best Interest: The Broker-Dealer Standard of Conduct, Release No. 34-86031 (June 5, 2019).

4 Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, Release No. IA-5249 (June 5, 2019).

5 Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, Release No. IA-4889 (Apr. 18, 2018) ("Proposed Interpretation").

its own, as well as a duty to make full and fair disclosure of all material facts relating to the advisory relationship (including the capacity in which it is acting with respect to the advice provided) and to obtain the client's informed consent to conflicts of interest. The Final Interpretation clarifies that an adviser's fiduciary duty applies to all investment advice, including advice about investment strategy, engaging a sub-adviser, and account type. We highlight below our key observations from the Final Interpretation, including notable clarifications and distinctions from the Proposed Interpretation.

- Best Interest Overlay on Fiduciary Duty. The Proposed Interpretation and the Final Interpretation both state that an adviser's fiduciary duty comprises the duty of care and the duty of loyalty. The Final Interpretation further clarifies that both of these duties (and not just the duty of care, as some had understood from the Proposed Interpretation) are subject to an overarching principle requiring the adviser to act in the client's best interest.

- Agreed-Upon Scope of Relationship Determines Fiduciary Duty Application. The Final Interpretation clarifies that the application of an adviser's fiduciary duty is determined by the scope of the relationship and that an adviser's fiduciary duty must be viewed in light of what the adviser and its client agreed upon. Although the Proposed Interpretation mentions this concept, it does not, as the Final Interpretation does, discuss the concept in any detail or incorporate it throughout the interpretation.

- Waiver of Fiduciary Duty.[6] Under both the Proposed Interpretation and the Final Interpretation, an adviser's fiduciary duty cannot be waived. However, while the Proposed Interpretation states that an adviser "cannot disclose or negotiate away" its fiduciary duty, the Final Interpretation states "an adviser's federal fiduciary duty may not be waived, *though it will apply in a manner that reflects the agreed-upon scope of the relationship*" (emphasis added). The Final Interpretation includes examples of contract provisions that purport to waive the adviser's fiduciary duty generally: (i) a statement that the adviser will not act as a fiduciary, (ii) a blanket waiver of all conflicts of interest, or (iii) a waiver of any specific obligation under the Advisers Act. Such general waivers of fiduciary duty are "inconsistent with the Advisers Act, regardless of the sophistication of the client."

- Advice to Institutional Clients. With respect to providing advice that is in the client's best interest, the Proposed Interpretation stated that an adviser was required to provide personalized advice based on the client's investment profile (taking into consideration the client's financial situation, sophistication, investment experience, and investment objectives), and adjust its advice to reflect changed circumstances. The Final Interpretation distinguishes institutional clients from retail clients and acknowledges that institutional clients might not have an investment profile. The Final Interpretation provides that with respect to institutional clients, rather than considering the client's

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[6] The Final Interpretation withdraws Heitman Capital Management, LLC, the staff's 2007 no-action letter addressing whether a hedge clause purporting to limit an adviser's liability under an advisory contract would violate sections 206(1) and 206(2) of the Advisers Act. The Final Interpretation states that there are few (if any) circumstances in which a hedge clause in an agreement with a retail client would be consistent with the antifraud provisions of the Advisers Act. Whether a hedge clause in an agreement with an institutional client would violate the antifraud provisions of the Advisers Act depends on the particular facts and circumstances. To the extent a hedge clause creates a conflict of interest, the Final Interpretation states that the adviser must address it as required by its duty of loyalty.

investment profile, an adviser must understand the client's investment mandate. Moreover, the Final Interpretation provides that unlike with respect to retail clients, an adviser's obligation to update a client's objectives would not be applicable with respect to institutional clients, such as funds, that have specific investment mandates.

- Duty to Not Subordinate Rather Than Duty to Put Client's Interest Ahead. The Proposed Interpretation states that the duty of loyalty requires an adviser to "put its client's interest first." The Final Interpretation states that the duty of loyalty requires that an adviser not subordinate its clients' interests to its own. "In other words, the investment adviser cannot place its own interests ahead of the interests of its client."

- Elimination of Conflicts Not Required. The Final Interpretation includes an explicit statement by the SEC that it does not believe advisers are required to eliminate conflicts of interest, and that "elimination of a conflict is one method of addressing that conflict; when appropriate advisers may also address the conflict by providing full and fair disclosure such that a client can provide informed consent to the conflict." While the Proposed Interpretation does not require elimination of conflicts, it also does not explicitly state that elimination is not required.

- Seeking to Avoid Conflicts Not Required. The Proposed Interpretation provides that "an adviser must seek to avoid conflicts of interest with its clients, *and*, at a minimum, make full and fair disclosure of all material conflicts of interest that could affect the advisory relationship" (emphasis added). By contrast, the Final Interpretation provides that advisers do not have a separate duty to "seek to avoid" conflicts when they fully and fairly disclose their conflicts and obtain the client's informed consent.

- Full and Fair Disclosure Must Be Specific. Both the Proposed Interpretation and the Final Interpretation state that in order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict and make an informed decision whether to provide consent. As an example, the Proposed Interpretation states that disclosure that an adviser "may" have a conflict is not adequate when the conflict actually exists. The Final Interpretation provides additional guidance and states that the use of "may" could be appropriate to disclose a potential conflict that does not currently exist but might reasonably present itself in the future.

- Implicit Consent to Conflicts Permitted. Both the Proposed Interpretation and the Final Interpretation acknowledge that informed consent may be explicit or implicit. Both interpretations also state that it would be inconsistent with an adviser's fiduciary duty to infer or accept client consent where the facts and circumstances indicate that the client did not understand the nature and import of the conflict. However, while the Proposed Interpretation states that it would also be inconsistent with an adviser's fiduciary duty to infer or accept client consent where "the material facts concerning the conflict could not be fully and fairly disclosed," the Final Interpretation excludes this statement.

- Client Sophistication Relevant to Informed Consent. Where an adviser cannot fully and fairly disclose a conflict and obtain informed consent (e.g., due to the complexity of the conflict), both the Proposed Interpretation and the Final Interpretation provide that the adviser should either eliminate or adequately mitigate the conflict to make full and fair disclosure and informed consent possible. Unlike the Proposed Interpretation, which states that "[w]ith some complex or extensive

conflicts, it may be difficult to provide disclosure that is sufficiently specific, but also understandable, to the adviser's clients[,]" the Final Interpretation specifically acknowledges that, compared to retail clients, institutional clients generally have a greater capacity and more resources to analyze and understand complex conflicts and their ramifications. The Final Interpretation provides that full and fair disclosure for an institutional client can differ significantly from full and fair disclosure for a retail client.

- Affirmative Determination that Consent was Informed Not Required. Although disclosure must be full and fair such that a client is able to provide informed consent, the Final Interpretation provides that advisers are not required to make an affirmative determination that a particular client understood the disclosure and that the client's consent was informed. Rather, advisers must provide disclosure that is designed to allow a client to understand and provide informed consent, which may be achieved through a combination of Form ADV and other disclosure. Clients can implicitly consent by entering into, or continuing, the advisory relationship upon receipt of such disclosure.

- Allocation of Investment Opportunities Shaped By Contract. The Proposed Interpretation states that in allocating investment opportunities among eligible clients, "an adviser must treat all clients fairly." The Final Interpretation acknowledges that this statement could be interpreted to mean that an adviser may not allocate a particular investment to one eligible client instead of another, even when the second client has received full and fair disclosure and provided informed consent to such an allocation. The Final Interpretation provides that when allocating investment opportunities, an adviser is permitted to consider the nature and objectives of the client and the scope of the relationship. An adviser and a client may even agree that the client will not be allocated or offered certain opportunities.

- Antifraud Liability Applicable to Prospective Clients. Both the Proposed Interpretation and the Final Interpretation provide that advisers are subject to antifraud provisions under section 206 of the Advisers Act when dealing with prospective clients. The Final Interpretation clarifies that in order to avoid liability under section 206, an adviser should have sufficient information about the prospective client and its objectives to form a reasonable basis for advice before providing any advice about those matters. When the prospective client opens an account with the adviser and becomes a client, an adviser's fiduciary duty applies.

- When Duty of Loyalty Not Satisfied through Disclosure and Consent. Both the Proposed Interpretation and the Final Interpretation provide that the duty of loyalty cannot always be satisfied through full and fair disclosure and informed consent. However, by providing that the application of an adviser's fiduciary duty is determined by the agreed-upon scope of its relationship with a client, the Final Interpretation provides greater flexibility than the Proposed Interpretation for an adviser to satisfy its duty of loyalty through disclosure and consent. The Proposed Interpretation states, "Disclosure of a conflict alone is not always sufficient to satisfy the adviser's duty of loyalty and section 206 of the Advisers Act." In comparison, the Final Interpretation states, "[W]hile full and fair disclosure of all material facts relating to the advisory relationship or of conflicts of interest and a client's informed consent prevent the presence of those material facts or conflicts themselves from violating the adviser's fiduciary duty, such disclosure and consent do not themselves satisfy the adviser's duty *to act in the client's best interest*" (emphasis added). As the Final Interpretation provides that acting in a client's best interest is an overarching principle of fiduciary duty, and that acting in a client's best interest is

determined by the agreed-upon scope of the relationship, under the Final Interpretation, so long as an adviser clearly sets forth the contours of its relationship with a client in the advisory contract, full and fair disclosure and informed consent would satisfy its duty of loyalty. Nonetheless, advisers continue to be subject to antifraud provisions of the Advisers Act. Therefore, even under the Final Interpretation, "[w]hile an adviser may satisfy its duty of loyalty by making full and fair disclosure of conflicts and obtaining the client's informed consent, an adviser is prohibited from overreaching or taking unfair advantage of a client's trust."

- Continued Evaluation of Certain Proposed Enhanced Standards. In the Proposed Interpretation, the SEC sought public comment as to whether registered investment advisers should be required to meet certain enhanced standards based on existing standards applicable to broker-dealers. Specifically, the SEC sought comments on licensing and continuing education requirements for investment professionals, financial responsibility requirements (such as net capital requirements), and a requirement to provide account statements to retail investors on a periodic basis. The Final Interpretation states that the SEC is continuing to evaluate the comments received in response to its request.

Form CRS

Starting next year, registered investment advisers and registered broker-dealers will be required to provide a Form CRS to retail investors. Form CRS, which the SEC also calls the "relationship summary," is a written disclosure statement designed to assist retail investors in making an informed choice with respect to investment advisory and/or brokerage services.

A "retail investor" means "a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes."[7] The definition captures natural persons without distinction based on net worth or sophistication. Although private fund investors are not explicitly carved out of the definition, consistent with the delivery requirements applicable to Part 2 of the Form ADV, as well as the federal courts'[8] interpretation of the term "client" under the Advisers Act, Form CRS, which is a relationship summary required to be delivered to "retail investor clients" (per Form CRS instructions), should not be required to be delivered to private fund investors that are not otherwise clients of the adviser.

Registered investment advisers that offer advisory services to retail investors will be required to file a Form CRS with the SEC as Part 3 of the Form ADV. An adviser that is not required to deliver a Form CRS to any client is not required to file a Form CRS.

The following is a brief summary of the Form CRS:

- Presentation and Format. Form CRS may be no more than two pages (or four pages, in the case of dual registrants). It must be written in plain English and follow a standardized question-and-

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7 The Form CRS as proposed would have defined "retail investor" to mean "a prospective or existing client or customer who is a natural person (an individual) or a trust for the benefit of a natural person, regardless of the individual's net worth or the nature of the trustee." The SEC adopted a revised definition designed to be consistent, where appropriate, with the definition of "retail customer" in Regulation Best Interest.

8 *See, e.g.*, *Goldstein, et al. v. Securities and Exchange Commission*, 451 F.3d 873 (D.C. Cir. 2006).

answer format using prescribed headings. The instructions encourage the use of graphics and text features, as well as online tools and layered disclosure.

- Disclosure Items. Information covered by Form CRS includes (i) the relationships and services offered, (ii) the standard of conduct and the fees and costs associated with those services, (iii) specified conflicts of interest, (iv) reportable legal or disciplinary events, and (v) how to obtain additional information about the firm.[9] In addition, Form CRS must include "conversation starters" designed to assist retail investors in engaging in dialogue with their financial professionals regarding their individual circumstances.[10]

- Filing Requirement and Amendment. Firms that are required to deliver Form CRS to retail investors must file it electronically in a text-searchable, machine readable format. Whenever information becomes inaccurate, an updated version must be filed within 30 days, and it must include an exhibit highlighting the changes.

- Timing of Delivery and Communication of Changes. Investment advisers must deliver Form CRS to retail investors before or at the time they enter into an advisory contract. Broker-dealers must deliver Form CRS to retail investors before or at the earliest of: (i) a recommendation of an account type, a securities transaction, or an investment strategy involving securities; (ii) placing an order for the retail investor; or (iii) the opening of a brokerage account for the retail investor. Changes to Form CRS must be communicated to existing clients or customers within 60 days. Firms are also required to post the current version of the Form CRS prominently on their public website (if they have one).

- Transition Filings and Delivery. Firms that are registered or investment advisers that have pending applications for registration prior to June 30, 2020 may file the Form CRS starting on May 1, 2020, and must do so by June 30, 2020. On and after June 30, 2020, investment advisers must include a Form CRS with their initial application for registration, and broker-dealers must file their Form CRS by the date on which their registration becomes effective. As part of the transition, firms must deliver their Form CRS to all existing clients and customers who are retail investors on an initial one-time basis within 30 days of the date they are required to file the Form CRS.

Regulation Best Interest

Regulation Best Interest applies to brokers, dealers, and natural persons associated with broker-dealers ("broker-dealers") when they recommend any securities transaction or investment strategy involving securities (including account recommendations) to retail customers. It requires such broker-dealers to act

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[9] The proposed form would have required firms to include prescribed wording throughout many sections of the relationship summary. For example, firms would have been required to include prescribed wording comparing the fees, services, applicable legal standard of conduct, and financial incentives of investment advisers and/or broker-dealers. In recognition of the fact that extensive use of prescribed wording in certain contexts could add to investor confusion and may not accurately or appropriately capture information about particular firms, the SEC limited the amount of prescribed wording to standardized headings in the form of questions.

[10] The proposed form would have required firms to include a list of key questions for retail investors to ask their financial professionals. In the Form CRS as adopted, those proposed key questions are generally integrated into the relationship summary section either as question-and-answer headings or "conversation starters."

in the best interest of their retail customers, without placing their own interests ahead of the interests of their retail customers. A "retail customer" means a natural person, or the legal representative of a natural person, who (i) receives a recommendation of any securities transaction or investment strategy involving securities from a broker-dealer; and (ii) uses the recommendation primarily for personal, family, or household purposes. To comply with Regulation Best Interest, a broker-dealer must satisfy each of the four specific obligations set forth below.

- Disclosure. At or before the time of a recommendation, a broker-dealer must provide in writing full and fair disclosure of all materials facts relating to the scope and terms of the relationship,[11] as well as all material facts relating to conflicts of interest associated with the recommendation. "Conflict of interest" in this context means an interest that might incline a broker-dealer, consciously or unconsciously, to make a recommendation that is not disinterested.

- Care. A broker-dealer must exercise reasonable diligence, care, and skill when making a recommendation to a retail customer. This requires the broker-dealer to understand the potential risks, rewards, and costs[12] 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. When making a recommendation to a particular retail customer, the broker-dealer must have a reasonable basis to believe that the recommendation is in the best interest of that retail customer based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation. When making a recommendation involving a series of transactions, the broker-dealer must have a reasonable basis to believe that such series of 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.

- Conflict of Interest. A broker-dealer must establish, maintain, and enforce policies and procedures reasonably designed to identify and at a minimum disclose, or eliminate, conflicts of interest. Specifically, a broker-dealer must identify and mitigate any conflicts of interest associated with recommendations that create an incentive for its financial professionals to place their interest, or the interest of the broker-dealer, ahead of the retail customer's interest.[13] A broker-dealer must identify and disclose any material limitations placed on the securities or investment strategies that may be recommended to a retail customer and any conflicts of interest associated with such

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11 The standard set forth in the proposed rule would have required broker-dealers to "reasonably disclose" such information. In adopting the final rule, the SEC stated that similar to the interpretation of the phrase "reasonably disclose" in the proposed rule, "broker-dealers' obligation to provide full and fair disclosure should give sufficient information to enable a retail investor to make an informed decision with regard to the recommendation."

12 Cost was not included as a factor in the proposed rule. The SEC added cost to the final rule in recognition of the fact that "cost will always be a salient factor to be considered when making a recommendation." However, a broker-dealer is not required to always select the lowest-cost option in order to satisfy the care obligation.

13 The standard set forth in the proposed rule would have required that the policies and procedures be reasonably designed to "identify and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with the recommendation." In response to concerns from commenters about the breadth of the proposed mitigation requirement, the SEC revised the mitigation requirement to focus on conflicts of interest associated with recommendations that create an incentive for an associated person of a broker-dealer to place its own interest, or the interest of the broker-dealer, ahead of the retail customer's interest.

limitations, and prevent such limitations and associated conflicts of interest from causing the broker-dealer to make recommendations that place its interest ahead of the interest of the retail customer.[14] Finally, a broker-dealer must identify and eliminate any conflicts of interest associated with sales contests, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.[15]

- Compliance. A broker-dealer must establish, maintain, and enforce policies and procedures reasonably designed to achieve compliance with Regulation Best Interest. This obligation was not included in the proposed rule.

Broker-Dealer Exclusion Interpretation

Section 202(a)(11)(C) of the Advisers Act excludes from the definition of "investment adviser" a broker-dealer that (a) provides investment advice that is "solely incidental" to the conduct of its broker-dealer business and (b) receives no special compensation for such advice (the "broker-dealer exclusion"). The Regulation BI Proposing Release sought comments on the scope of the broker-dealer exclusion when a broker-dealer exercises investment discretion. In light of comments received, the SEC published the Broker-Dealer Exclusion Interpretation to confirm and clarify the SEC's position that "a broker-dealer's provision of advice as to the value and characteristics of securities or as to the advisability of transacting in securities is consistent with the solely incidental prong if the advice is provided in connection with and is reasonably related to the broker-dealer's primary business of effecting securities transactions." The SEC also confirmed that the quantum or importance of the investment advice is not determinative as to whether it is consistent with the solely incidental prong.

The SEC gave guidance on applying the interpretation in the context of investment discretion and account monitoring. The exercise of unlimited discretion would not be solely incidental, whereas discretion which is limited in time, scope or other manner could be solely incidental. Examples of limited discretion that is solely incidental include discretion (i) as to the price at which or the time to execute an order given by a customer for the purchase or sale of a definitive amount of a specified security, (ii) on an isolated or infrequent basis, to purchase or sell a security or type of security when the customer is unavailable for a limited period of time, and (iii) to purchase or sell securities to satisfy margin requirements, or other customer obligations that the customer has specified. In the context of account monitoring, the SEC made a distinction between continuous monitoring (which would not be solely incidental) and periodic agreed-upon monitoring (which may or may not be incidental depending on the facts and circumstances). By contrast, when a broker-dealer, voluntarily and without any agreement with the customer, reviews the holdings in a customer's account and contacts the customer to provide a recommendation to buy or sell

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[14] The standard set forth in the proposed rule would have required broker-dealers to establish policies and procedures reasonably designed to mitigate the conflicts of interest associated with offering a limited range of products and proprietary products. In response to comments requesting confirmation that offering a limited universe of products with proper disclosure would not violate Regulation Best Interest, the SEC adopted this new requirement.

[15] The standard set forth in the proposed rule would not have required the absolute elimination of, or policies and procedures reasonably designed to eliminate, any particular conflict of interest. The SEC added this requirement to Regulation Best Interest in recognition of the fact that certain sales practices "create high-pressure situations for associated persons to engage in sales conduct contrary to the best interest of retail customers."

securities, those actions are "reasonably related to the broker-dealer's primary business of effecting securities transactions."

Effective Dates and Transition

The Final Interpretation and the Broker-Dealer Exclusion Interpretation will become effective upon publication in the Federal Register. Form CRS and Regulation Best Interest will become effective 60 days after their publication in the Federal Register, although firms will have until June 30, 2020 to transition into compliance. The SEC expects the industry will encounter operational and other challenges when planning for compliance with the new rules and interpretations. In order to assist firms with such planning, the staff is expected to post a chart providing a high-level comparison of the key components of an investment adviser's fiduciary duty and Regulation Best Interest. The SEC is also establishing an inter-Divisional Standards of Conduct Implementation Committee to field questions from and provide other assistance to firms as they transition into compliance.

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