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VIA EMAIL AND FEDERAL EXPRESS

Hon. Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Proposed Regulation Best Interest; Proposed Rule 15*l*-2

Dear Chairman Clayton:

Thank you again for taking the time to meet with us on October 4, 2018. We greatly appreciate your continued willingness to engage with LPL Financial LLC ("LPL") regarding the proposed rulemakings and interpretation relating to the standards of conduct that would apply to broker-dealers and investment advisers (each a "Proposal" and, collectively, the "Proposals").[1] As we discussed, LPL is a diversified financial services company and is dually-registered with the U.S. Securities and Exchange Commission ("Commission") as a broker-dealer and an investment adviser. We provide proprietary technology, comprehensive clearing and compliance services, practice management programs and training, and independent research to more than 16,000 independent financial professionals and over 800 banks and credit unions. LPL has been the nation's largest independent broker-dealer since 1996. LPL also supports a network of over 400 independent registered investment advisers ("RIAs") throughout the country by providing them with access to a range of products, platforms, and services.

During our October 4 meeting, we committed to provide you and your staff with proposed clarifying language to consider including in the rulemaking releases that would be issued in connection with the adoption of proposed Regulation BI and the titling restrictions under proposed Rule 15*l*-2. As discussed below, we believe certain language should be included in any adopting release: (i) to dispel any notion that broker-dealers and financial professionals are required to have a detailed understanding, and make comparative judgments, of the costs associated with *every* similar investment product available through a broker-dealer's platform, and to make clear that firms may rely on disclosure as a component of their compliance programs to mitigate conflicts of interest and satisfy the care obligation ("Care Obligation") under Regulation BI (ii) to confirm that in including a non-exhaustive list of potential practices for promoting compliance with proposed Rule 15*l*-1(a)(2)(iii), the Commission did not intend to set a minimum bar for compliance with Regulation BI, but rather intended merely to provide examples of the types of practices broker-dealers *could* consider in seeking to comply with the rule; and (iii) to confirm that dual-hatted financial professionals can make use of the term "advisor" or "adviser" so long as they are

[1] *See* Exchange Act Release No. 83062 (Apr. 18, 2018), 83 Fed. Reg. 21,574 (May 9, 2018) ("Regulation BI Proposing Release"); Exchange Act Release No. 83063 (Apr. 18, 2018), 83 Fed. Reg. 21,416 (May 9, 2018) ("Form CRS Proposing Release"); Advisers Act Release No. 4889 (Apr. 18, 2018), 83 Fed. Reg. 21,203 (May 9, 2018).

investment adviser representatives of, and provide investment advice on behalf of, *any* Commission- or State-registered investment adviser, regardless of whether such professionals also provide brokerage services (and not investment advice) on behalf of a separate dual-registrant.

I. Costs Comparisons and Disclosure under the Care Obligation

In the Regulation BI Proposing Release, the Commission indicated that the Care Obligation – one of four component obligations under proposed Rule 15*l*-1 – would require a broker-dealer generally to "consider reasonably available alternatives offered by the broker-dealer as part of having a reasonable basis for making the recommendation."[2] The Commission stated that "a broker-dealer could not have a reasonable basis to believe that a recommended security is in the best interest of a retail customer if it is more costly than a reasonably available alternative offered by the broker-dealer and the characteristics of the securities are otherwise identical, including any special or unusual features, liquidity, risks and potential benefits, volatility and likely performance."[3]

Based on our reading of the Regulation BI Proposing Release, we are concerned that these and related statements might be misconstrued to suggest that broker-dealers and financial professionals are required to have a detailed understanding, and make comparative judgments, of the costs associated with *every similar investment product available through the broker-dealer's platform*. Because we do not believe that was the Commission's intent, any adopting release should clarify that the Care Obligation can be satisfied when a broker-dealer or financial professional recommends an investment product that may carry higher costs and expenses than other similar available alternatives, so long as the broker-dealer has disclosed prominently (in advance or contemporaneously with the recommendation) that the recommended product is not the least expensive among those alternatives and the recommendation is otherwise in the investor's best interest, taking into consideration the other non-compensation factors that the Commission highlighted.[4] Any other interpretation of the Care Obligation would be exceedingly challenging to implement.

Like other independent broker-dealers and wire-houses, LPL offers investors access to thousands of different investment products, many of which pursue similar investment strategies (*e.g.*, exposure to the domestic equity market, balanced income and growth, *etc*.). Each of those products may in turn have a variety of scheduled sales load waivers, breakpoints, rights of accumulation (including pursuant to letters of intent), exchange privileges, mortality and expense risk charges, surrender charges, administrative expenses and redemption fees, among others. LPL also offers access to individual equities and fixed income securities, a bespoke portfolio of which may be similar to strategies pursued by pooled investment products offered through our platform. It would be practically impossible for LPL's financial professionals to conduct a meaningful comparison of cost structures across all similar available securities. In addition, under the interpretation noted above, it would be difficult for a broker-dealer to demonstrate that it had satisfied its Care

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2 Regulation BI Proposing Release, 83 Fed. Reg., at 21,588.

3 *Id*.

4 These factors include the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions. *See id.*, at 21,612.

Obligation in the face of a hindsight challenge, absent a practice of maintaining detailed contemporaneous written comparisons of all recommendations against all other potential alternatives—a practice that would be administratively challenging, if not impossible, for any large financial services firm to implement and police.

We also have concerns regarding the Commission's statement that it "do[es] not believe a broker-dealer could meet its Care Obligation through disclosure alone."[5] For example, the Commission noted that where a broker-dealer is choosing among identical products with different cost structures, "it would be inconsistent with the best interest obligation for the broker-dealer to recommend the more expensive alternative for the customer, even if the broker-dealer had disclosed that the product was higher cost and had policies and procedures reasonably designed to mitigate the conflict under the Conflict of Interest Obligations."[6] We respectfully submit that a broker-dealer's inability to rely on disclosure in fulfilling the Care Obligation effectively imposes a standard of dealing that is more stringent than what is required of investment advisers under the Advisers Act.[7]

Based on our October 4 meeting, it appears that the Commission and its staff are receptive to the industry's concerns about the issues identified above. To dispel any confusion and alleviate those concerns, we would propose *excludin*g from an adopting release any language that suggests a broker-dealer could not rely on disclosure as a component of its compliance program for purposes of addressing conflicts of interest under the Care Obligation, and *including* language similar to the text below (based off of language included at 83 Fed. Reg., at 21,588):

> We recognize that broker-dealers may make available on their platforms many – and in some cases thousands of – different products that pursue similar investment strategies but carry a variety of different cost structures that may apply differently to different investors. Those cost structures include, among other things, scheduled sales load waivers, breakpoints, rights of accumulation (including pursuant to letters of intent), exchange privileges, mortality and expense risk charges, surrender charges, administrative expenses and redemption fees. When a broker-dealer recommends a more remunerative product or investment strategy over another reasonably available alternative offered by the broker-dealer, and the other characteristics of the products or strategies are otherwise similar, the broker-dealer could not satisfy the Care Obligation unless: (i) the broker-dealer prominently discloses to the investor in writing prior to or at the time of the recommendation that the recommended product is not the least expensive among available

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5 *Id*.

6 *Id*., at 21,613.

7 An investment adviser can mitigate conflicts of interest and satisfy its fiduciary duties through disclosure alone. *See* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-92, 194 (1963). If, as the Commission has conceded, broker-dealers generally should not be viewed as fiduciaries because, among other things, "[b]roker-dealers and registered representatives generally provide financial advice at the transactional level, and the nature of the relationship between customers and broker-dealers and the level of monitoring by broker-dealers tends to be episodic, rather than ongoing," then broker-dealers should not be held to a higher standard than fiduciaries when making investment recommendations. Regulation BI Proposing Release, 83 Fed. Reg., at 21,662; *see also, id.*, at n. 519, and accompanying text.

alternatives, and (ii) the recommendation is otherwise in the investor's best interest. Accordingly, compliance with the Care Obligation would not require a financial professional to conduct a comprehensive comparison across all similar products available on a broker-dealer's platform for the purpose of identifying the lowest cost alternative, and we have no expectation that a financial professional should have a detailed understanding, or even be familiar with, every product on a broker-dealer's platform. Nor do we have any expectation that a financial professional must, in satisfying the Care Obligation, prepare and maintain a contemporaneous written comparison of a recommended product against similar available alternatives; we acknowledge that such a practice may be incompatible with the practical demands of retail financial services. Rather, to satisfy the Care Obligation, (i) a broker-dealer should provide a retail investor with prominent written disclosures that (a) identify the costs that apply to the products that the investor's financial professional recommends, and (b) make clear that a recommended product may not be the least expensive alternative available; and (ii) the investor's financial professional should recommend only products whose cost characteristics are consistent with those disclosures and which are otherwise in the investor's best interest.

II. Policies and Procedures to Mitigate Conflicts of Interest

The conflict of interest obligations (the "Conflict of Interests Obligations") under Regulation BI would require broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to identify and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives. In discussing the requirements, the Commission noted that "in lieu of mandating specific mitigation measures or a 'one-size fits all' approach, the… proposal would leave broker-dealers with flexibility to develop and tailor reasonably designed policies and procedures that include conflict mitigation measures, based on each firm's circumstances."[8] The Commission went on to say, however, that "broker-dealers generally should consider incorporating" a "non-exhaustive list of potential practices as relevant into their policies and procedures."[9] We understand that, in including the enumerated practices, the Commission did not intend to set a minimum bar for compliance with Regulation BI – that is, the Commission did

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[8] 83 Fed. Reg., at 21,620.

[9] *Id.*, at 21,621. This list included "[i] avoiding compensation thresholds that disproportionately increase compensation through incremental increases in sales; [ii] minimizing compensation incentives for employees to favor one type of product over another, proprietary or preferred provider products, or comparable products sold on a principal basis – for example, establishing differential compensation criteria based on neutral factors (*e.g.*, the time and complexity of the work involved); [iii] eliminating compensation incentives within comparable product lines (*e.g.*, one mutual fund over a comparable fund) by, for example, capping the credit that a registered representative may receive across comparable mutual funds or other comparable products across providers; [iv] implementing supervisory procedures to monitor recommendations that are: near compensation thresholds; near thresholds for firm recognition; involve higher compensating products, proprietary products or transactions in a principal capacity; or, involve the rollover or transfer of assets from one type of account to another (such as recommendations to rollover or transfer assets in an ERISA account to an IRA, when the recommendation involves a securities transaction) or from one product class to another; [v] adjusting compensation for registered representatives who fail to adequately manage conflicts of interest; and [vi] limiting the types of retail customers to whom a product, transaction, or strategy may be recommended (*e.g.*, certain products with conflicts of interest associated with complex compensation structures)."

not intend to suggest that broker-dealers must implement at least one or more of the practices to satisfy the Conflict of Interests Obligations. Rather, we understand that the Commission intended merely to provide examples of the types of practices broker-dealers *could* consider in seeking to comply with the rule. As FINRA has observed, the appropriate framework for developing a conflicts governance framework depends on the scope and scale of a firm's business.[10] To the extent the Commission were to require broker-dealers to implement specific prohibitions or restrictions, such a requirement could have unintended consequences because *per se* prohibitions and restrictions might drive industry behavior to different practices that may implicate the same conflicts of interest. Industry innovation also tends to render certain prohibited activities obsolete over time.

We also have concerns that the Regulation BI Proposing Release does not adequately take into account that the types of conflicts that a broker-dealer faces could differ in material respects from the conflicts that the broker-dealer's financial professionals face when making recommendations available on the broker-dealer's platform. For example, a mutual fund may pay 12b-1 fees to a broker-dealer as consideration for distribution services, but the broker-dealer may not share any of the 12b-1 revenue with its financial professionals.

To confirm that the non-exhaustive list of potential practices included in the Regulation BI Proposing Release was intended merely as a list of examples of the types of practices broker-dealers *could* consider in seeking to comply with the rule and to acknowledge that conflicts of interests may differ materially as between two or more broker-dealers and as between a broker-dealer and its financial professionals, we would suggest including language similar to the following blacklined text (taken from 83 Fed. Reg., at 21,662):

> For example, **while we recognize that an appropriate conflicts mitigation framework will vary widely among firms depending on the scope and scale of their business practices and product offerings,** broker-dealers ~~**generally should**~~ **could** consider incorporating **one or more of** the ~~**following non-exhaustive list of**~~ potential practices **listed below**, as relevant, into their policies and procedures to promote compliance with (a)(2)(iii) of proposed Regulation Best Interest. **This list is non-exhaustive, and a firm may conclude that none of the identified practices is relevant and/or appropriate in light of its business. We further recognize that the conflicts of interest a broker-dealer faces as a firm may differ from (and in some cases materially) and/or have no relation to the conflicts of interest that the broker-dealer's financial professionals face when making recommendations. For example, some investment products and sponsors may compensate a broker-dealer for distribution and shareholder services (or similar services), but the broker-dealer may choose not to share any of that compensation with its financial professionals, or to otherwise provide any indirect incentives associated with the receipt of that compensation. We expect that a broker-dealer whose financial professionals**

[10] *See* FINRA Report on Conflicts of Interest (Oct. 2013), *available at* https://www.finra.org/sites/default/files/Industry/p359971.pdf. (noting that a conflicts framework "will look vastly different for a small introducing broker than for a large firm with multiple affiliates engaged in a broad range of businesses on a national or global scale.").

face different or fewer conflicts than the firm itself will take those differences into account when developing the policies and procedures mandated by the Conflicts of Interest Obligations.

III. Application of Titling Restrictions to Dual-Hatted Professionals

If the Commission adopts the titling restrictions under proposed Rule 15*l*-2, we believe certain clarifications are necessary to account for dual-hatted financial professionals who provide investment advice on behalf of one investment adviser and brokerage services on behalf of a separate, unaffiliated broker-dealer that is a dual-registrant.

In the Form CRS Proposing Release the Commission noted:

> [W]e recognize that some financial professionals of dually registered firms only provide brokerage services. We are concerned that if these financial professionals use "adviser" or "advisor" in their names or titles, retail investors may be misled about the nature of services they are receiving, and may incorrectly believe that such person would provide them investment advisory services rather than brokerage services. Therefore, we believe that a financial professional who does not provide investment advice to retail investors on behalf of the investment adviser, *i.e.*, a financial professional that only offers brokerage services to retail investors, should be restricted from using the title "adviser" or "advisor" despite such person's association with a dually registered firm.[11]

Separately, proposed Rule 15*l*-2 would provide, in relevant part, that "a natural person who is an associated person of a broker or dealer shall be restricted, when communicating with a retail investor, from using as part of a name or title the term 'adviser' or 'advisor' unless any such… [n]atural person who is an associated person of a broker or dealer is a supervised person of an investment adviser registered under Section 203 of the [Advisers Act] or with a State, and such person provides investment advice on behalf of *such* investment adviser."[12]

The use of the word "such" in the preceding sentence – although perhaps not intentional – could be construed as prohibiting a financial professional who provides investment advice on behalf of one investment adviser and brokerage services on behalf of a separate, unaffiliated broker-dealer that is a dual-registrant from referring to himself or herself as an "advisor" when providing brokerage services. If the Commission intends to bring about this restriction – which we do not believe it does – it would have unusual consequences and contribute to increased investor confusion with respect to a large subset of dual-hatted financial professionals. For example, LPL supports dual-hatted financial professionals who either (i) may provide brokerage and advisory services on behalf of LPL, or (ii) may provide brokerage services on behalf of LPL while providing advisory services on behalf of an unaffiliated RIA. Under the Proposal, the financial professionals described in (ii) would appear to be prohibited from referring to themselves as financial "advisors" or "advisers" when offering or providing brokerage services to investors but could make use of those titles when offering or providing investment advice to the same investors. In addition to

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[11] Form CRS Proposing Release, 83 Fed. Reg., at 21,463.

[12] Proposed Rule 15*l*-3(a)(2) (emphasis supplied).

bringing about investor confusion, this prohibition would require LPL, similarly situated firms, and RIAs to incur significant costs to amend existing marketing materials and client-facing forms, letterhead, business cards, websites, fixtures and signage located on real property, and other materials.

The Commission stated that it "believe[s] it is appropriate for financial professionals that provide services as an investment adviser to retail investors to be permitted to use names or titles which include 'adviser' and 'advisor,' even if, as a part of their business, they also provide brokerage services." Thus, we believe the Commission should confirm, if it elects to impose titling restrictions, that dual-hatted financial professionals can make use of the term "advisor" or "adviser" so long as they are investment adviser representatives of, and provide investment advice on behalf of, any Commission- or State-registered investment adviser, regardless of whether they also provide brokerage services (and not investment advice) on behalf of a separate dual-registrant. To that end, we would propose including in any adopting release language similar to the following blacklined text (taken from 83 Fed. Reg., at 21463):

> We recognize that, as with dually registered firms, some dual-hatted financial professionals may under some circumstances only offer brokerage services to a particular retail investor, which has the potential to cause confusion. For the same reasons discussed above regarding dually registered firms, however, we do not believe that the determination of when the restriction applies should be based on what capacity a dual-hatted financial professional is acting in a particular circumstance, *i.e.*, whether a dual-hatted professional is offering only brokerage services to that particular investor and not offering investment advisory services. **Moreover, some dual-hatted financial professionals provide investment advice on behalf of one investment adviser and brokerage services on behalf of a separate, unaffiliated broker-dealer that is a dual-registrant. The determination of when a titling restriction applies should not be based on the particular firm on behalf of which a dual-hatted financial professional is acting in a given interaction with a retail investor. Rather, dual-hatted financial professionals can make use of the term "advisor" or "adviser" so long as they are investment adviser representatives of, and provide investment advice on behalf of, any Commission- or State-registered investment adviser, regardless of (i) whether they also provide brokerage services (and not investment advice) on behalf of another dual-registrant that is not affiliated with such investment adviser, and (ii) the particular service they are offering in a particular interaction with a retail investor**.
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Thank you for again considering our comments and suggestions. Please do not hesitate to contact me should you wish to discuss any of the matters discussed in this letter.

Sincerely,

Michelle Bryan Oroschakoff
Chief Legal Officer

Enclosures

cc: Hon. Kara M. Stein, Commissioner, U.S. Securities and Exchange Commission

Hon. Robert J. Jackson, Jr., Commissioner, U.S. Securities and Exchange Commission

Hon. Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission

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