September 20, 2021

Via E-Mail

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

***Re:* Petition for a Rulemaking to Finalize Proposed Interpretive Rule Under the Advisers Act Affecting Broker-Dealers [Release No. IA-2652; File No. S7-22-07] (Sept. 24, 2007)**

***Re:* Petition to Withdraw 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)**

Dear Ms. Countryman:

The Petitioner, XY Planning Network ("XYPN"), submits this Petition for a rulemaking pursuant to Rule 192(a) of the Commission's Rules of Practice. XYPN respectfully requests the SEC to revisit a chapter of unfinished regulatory business when it proposed a market conduct rule in 2007 (the "2007 Proposed Rule") for broker-dealers. The 2007 Proposed Rule, which contained elements of an earlier rule clarifying the 'solely incidental' prong of the exemption for broker-dealers under the Investment Advisers Act of 1940 (the "Advisers Act"), has remained as a Proposed Rule for 14 years but was never formally adopted.[1] By this Petition XYPN asks that the Commission substantively revise and adopt the

[1] The 2007 Proposed Rule was a response by the Commission to an earlier rule adopted in 2005 by the agency providing an exemption from Advisers Act registration for certain fee-based brokerage advice-programs. The 2005 rule was vacated Mar. 30, 2007, by the Court of Appeals for the District of Columbia Circuit in *Fin. Planning Ass'n v. SEC,* 482 F.3d 481, 375 U.S. App. D.C. 389, 2007. The 2005 rule also was known colloquially as "Rule 202" or the "Merrill Lynch Rule." *See Certain Broker-Dealers Deemed Not To Be Investment Advisers* IA Release No. 2376, Apr.

2007 Proposed Rule, and thereby restore the original intent of the statutory exemption for a broker-dealer providing solely incidental investment advice to its customers.

XYPN also respectfully requests, in connection with the aforementioned rulemaking, that the Commission withdraw its' "solely incidental" regulatory guidance[2] ("2019 Guidance") approved as part of the agency's Regulation Best Interest package of rules and regulatory guidance.[3] The 2019 Guidance substantively altered the 2007 Proposed Rule's interpretation of solely incidental, but without engaging in a formal rulemaking process, nor in resolving the 2007 Proposed Rule's rulemaking process. Instead, the 2019 Guidance picked up the SEC's definition of solely incidental advice from the vacated 2005 Rule (the "2005 Rule") that permits 'solely incidental' advice to a brokerage account "when those advisory services are in connection with and reasonably related to the brokerage services."[4] In addition, the near-identical language in the 2019 Guidance, adopted from the 2005 Rule, omits other important provisions that were part of the 2005 definition. Moreover, we believe the 2005 Rule and 2019 Guidance subverts the plain meaning of the original statutory exemption[5] by defining 'solely incidental' through an unreasonably broad and arbitrary interpretation, allowing a broker-dealer to provide essentially the same retail advisory services as an RIA but without being held to the same standard of care for that advice.

Overview

On Sept. 24, 2007, the Commission released the 2007 Proposed Rule for public comment, but never finalized or acted upon the proposal. The 2007 Proposed Rule, as explained in the Proposing Release, contains three parts clarifying that: 1) the investment advice of a broker-dealer exercising investment discretion over an account, or charging a separate fee, or separately contracting for advisory services is not 'solely incidental' advice; 2) a broker-dealer does not receive 'special compensation' solely because it charges a commission for discount brokerage services; and 3) a broker-dealer is an investment adviser (and thereby a fiduciary) solely with regard to its accounts subject to the Advisers Act.

The 2019 Guidance restored the 2005 Rule's version of 'solely incidental' advice by defining 'solely incidental' as advice that "is provided in connection with and is reasonably related to the broker-

12, 2005. The Court's opinion addressed 'special compensation' – but not the solely incidental prong – of the exemption for broker-dealers, leaving that question unsettled as to the extent securities brokers can provide 'solely incidental' investment advice as a part of their services.

[2] *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser*, SEC Release No. IA-5249, June 5, 2019.

[3] "SEC Adopts Rules and Interpretations to Enhance Protections and Preserve Choice for Retail Investors in Their Relationships With Financial Professionals," SEC press release 2019-89, June 5, 2019.

[4] IA Release No. 2376 (2005), at 13.

[5] Sec. 202(a)(11)(c) of the Advisers Act provides a limited exemption from registration for "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefore…"

dealers primary business of effecting securities transactions."[6] Buried in a footnote, the 2019 Guidance revoked earlier Commission guidance on 'solely incidental' advice, which had the effect of reversing its earlier position in the 2005 Rule that financial planning services "would not be solely incidental to the business of brokerage."[7] Instead, the 2019 Guidance simply stated that, "To the extent that this interpretation is inconsistent with the Commission's prior interpretations with respect to the solely incidental prong, this interpretation supersedes those interpretations."[8]

The 2019 Guidance was effective July 12, 2019.

The Petitioner

XY Planning Network is a national network of fee-for-service financial planners. XYPN provides members with technology, compliance, and business consulting services, representing more than 1,500 independent financial planners in all 50 states.

XYPN members serve primarily Generation X and Generation Y investors, providing financial planning advice for which XYPN members receive fee-only compensation for their services, without asset minimums or product sales. As noted by the SEC in its 2005 Rule, "Typically what distinguishes financial planning from other types of advisory services is the breadth and scope of the advisory services provided."[9] Given that the investment advice component is integrated with other services as part of the financial planning process, unless an exemption is available, individuals holding out to the public as financial planners are subject to oversight by state securities administrators or the SEC. XYPN members are primarily registered as investment adviser representatives of state-registered investment advisers ("RIAs"), but remain subject to Commission authority "with respect to fraud or deceit against an investment adviser or person associated with an investment adviser."[10]

As a condition of membership, XYPN members must sign a fiduciary oath and receive only fees paid directly by their clients in compensation for financial planning services.

XYPN members are directly impacted by the 2019 Guidance in two primary ways. First, XYPN's business model depends in substantial part on financial planners needing to register as RIAs in order to be compensated for their financial planning advice. By allowing broker-dealers to provide the same scope of financial planning advice as XYPN members, and be compensated for that financial planning advice as long as the advice remains "in connection with and reasonably related to" the sale of brokerage products, the 2019 Guidance reduces the likelihood that financial planners at broker-dealers will register as investment advisers, resulting in a loss of business for XYPN.

Second, the SEC's rule poses a competitive threat to XYPN's members. In subjecting broker-dealers to a lower standard of conduct under Reg BI, the 2019 Guidance permits the delivery of financial planning advice by brokerage firms as long as it is "in connection with and reasonably related to" the

[6] *Supra* note 2, at 12.

[7] *Supra* note 4, at 13.

[8] *Supra* note 2, footnote 46.

[9] *Supra* note 4, at 54.

[10] *See* State and Federal Responsibilities. Sec. 203A(b)(2) of the National Securities Markets Improvement Act of 1996 (15 USC 80b-3a.)

sale of brokerage products."[11] This creates (or rather formalizes) an unlevel playing field in which broker-dealers can hold out as providing identical financial planning services to consumers, deliver an identical comprehensive financial plan to clients, receive identical total remuneration from the client for that financial planning advice (in the form of commissions), yet be subject to a non-identical lower standard of care and benefit from reduced legal exposure.

In other words, the current regulatory scheme under Regulation Best Interest ("Reg BI") allows non-fiduciary salespersons[12] to hold out as trusted advisors by using fiduciary-advice-sounding titles like "financial planner"[13], provide comparable financial planning services, and be compensated for those financial plans, without a clear, 'real-time' disclosure to the consumer of the sales capacity in which they are actually operating and that the preceding advice relationship has ended.[14] Nor does Reg BI recognize that from the consumer's perspective, a product sold pursuant to a recommendation given when the advisor was operating *as* an advisor is still viewed as being an implementation of *advice*, and not acting in a brokerage sales capacity. And Form CRS (a part of the Reg BI package of rules) does little to dispel the confusion with its own failure to clearly distinguish between advisors and salespeople.[15] By clearly (re-)defining 'solely incidental' in sec. 202(a)(11)(c) of the Advisers Act, the Commission can increase investor protection by (re-)asserting a distinction between product sales and stand-alone investment advice.[16]

Discussion

The 2007 Proposed Rule is not "old" or "outdated" in a regulatory context. In 2019, when formally voting on, and approving each rule and regulatory interpretation, then-SEC Chairman Jay

[11] *Supra* note 2.

[12] Here we refer to securities brokers and state-licensed insurance producers as 'non-fiduciary salespersons.'

[13] *See*, e.g., *"Consumer Perceptions of Financial Advisory Titles in the United States and Implications for Title Regulation"*, International Journal of Consumer Studies, June 8, 2020, available at https://doi.org/10.1111/ijcs.12597, which showed that "financial advisor" titles, and in particular the "financial planner" title, creates a substantively different expectation of trust and competency when used to describe a financial salesperson than using actual sales-oriented titles.

[14] *See*, *Regulation Best Interest: The Broker-Dealer Standard of Conduct,* SEC Release No. 34-86031; File No. S7-07-18, June 5, 2019, at 125. "Treatment of Dual-Registrants. …The Commission recognized the issues surrounding the determination of whether a dual registrant is acting in the capacity of a broker-dealer or an investment adviser, and asserted that such a determination *requires a facts and circumstances analysis*, with no one factor being determinative." [Emphasis added.]

[15] For example, the proposing release of Form CRS required investment advisers to state that they are held to a fiduciary standard. *See* Appendix E, Sample Firm, "Our Obligations to You." However, the final instructions removed the reference to a fiduciary standard. Instead the final release requires an identical, milquetoast boilerplate description of a broker-dealer's legal obligations and those of an investment adviser, i.e., "…we have to act in your best interest and not put our interest ahead of yours."

[16] *See*, e.g., "some of these organizations using the descriptive title of investment counsel were in reality dealers or brokers offering to give advice free in anticipation of sales and brokerage commission on transactions executed upon such free advice" (discussing why Congress, in enacting the Advisers Act, needed to regulate the titles that brokers used in marketing their services), *Dwight Rose, President, ICAA, at the Senate hearing record, p. 736.*

Clayton noted that the adopted rules and interpretations "address issues that the Commission has been actively considering *for nearly two decades*." [Emphasis added.][17]

Although XYPN members are generally not directly regulated by the Commission, the SEC exerts significant influence on state regulatory policy in two ways, through: 1) promulgation of rules that may be adopted in similar form by state securities administrators;[18] and 2) state regulations that incorporate SEC rules by reference.[19]

The Proposed 2007 Rule is deficient in providing much-needed guidance consistent with the statutory exemption. The Proposed 2007 Rule offers no unique insight into what 'solely incidental' means, other than simply confirming already-commonly understood boundaries for 'solely incidental' advice, and fails to build upon the SEC's own acknowledgements in its 2005 Rule that

> "financial planners today belong to a distinct profession, and financial planning is a separate discipline from, for example, portfolio management. This development has occurred only relatively recently, over approximately the last twenty-five years – well after the enactment of the Investment Advisers Act in 1940."[20]

Consequently, the 2007 Proposed Rule should be significantly expanded with additional guidance regarding the boundaries of 'solely incidental' services of a broker-dealer. In particular, this is critical given that the 2007 Proposed Rule (and the 2019 Guidance) were notable for excluding three other important restrictions that were part of the vacated 2005 Rule, namely that: 1) providing advice as part of a financial plan; 2) holding out to the public as a financial planner; or 3) delivering a financial plan to a customer, were not available to broker-dealers under the 'solely incidental' prong of the exemption.[21]

The 2007 Proposed Rule is part of a larger picture in which the question of appropriate advisor conduct has been ongoing – even before the agency was created in 1934 and the Advisers Act enacted by Congress six years later. This much-needed inquiry actually began in the late 19th century with a news publication's call for men "well qualified to certify to the merits of railroad bonds," according to

[17] *Supra* note 3.

[18] *See*, e.g., *NASAA Model Rule for Investment Adviser Written Policies and Procedures Under the Uniform Securities Act of 1956 and 2002,* North American Securities Administrators Ass'n., Adopted Nov. 24, 2020. NASAA's request for public comment on the proposal noted that the SEC had required investment advisers under its purview "to adopt and implement written policies and procedures…since February 5, 2004."

[19] *See*, e.g., Ohio Laws & Administrative Rules, Sec. 1707.20(2) that states, "Notwithstanding sections […] of the Revised Code, the division may incorporate by reference into its rules any statute enacted by the United States congress or any rule, regulation, or form promulgated by the securities and exchange commission…in a manner that also incorporates all future amendments to the statute, rule, regulation, or form."

[20] *Supra* note 4, at 54.

[21] The Commission has never explained this omission, either in the Proposed 2007 Rule or the 2019 Guidance.

one research paper.[22] The call for objective investment advice was reiterated in the 1930s, culminating in the Investment Advisers Act of 1940 and congressional recognition that "not only must the public be protected from the frauds and misrepresentations of unscrupulous tipsters and touts, but the bona fide investment adviser must be safeguarded against the stigma of the activities of these individuals."[23]

The debate over advice regulation then entered a new and heightened phase of interest in the 1980s, as the term "financial planner" became a popular marketing term, and questions arose over the appropriate regulation of financial planners.[24] After that registration question was resolved through joint SEC-NASAA guidance,[25] the issue over the appropriate regulatory standard for stand-alone investment advice versus advice connected to product sales has, over the last two decades, undergone vigorous examination in Congress, the courts and federal and state agencies without clear resolution.

XYPN believes the debate over a fiduciary or suitability standard for financial advice is unlikely to abate in the foreseeable future. In light of adoption by the SEC of Regulation Best Interest, and the substantive policy questions raised by the Commission's approval of the 2019 Guidance (which was never opened to public comment and did not follow a formal rulemaking process), XYPN believes the 2007 Proposed Rule is not moribund, and the issues surrounding incidental advice of a broker remain even more highly relevant today.[26]

XYPN believes that in addition to the Commission's failure to complete the rulemaking process of the 2007 Proposed Rule, the 2019 Guidance is also fundamentally flawed and inconsistent with the plain meaning of the statutory language and its intention to separate (rather than blend) product sales

---

[22] *See*, e.g., W.T. Mallison Jr., "The Investment Advisers Act of 1940," *Vanderbilt Law Review 68* (1947). "In 1897 the *Nation* sounded a clarion call for a new profession on the ground that 'there ought to be men as well qualified to certify to the merits of railroad bonds as the men who now certify to the merits of land-titles."

[23] *Report to Accompany S. 4108, Investment Company Act of 1940 and Investment Advisers Act of 1940,* by the Senate Committee on Banking and Currency, May 28, 1940, at 21.

[24] "The staff of the Commission has received numerous requests for staff interpretive or no-action advice concerning the applicability of the [Advisers Act] to persons, such as financial planners…. In addition, it appears that many of these persons may not be aware of the provisions of the federal securities laws which may be applicable to their activities, particularly the fiduciary standards…of the Advisers Act." *Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons who Provide Investment Advisory Services as an Integral Component of Other Financially Related Services,* SEC Release No. IA-770, Aug. 13, 1981, at 2.

[25] Release Nos. IA-770 and IA-1092 (1987).

[26] *See*, e.g., recent statements of SEC Chairman Gary Gensler in reference to Regulation Best Interest. "The SEC staff will implement the rule in ways that will maximize investor protection. At the same time, we are keeping an open mind about what guidance or other updated, if any, may be needed to ensure that broker-dealers fully understand the rules and that Regulation Best Interest lives up to the promise of its name." *Testimony Before the Subcommittee on Financial Services and General Government, U.S. House Appropriations Committee*," SEC Chairman Gary Gensler, May 26, 2021. *See* also Chairman Gensler's response to questions during the hearing in which he explained that the Commission is "going to vigorously get the most out of Regulation Best Interest, but we're also going to evaluate. If it's not serving the purpose of investors then we will update and freshen that rule as well as other rules because we always have to be evaluating that investors come first…" Melanie Waddell, "SEC Will Enforce Reg BI to the Letter: Gensler," *Think Advisor*, May 6, 2021.

from advisory services.[27] The Commission should revisit, revise, and adopt guidance via a rulemaking (or other form) that assists investors and the regulated community in more fully understanding the distinctions between a financial intermediary acting in the role of a salesperson, i.e., a registered representative of a broker-dealer providing product advice attached to a securities transaction, and the role of an adviser, who is a fiduciary accountable to its client under twin duties of loyalty and care.[28] This laudable goal can be accomplished by withdrawing the 2019 Guidance, and significantly narrowing the type of incidental investment advice and financial planning services that can be provided to a brokerage firm's customers under a revamped 2007 Rule.[29]

On a related investor protection issue, it should be noted that the question of jurisdiction for advisory activities remains largely unsettled. Even when a dual registrant[30] is acting as an investment adviser, the Commission has failed to clearly address another aspect of the "capacity" question, i.e., when fiduciary accountability ends and other laws intercede when the dual-registrant provides other services or products in the capacity of a registered representative or insurance producer.

The Commission's own guidance with respect to the legal obligations of securities brokers that also act as RIAs is in fact confusing. For example, the SEC's fiduciary guidance for RIAs states that the fiduciary standard applies to the *entire* client relationship, [31] while its guidance for dual-registrants in Reg BI seemingly curtails – or at best muddles – the extent to which the fiduciary standard of an adviser applies by stating "that a dual-registrant is an investment adviser *solely with respect to accounts for which a dual-registrant provides advice* and receives compensation that subjects it to the Advisers Act."[32] [Emphasis added.] By contrast, XYPN believes that because the fiduciary standard applies to an entire client relationship, any subsequent implementation of that advice – whether in the form of an advisory *or* a brokerage account – should be encompassed within that fiduciary relationship.

Statement Setting Forth the Substance of the Proposed Rule

XYPN respectfully submits the follow draft language (with additions and deletions so noted) for consideration in amending the 2007 Proposed Rule:

VII. STATUTORY AUTHORITY

The Commission is proposing to amend Rule 202(a)(11)-1 pursuant to section 211(a) of the Advisers Act.

---

[27] *Supra*, Notes 14 and 22

[28] "Included in the fiduciary standard [of investment advisers] are the duties of loyalty and care." *Study on Investment Advisers and Broker-Dealers*, SEC staff study, Jan. 22, 2011, at iii.

[29] *See* XYPN's detailed comments on the 'solely incidental' topic, which can be found in its Public Comment letter in response to Regulation Best Interest at https://www.sec.gov/comments/s7-07-18/s70718-4171547-172223.pdf, and further detail at https://www.kitces.com/blog/xypn-sec-petition-208c-advisers-act-title-reform-solely-incidental/

[30] By "dual registrant" we mean a registered representative of a broker-dealer who is dually registered as an investment adviser representative of the same firm, or as an independent RIA affiliated with a separate brokerage firm.

[31] *See,* e.g., "The fiduciary duty to which advisers are subject is broad and applies to the entire adviser-client relationship." *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, SEC Release No. IA-5248; File No. S7-07-18, June 5, 2019, at 6.

[32] *Supra* Note 13, at 35.

TEXT OF RULE

List of Subjects in 17 CFR Part 275

Investment advisers, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 275 -- RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The general authority citation for Part 275 is revised to read as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted. [Note: To be amended as necessary in reflecting new language.]

* * * * *

2. Section 275.202(a)(11)-1 is revised to read as follows:

§ 275.202(a)(11)-1 Certain broker-dealers.

(a) Solely incidental. A broker or dealer provides advice that is not solely incidental to the conduct of its business as a broker or dealer within the meaning of section 202(a)(11)(C) of the Advisers Act (15 U.S.C. 80b-2(a)(11)(C)) if the broker or dealer (among other things, and without limitation):

(1) Charges a separate fee, or separately contracts, for advisory services; or

(2) Provides advice as part of a financial plan or in connection with providing financial planning services; or

(3) Holds itself out generally to the public as a financial planner, or as providing financial planning services; or

(4) delivers to the customer a financial plan; or

(5) represents to the customer that the advice is provided as part of a financial plan or in connection with financial planning services; or

(6) Holds itself out using similar titles or marketing materials indicating the offer of holistic financial advisory services; or

(~~2~~7) Exercises investment discretion (as that term is defined in section 3(a)(35) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78c(a)(35))), except investment discretion granted by a customer on a temporary or limited basis, over such account.

(8) For purposes of this section, "solely incidental" is defined as services that are likely to ensue as a chance or minor consequence of a broker-dealer's primary business of effecting securities transactions.

(b) Special compensation. A broker or dealer registered pursuant to section 15 of the Exchange Act (15 U.S.C. 78o) does not receive special compensation within the meaning of section 202(a)(11)(C) of the Advisers Act solely because the broker or dealer charges a commission, mark-up, mark-down, or similar fee for brokerage services that is greater than or less than one it charges another customer.

(c) Special rule. An investment adviser ~~broker or dealer~~ registered with the Commission under Section 2021~~5~~ of the Advisers ~~Exchange~~ Act is an investment adviser ~~solely with respect to those accounts for which it provides services or receives compensation that subject the broker-dealer to the Advisers Act~~ and expressly includes any associated person of the investment adviser who holds himself or herself out as a financial planner or providing investment advisory services, including the execution of non-

securities transactions. The fiduciary duty to which investment advisers are subject is broad, and applies to the entire adviser-client engagement. ~~, including the subsequent implementation of advice provided pursuant to an advisory relationship even if the advice is implemented outside of an advisory account~~ In addition, a fiduciary relationship may arise as a matter of law when an investor reposes trust and confidence in a broker-dealer registered with the Commission under Section 15 of the Exchange Act.

By the Commission.

_____

XYPN also recommends withdrawing the following regulatory guidance in a form or order required by the Commission using the sample language below:

"The Commission hereby withdraws the following guidance in its entirety, i.e., *Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser,* SEC Release No. IA-5249, effective [date].

_____

In summary, XYPN respectfully requests that the Commission consider the 'solely incidental' issue expeditiously and initiate a new rulemaking process as soon as practical.

Of course, XYPN is happy to provide any additional information that may be requested by the Commission or its staff in consideration of this Petition.

Respectfully,

Michael Kitces
Executive Chairman and Co-Founder, XY Planning Network