



Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: File Number S7-07-18  
File Number S7-08-18

Dear Sir or Madam:

Great-West Financial ("Great-West") appreciates the opportunity to comment on the Securities and Exchange Commission's (the "Commission" or "SEC") recently proposed Form CRS Relationship Summary ("Form CRS") and Regulation Best Interest disclosure ("RBI") as well as the Interpretation Regarding Standard of Conduct for Investment Advisers (together "SEC Proposals" or "Proposals").<sup>1</sup>

Great-West has been at the forefront of developing innovative products and investments that help workers accumulate and manage income in retirement. Great-West provides registered and unregistered variable insurance and annuity products and index-linked annuities to many thousands of benefit plans and IRAs through its relationship with Empower Retirement, our related retirement business, and among independent broker-dealers, banks and investment advisers alike. Great-West's variable annuity and life insurance products are complemented by a complex of mutual funds offered through Great-West Funds, Inc. ("Great-West Funds"). Great-West Funds are offered through Great-West's variable annuity and life insurance products and directly to qualified retirement plans and IRAs.

### **Standard of Conduct Harmonization and Uniformity with Other Applicable Regulatory Regimes**

We applaud the Commission for its leadership on establishing a balanced approach to regulating standards of conduct in the financial industry. Because the Commission is the primary regulator of broker-dealers, investment advisers and most securities products in both the retirement and retail markets, it is the proper regulator to lead this effort at the federal and state levels. Great-West consistently emphasized to the Department of Labor ("DOL") during its fiduciary rule proposals that regulator coordination and rule harmonization are the most critical elements of any standard of conduct regime. We now emphasize the point to the Commission in this letter.

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<sup>1</sup> 83 Fed. Reg. 21416 (May 9, 2018); 83 Fed. Reg. 21574 (May 9, 2018); 83 Fed. Reg. 21203 (May 9, 2018).

While there are different regulatory regimes covering different account types and investments, investors should not view the duties owed to them as differing depending on the nature of the investment. The expectation is that the same standards of conduct should apply to the same consumer regardless of their 401(k) balances, IRA holdings or retail brokerage accounts and the investments in those accounts (e.g., annuities, life insurance or mutual funds).

The SEC Proposals appear to create a distinction whereby registered investment advisors hold fiduciary responsibilities in an ongoing advice model while broker-dealer recommendations must be made in the best interest of a customer at the time of the recommendation. The SEC Proposals seek to thoughtfully explain these distinctions. However, we believe the Commission should carefully consider comments from industry and consumer stakeholders about whether this distinction is clear to all parties (such as the manufacturer, distributor and consumer) in a securities transaction. During the DOL fiduciary rule process, regulatory uncertainty was the biggest challenge to the variable annuity marketplace. To that end, we hope any final SEC rules and interpretations related to investment advisor and broker-dealer standards of conduct focus on eliminating as much regulatory uncertainty as possible. We believe removing uncertainty benefits financial services markets as a whole and consumers in particular.

Once the Commission's regulations and guidance are finalized, it is critically important that the Commission work swiftly with the Financial Industry Regulatory Authority ("FINRA") on an action plan to resolve any inconsistencies that may have arisen with regard to current FINRA rules.

The other key element to eliminating uncertainty is coordinating with the DOL and state securities and insurance regulators on a harmonized standard of conduct.

#### **a. Department of Labor**

The Commission has indicated its interest in addressing the standards of conduct for investment advisers and broker-dealers. In a public statement posted on the SEC website on June 1, 2017, SEC Chairman Jay Clayton expressed interest in working with the DOL on this issue and noted: "I believe clarity and consistency — and, in areas overseen by more than one regulatory body, coordination — are key elements of effective oversight and regulation." We agree.

It is imperative that there be a closely coordinated rulemaking effort between the Commission and the DOL. This coordination should result in clear, workable and harmonized regulations. To the extent the DOL intends to propose a subsequent, similar regime to its fiduciary rule, those rules should be harmonized and consistent with the standards set in the Commission's final regulations and guidance.

#### **b. State Regulators**

We also urge the Commission to not only consult but formally engage with state insurance and state securities regulators. Specifically, we call your attention to the following state-level actions that should be factored in to the Commission's final regulations and guidance:

- The National Association of Insurance Commissioners (NAIC) is actively revising their "Suitability in Annuity Transactions Model Regulation" to incorporate a best interest standard. We understand the Commission has met and intends to continue to meet with the NAIC during the Commission's work related to standards of conduct. We are very supportive of this collaboration.
- On July 18, 2018, the New York Department of Financial Services issued its final "First Amendment to Insurance Regulation 187 – Suitability and Best Interests in Life Insurance and Annuity Transactions." New York's regulation not only imposes a "best interest" standard on insurance producers for annuities (including those producers that sell registered securities) but also expands that duty to include insurance producers that sell life insurance.
- In 2017, Nevada passed a new law that classifies broker-dealers and registered investment advisers as "financial planners" and assigns a fiduciary standard to their day-to-day interactions. The Nevada state securities regulator is due to issue regulations around this legislation in the near future. Separately, the Nevada Department of Insurance intends to revise its current annuity suitability regulation to incorporate a best interest standard.
- Standard of conduct legislation is also being contemplated in other states, including California and New Jersey.

As noted above, it is very possible that financial services professionals and investors will enter transactions with multiple standards applying to one transaction. Great-West understands that establishing appropriate standards of conduct on financial professionals is not easy, and each regulator brings a unique and potentially positive perspective to the conversation. However, the regulatory community must understand a tapestry of different rules is detrimental to the industry, especially to investors, who expect their financial professionals to understand and abide by clear legal obligations and duties. Separately, those investors will also bear additional compliance costs through products and services as the financial services professionals who serve them strive to comply with separate rules.

In any future discussions with the NAIC and other state regulators, we strongly urge the Commission to advocate for regulatory harmonization and consistency, which are critical elements if consumer understanding and ultimately the success of the Commission's final regulations and guidance are to be achieved.

### **Key Successes in the SEC Proposals**

The Commission has succeeded on many fronts with the SEC Proposals. We would like to specifically note a few significant successes.

**a. The standard of conduct for broker-dealers is balanced.**

In the DOL's Best Interest Contract Exemption, the DOL created a standard of conduct that would have required broker-dealers making recommendations to act "without regard to the financial interests of the adviser, financial institution or any affiliate or related entity, or other party." This language drastically moved the standard of conduct from a traditional suitability standard to a fiduciary standard grounded in the common law of trusts. The Commission appears to have properly recalibrated this standard in that it has raised the standard of conduct to a "best interest standard" and does not expressly prohibit particular conflicts of interest. While we recommend some adjustments to the RBI (as discussed later), we generally agree with broker-dealers having disclosure, care and conflict of interest obligations as proposed.

**b. The SEC Proposals do not pick winners and losers and preserve consumer choice.**

While the DOL sought a regulatory solution to an important problem with its fiduciary rule and Prohibited Transaction Exemptions, its solutions led to a framework in which certain products and compensation structures became favored and disfavored. For instance, in its Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (RIN 1210-AB82), the DOL sought comment on clean share mutual funds and fee-based annuities, which implied these product structures alone potentially removed conflicts of interest. As we noted in our response to the DOL's RFI, no one product or investment solution could resolve all the problems the DOL sought to remedy.

Additionally, we expressed concerns that these products implicitly became "endorsed" under the DOL fiduciary rule and PTEs. The SEC Proposals attempt to strike a balance by governing products, services and distribution models in a relatively consistent manner. Based on the Commission's longstanding track record of regulating innovative financial products, instruments and markets, we believe the final regulations and guidance will successfully continue this agnostic tone and allow companies to continue to develop new and innovative products with reasonable compensation structures.

Separately, we commend the Commission for recognizing that while conflicts of interests may exist, there is no inherent favoring of one compensation structure over another. The Commission appears to accept that commission-based payments may be more appropriate for "point-in-time" investors, who intend to hold investments for an extended time, while fee-based compensation may be better for other investors.

This distinction is of significant importance to annuity manufacturers and distributors.

**c. The SEC Proposals clarify the SEC stance related to no new private**

**right of action.**

Great-West appreciates the clarification in the RBI that states the Commission does not intend to create a new private right of action or right of recession. In order for the Commission to preserve the flexibility and principles-based approach in the SEC Proposals, it is critical for the Commission to be the exclusive regulator and not the plaintiff's bar. We believe the Commission should further clarify this point by stating in Form CRS and the RBI that financial intermediary contracts and disclosure documents may include disclaimers of liability based on the Commission's final rules and required disclosures. Specifically, for example, it should be stated that the requisite disclosures under Form CRS should not give rise to any contractual obligation on the part of the financial intermediary based on the disclosure.

**d. The benefits of electronic delivery are discussed.**

The SEC Proposals specifically discuss the benefits of electronic delivery. We believe this is appropriate as widespread access to modern technology, like smartphones, has shifted consumer-business relationships away from paper toward electronic methods. Great-West cites Empower Retirement statistics, which show that the majority of its plan participants, including 52% of participants aged 62-71, prefer to receive communications electronically. We believe the same preferences exist in non-retirement plan models as well.

**Opportunities for Improvement in the SEC Proposals**

We appreciate the opportunity to also provide our comments to the Commission regarding potential improvements to the SEC Proposals.

**a. The Commission should clarify that the SEC Proposals preempt state law.**

Consistent with our earlier statements, Great-West strongly believes in the existence of clear and consistent laws and regulations across the federal and state regulatory landscape. Specifically, with respect to standards of conduct for federally registered investment advisers and broker-dealers, we believe federal law should preempt any conflicting state law. We urge the Commission to finalize regulations and guidance to clarify that the regulations, when finalized, will become the exclusive standards of conduct for federally registered broker-dealers and investment advisers alike.

Section 203A(b)(1)(A) of the Investment Advisers Act of 1940 (the "Advisers Act") states, "no law of any State or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser *shall apply* (emphasis added) to any person that is registered under Section 203 as an investment adviser, or that is a supervised person..." The law only grants states and localities the ability to separately "license, register, or otherwise qualify" an investment adviser.

Further, Section 15(i) of the Securities Exchange Act of 1934 (the “Exchange Act”) provides, “no law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to, the requirements in those areas established under this chapter.”

In light of the above, we recommend that the Commission affirm, consistent with Section 203A of the Advisers Act and Section 15(i) of the 1934 Act, that SEC standards of conduct would preempt any standards under state law that are inconsistent with the scheme of SEC regulation under federal law.

**b. The Commission should create a definition of recommendation in the RBI.**

We commend the Commission for looking to FINRA Rule 2111 and FINRA interpretations regarding the interpretation of “recommendation.” However, given broker-dealers’ best interest obligations under the proposed RBI when making a “recommendation,” we believe it is critical that the term “recommendation” be formally defined in the final rule. Failure to clarify the term may lead to a number of unintended consequences. We believe FINRA 2111.03 provides a reasonable definition as well as descriptions of items that are not recommendations:

“Recommendation” means a communication to a retail customer that, based in its content, context and presentation, would reasonably be viewed as a call to take action or to refrain from taking action to that retail customer. Recommendation does not include the following communications as long as they do not include (standing alone or in combination with other communications) a recommendation of a particular security or securities:

(a) General financial and investment information, including (i) basic investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment, (ii) historic differences in the return of asset classes (e.g., equities, bonds, or cash) based on standard market indices, (iii) effects of inflation, (iv) estimates of future retirement income needs, and (v) assessment of a customer's investment profile;

(b) Descriptive information about an employer-sponsored retirement or benefit plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan;

(c) Asset allocation models that are (i) based on generally accepted investment theory, (ii) accompanied by disclosures of all material facts and assumptions that may affect a reasonable investor's assessment of the asset allocation model or

any report generated by such model, and (iii) in compliance with FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) if the asset allocation model is an "investment analysis tool" covered by Rule Rule 2214; and

(d) Interactive investment materials that incorporate the above."

We appreciate your consideration of what we believe is a fundamental and essential point of clarification.

**c. The RBI should clarify that the lowest fee product is not necessarily in the retail investor's best interest.**

Great-West agrees with the Commission's clarification that the RBI is not intended to drive investors to the "lowest cost" or "lowest risk" investment. However, we think it is important for the Commission to clarify this point explicitly in the final regulation.

We recommend the following addition:

(a) Best Interest Obligation. (1) A broker, dealer, or natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer. "For example, it may be relevant for a broker, dealer, or natural person to consider factors including cost, investment objectives, potential risks and returns, product design, liquidity, minimum and maximum investment amounts, issuer ratings, issuer reputation, convenience, and brand. Further, in no event will a broker, dealer, or natural person be deemed to have met this requirement merely by recommending the lowest cost or lowest risk investment."

**d. The conflict of interest section of the RBI requires clarification.**

Great-West agrees in concept with a broker-dealer establishing thorough, comprehensive and verifiable procedures to manage conflicts of interest. However, aspects of the conflict of interest requirement of the RBI require clarification or modification.

*Conflicts of interest in the RBI should have a materiality threshold rooted in federal securities law that conforms to the Advisers Act.*

Material conflicts of interest are a fundamental aspect of the RBI. The SEC Proposals state: "we proposed to interpret, for purposes of Regulation Best Interest, a '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.”

However, the Commission appears to have created a very subjective standard to determine materiality. The goal the conflict of interest obligation under the RBI is to require broker-dealers to identify and analyze material conflicts of interest and draft policies and procedures for the purposes of disclosure or take actions to eliminate or mitigate the conflicts. These policies and procedures occur at the firm level, but the intended standard focuses on the mindset, conscious or unconscious, of the individual associated person. The standard is unworkable as currently drafted, because it would be practically impossible for a firm to anticipate unconscious conflicts at an individual level to effectively develop reasonable policies and procedures.

We believe this is an opportunity for the Commission to unify the standard with the Advisers Act.

Under the Advisers Act, as established by the U.S. Supreme Court in *SEC v. Capital Gains Research Bureau* in 1963, a conflict of interest arises if an incentive exists that “might incline an investment adviser to render advice which was not disinterested.” This is an objective standard that creates more of a bright line rule for a firm to establish and maintain effective conflict of interest policies and procedures. Thus, we recommend the Commission interpret “conflict of interest” to mean “a conflict of interest that might incline a broker-dealer to make a recommendation that is not disinterested.” Further, such a conflict of interest should be considered “material” if “there is a substantial likelihood that a reasonable investor would consider the information important when making an investment decision.” This description of materiality is consistent with the generally accepted definition of the term for purposes of federal securities law as established and reaffirmed under federal case law.

*Clarity is needed related to duty to mitigate or eliminate conflicts of interest.*

Section 240.15l-1(a)(2)(iii)(A) and (B) of the RBI requires clarification or potential reformulation. Great-West believes that:

- 1) Reasonable policies and procedures should be established, documented and enforced to identify and reasonably prevent material conflicts of interests; and
- 2) Those material conflicts of interests should be disclosed to investors at or before the time of the recommendation.

In terms of how that is implemented, we believe the DOL established a reasonable and workable regime under Section II (d) (2) of the Best Interest Contract Exemption, which required a firm to establish policies and procedures reasonably designed to identify and prevent material conflicts of interest. This regime made no distinction between financial and non-financial material conflicts of interest. Therefore, we recommend the Commission reformulate the Conflict of Obligation subsection in the RBI as follows:



(iii) The broker or dealer shall establish, maintain, and enforce written policies and procedures reasonably designed to identify, disclose, and prevent material conflicts of interest that are associated with such recommendations.

This change would not only align with broker-dealer practices adopted as part of the DOL fiduciary rule; it would also allow broker-dealers the flexibility the Commission intended and eliminate the need for the Commission to specifically identify a list of financial-incentive material conflicts of interest.

In an absence of a reformulated conflicts of interest section, the RBI should provide clear guidance regarding when a firm must disclose, mitigate or eliminate material financial and non-financial conflicts of interest. The absence of such guidance will lead to drastically different regimes on a firm-to-firm basis, and enforcement and compliance will be burdensome for both the Commission and the broker-dealer.

#### **e. Duty of Care Obligation**

The Commission has specifically sought comment on the use of the word “prudence” in the definition of duty of care, and we do have some concerns related to that usage. That term is used almost exclusively to describe fiduciary responsibilities under ERISA and trust law. Since compliance with the duty of care obligation is ultimately fact specific, and the consequences of violating it can be significant, plan fiduciaries are constantly seeking guidance on how it applies in specific factual scenarios. ERISA fiduciary breach claims can only be brought in federal court, which ensures consistency in interpretation. Using the same term as a standard of care for non-ERISA fiduciaries in situations in which interpretation of the term will be effectuated by way of non-public, state-by-state arbitration proceedings opens the door to confusion and misinterpretation. We recommend that another term, such as “good judgment,” be used in its place.

#### **f. The Commission should clarify that Form CRS does not apply to broker-dealers when an associated person is not making a recommendation.**

Great-West’s wholly owned subsidiary broker-dealer, GWFS Equities, Inc., often only acts as a limited-purpose broker-dealer for activities not associated with recommendations to a retail investor. The broker-dealer acts as a principal underwriter and distributor to variable life insurance policies and variable annuity contracts of Great-West; sole distributor of Great-West Trust Company, LLC collective investment trusts; distributor of unaffiliated mutual funds and collective trusts; and principal underwriter for Great-West Funds, but will only make recommendations in certain markets.

GWFS Equities, Inc. registered representatives often only conduct wholesaling services to advisers. In this context, the selling broker-dealer is an unaffiliated broker-dealer, and that broker-dealer’s registered representative makes the recommendation and actually sells the security. We believe this model, or models similar to this, exists with other life insurance companies.

If the intent of Form CRS is to provide a layered disclosure regime to work with other disclosures found in the RBI and the Advisers Act, the Commission should understand that it would be confusing to the investor to receive a Form CRS documenting services of a broker-dealer with whom it has had no sales interaction along with a separate disclosure from the selling broker-dealer. The Form CRS disclosures would effectively require the limited-purpose broker-dealer to disclose the same information as the selling broker-dealer but with no immediate intent on behalf of the limited-purpose broker-dealer or investor to engage in a true brokerage relationship.

Additionally, because the Regulation Best Interest disclosure is not required until the time of a recommendation, the investor will potentially never receive another disclosure from the limited-purpose broker-dealer unless they separately retain their services in a more traditional broker-dealer/investor financial transaction. Such a disclosure could be delivered years after the first Form CRS disclosure.

We believe the intent of the Commission is to require broker-dealers to deliver Form CRS to retail investors for which it is making recommendations or otherwise providing traditional brokerage services. We do not believe the intent is to require this of limited-purpose broker-dealers. However, the proposed addition of Section 240.17a-14 (a) makes no distinction in this regard.

We recommend that the Commission make the following change to Section 240.14a-14:

(a) Scope of Services: This section shall apply to every broker or dealer registered with the Commission pursuant to section 15 of the Act that offers services to a retail investor, but in no event shall delivery of Form CRS be required to a retail investor unless the broker or dealer, or a natural person of a broker or dealer, makes a recommendation pursuant to Regulation Best Interest.

**g. The Commission should strongly evaluate the layered disclosure approach based on stakeholder feedback.**

Great-West strongly supports the Commission's disclosure-based approach to addressing financial professional standards of care. We believe disclosures should be simple, straightforward and easy to read and should provide basic information to the investor about a financial services relationship. We are concerned, however, that the Form CRS disclosure does not interact well with either the Regulation Best Interest disclosure obligations or those found in the Advisers Act. To that end, we believe the Commission should carefully assess all broker-dealer models before finalizing its Regulation Best Interest regulation.

## **Conclusion**

We again applaud the Commission on this important effort. We hope these comments

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provide insight into aspects of the SEC Proposals that we believe would serve their purposes well and those that can be improved with Commission, regulatory and stakeholder collaboration.

Sincerely,

A handwritten signature in black ink that reads "Robert K. Shaw." The signature is written in a cursive, flowing style.

Robert K. Shaw  
President, Individual Markets