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[redacted]

August 7, 2018

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Via Email to: rule-comments@sec.gov

Re: Regulation Best Interest, File No. S7-07-18
Proposed Form CRS, File No. S7-08-18
Notice of Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers, File No. S7-09-18

Dear Mr. Fields:

As the leading provider of retirement and other financial services for those in academic, research, medical, and cultural fields, Teachers Insurance and Annuity Association of America ("TIAA") appreciates the opportunity to submit comments in response to (i) the Securities and Exchange Commission's (SEC, or the "Commission") proposed new rule under the Securities Exchange Act of 1934 (the "Exchange Act") establishing a standard of conduct for broker-dealers and natural persons who are associated persons of a broker-dealer when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer ("Regulation Best Interest");[1] (ii) the SEC's proposed new and amended rules and forms under both the Investment Advisers Act of 1940 (the "Advisers Act") and the Exchange Act related to requiring registered investment advisers (RIAs) and broker-dealers to provide a relationship summary to retail investors ("Form CRS");[2] and (iii) the SEC's proposed interpretation of the standard

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[1] *Regulation Best Interest*, SEC Release No. 34-83062, 83 Fed. Reg. 21574 (May 9, 2018), available at: https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08582.pdf.

[2] *Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles*, SEC Release No. 34-83063, 83 Fed. Reg. 21416 (May 9, 2018), available at: https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08583.pdf.

of conduct for investment advisers under the Advisers Act (the "Investment Adviser Interpretation").[3] We are writing to express our support for Regulation Best Interest, Form CRS, and the Investment Adviser Interpretation, as well as to request that the SEC consider certain changes and clarifications that we believe would make all three proposals more effective.

TIAA previously submitted a comment letter in response to the SEC's public statement concerning the regulatory framework applicable to RIAs and broker-dealers on September 26, 2017.[4] We also provided comments on related issues through our subsidiary, TIAA-CREF Individual & Institutional Services, LLC ("TC Services"), in connection with the Commission's 2010 Study Regarding the Obligations of Brokers, Dealers and Investment Advisers[5] and the Commission's 2013 request for data and other information relating to the benefits and costs of various alternative approaches to the standards of conduct and other obligations of broker-dealers and investment advisers.[6] In this letter, we reiterate our support for applying a best-interest standard of conduct to all personalized investment advice provided to retail investors, whether by RIAs or broker-dealers, as well as for enhanced disclosure obligations for providers of retail investment advice – a goal that we believe Regulation Best Interest and Form CRS achieve. We also express our appreciation for the SEC's efforts to reaffirm and clarify certain aspects of the fiduciary standard under the Advisers Act – a standard we believe has served investors and RIAs well for decades, and will continue to serve the industry for decades to come.

About TIAA.

Founded in 1918, TIAA is the leading provider of retirement services for those in academic, research, medical, and cultural fields. Over our century-long history, TIAA's mission has always been to aid and strengthen the institutions and participants we serve and to provide financial products that meet their needs. To carry out this mission, we have evolved to include a range of financial services, including asset management and retail services. With our strong nonprofit heritage, we remain committed to the mission we embarked on in 1918 of serving the financial needs of those who serve the greater good.

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[3] *Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation*, SEC Release No. IA-4889, 83 Fed. Reg. 21203 (May 9, 2018), available at: https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08679.pdf.

[4] *See* TIAA comment to the Commission (September 26, 2017), available at: https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2597428-161097.pdf.

[5] *See* TIAA-CREF Individual & Institutional Services, LLC comment to the Commission (August 27, 2010), available at: https://www.sec.gov/comments/4-606/4606-2275.pdf.

[6] *See* TIAA-CREF Individual & Institutional Services, LLC comment to the Commission (July 5, 2013), available at: https://www.sec.gov/comments/4-606/4606-3111.pdf.

Today, TIAA as an enterprise has multiple RIA and broker-dealer affiliates. Our investment model and long-term approach aim to benefit the five million retirement-plan participants we serve across more than 15,000 institutions.[7] TIAA's investment management subsidiary Nuveen, LLC ("Nuveen") includes RIAs that collectively manage over $973 billion in assets, including the Nuveen and TIAA-CREF mutual fund complexes, separately managed accounts, and various other product offerings.[8] Nuveen's products and services are distributed through a wide range of unaffiliated intermediaries, as well as through TIAA.

TIAA's unique corporate structure allows us to focus our efforts on our clients' long-term financial needs. TIAA has no outside shareholders, other than the TIAA Board of Overseers, which is a not-for-profit entity. Importantly, under TIAA's corporate charter, TIAA functions without profit to the corporation or its shareholders. As a result, our corporate interests are aligned with those of our participants – both at the plan and individual investor level. This structure makes TIAA particularly sensitive to the potential for additional costs, which are ultimately borne by our participants through fees and/or lower investment returns.

REGULATION BEST INTEREST

1. TIAA supports the best-interest standard for broker-dealers set forth in Regulation Best Interest.

"Put the customer first" has always been a core TIAA value – and we believe this should be the industry standard. We have long advocated for a clear and enforceable best-interest standard that applies to all investment advice provided to retail customers, regardless of whether the advice is provided by an RIA or broker-dealer. As such, we support Regulation Best Interest's goal of requiring broker-dealers and their associated persons to act in the customer's best interest when recommending securities or investment strategies involving securities to retail customers. In our previous comments to the Commission on this topic, TIAA has similarly expressed support for a uniform best-interest standard of care for both RIAs and broker-dealers when providing personalized investment advice to retail investors.

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[7] Asset and participant data are as of March 31, 2018.

[8] Asset data are as of June 30, 2018. Nuveen assets under management are inclusive of Nuveen's multiple investment subsidiaries, including Nuveen Asset Management, LLC; Symphony Asset Management, LLC; NWQ Investment Management Company, LLC; Santa Barbara Asset Management, LLC; Winslow Capital Management, LLC; AGR Partners LLC; Churchill Asset Management LLC; Greenwood Resources Capital Management, LLC; Gresham Investment Management LLC; Nuveen Fund Advisors, LLC; Nuveen Investments Advisers, LLC; Teachers Advisors, LLC; TIAA-CREF Investment Management, LLC; and Nuveen Alternatives Advisors LLC.

We believe that any best-interest standard that applies to broker-dealers should include a duty of loyalty and a duty of care, and be flexible enough to accommodate episodic advice. While the Commission has not sought to characterize Regulation Best Interest's proposed best-interest obligation as a fiduciary standard, the best-interest standard would incorporate three important duties that are consistent with fiduciary expectations – specifically, a care obligation, a disclosure obligation, and a conflict of interest obligation. We agree with the Commission that these obligations under Regulation Best Interest will improve the quality of recommendations made by broker-dealers to retail customers, enhance disclosures to customers, and facilitate more consistent regulation of investment advice while preserving investor choice and access to a wide array of affordable investment services and products.

2. <u>TIAA echoes the SEC's view that broker-dealers should be permitted to agree to hold themselves to a fiduciary standard</u>.

The goal of Regulation Best Interest is to impose "minimum professional standards that encompass and go beyond existing suitability obligations under federal securities laws."[9] Importantly, however, the Commission also recognizes that a broker-dealer may nevertheless agree with a retail customer that the broker-dealer is subject to a fiduciary duty, provided the broker-dealer also satisfies its requirements under Regulation Best Interest.[10] We agree with the Commission's view on this point. Through our agreements with employers that sponsor workplace retirement plans, TIAA provides fiduciary advice when making recommendations to retirement plan participants regarding model asset allocation portfolios developed, maintained, and overseen by a financial expert who is independent of TIAA. We deliver these recommendations as a brokerage service provided by TC Services, a TIAA subsidiary that is dually registered as a broker-dealer and an RIA. While Regulation Best Interest would impose a best-interest standard of care on the provision of these recommendations, we appreciate that TIAA will continue to have the option of assuming additional fiduciary responsibilities with respect to these activities, subject to our agreements with retirement plan sponsors.

3. <u>TIAA requests greater clarity regarding the difference between Regulation Best Interest's proposed best-interest standard and a fiduciary standard</u>.

TIAA understands that the SEC considered imposing a fiduciary standard on broker-dealers with respect to retail customers, but ultimately decided to create a separate best-interest standard for broker-dealers due to the Commission's belief that "a

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9 *Regulation Best Interest*, 83 Fed. Reg. 21585 (May 9, 2018).

10 *Id.* at 21594.

uniform fiduciary standard that would attempt to fit a single approach to retail customer protection to two different business models is unlikely to provide a tailored solution to the conflicts that uniquely arise for either broker-dealers or investment advisers."[11] We appreciate the SEC's careful consideration of this point, and its position that a "differentiated approach to customer protection is more likely to provide more appropriate investor protection commensurate with the risks inherent in each of those business models."[12] However, we would respectfully request that the Commission provide greater clarity regarding the specific differences between the proposed best-interest standard for broker-dealers and a fiduciary standard of conduct. The Commission notes in the proposing release for Regulation Best Interest that "fiduciaries are generally required to act with a duty of care and duty of loyalty to their clients" – but we understand that such duties are also included in Regulation Best Interest's best-interest standard for broker-dealers.[13] We would ask the SEC to provide examples of instances where a broker-dealer's recommendation to a retail customer would satisfy the proposed best-interest standard while failing to meet the fiduciary standard that applies to RIAs. If the Commission were to delineate in greater detail the ways in which the proposed best-interest standard differs from a fiduciary standard of conduct, firms would be better able to understand their responsibilities under Regulation Best Interest and any differences that might result from entering into agreements with retail customers that subject the broker-dealer to a fiduciary standard, as discussed above.

4. <u>TIAA urges the SEC to provide greater clarity and flexibility with respect to the disclosure requirements in Regulation Best Interest and Form CRS</u>.

TIAA appreciates that Regulation Best Interest takes a flexible approach toward the timing and frequency of disclosures a broker-dealer is required to provide prior to or at the time of a recommendation. Notably, Regulation Best Interest provides that "a broker-dealer may determine that certain disclosures may be most effective if they are made at multiple points in the relationship, or, if pursuant to a layered approach to disclosure, certain material facts are conveyed in a more general manner in an initial written disclosure and followed by more specific information in a subsequent disclosure," which may be prior to, at the time of, or even after the recommendation.[14] TIAA supports this layered approach, which will allow broker-dealers to determine the most effective method of providing required disclosures to customers, depending on the broker-dealer's business model and the circumstances surrounding a recommendation. However, we believe greater clarity is needed with

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11 *Id*. at 21663.
12 *Id*.
13 *Id.* at 21662.
14 *Id.* at 21605.

respect to certain elements of the disclosure requirements in Regulation Best Interest.

For example, we would urge the SEC to provide greater clarity and consistency with respect to the interplay of disclosure requirements in Regulation Best Interest and proposed Form CRS. Specifically, we believe the timing requirements in Regulation Best Interest and Form CRS should be better coordinated. The SEC's Form CRS proposal requires a broker-dealer to provide a relationship summary form before or at the time a retail investor "first engages" the broker-dealer's services (though the SEC does not define the term "engages"),[15] while Regulation Best Interest requires a broker-dealer to provide separate disclosures before or at the time a recommendation is made.[16] Assuming the SEC considers that an investor "first engages" a broker-dealer's services at the point the investor becomes a customer of that broker-dealer (a point discussed in more detail below), this discrepancy in disclosure requirements means that if a broker-dealer provides a recommendation to a retail investor before the investor becomes a customer, the broker-dealer would be required to provide Regulation Best Interest disclosures to the investor before delivering Form CRS. This result makes little sense; investors would be better served if the disclosure requirements in Regulation Best Interest and Form CRS were harmonized such that broker-dealers are required to provide both Regulation Best Interest disclosures and Form CRS at or before the point the investor first "engages" the broker-dealer's services, with the term "engage" being defined as we recommend below.

To address this issue, we first urge the SEC to specifically define the point at which an investor will be deemed to have first engaged a broker-dealer's services for purposes of Form CRS. In most cases, a customer will first engage a broker-dealer's services by completing a brokerage account application and agreeing to certain account terms and conditions. Disclosures can be readily incorporated into the application paperwork delivered to the customer without the need for expensive system changes by the broker-dealer. A notable exception is the employer sponsored retirement plan enrollment process, where plan participants typically enroll through the plan sponsor. Additionally, some plan sponsors choose to auto-enroll participants into the plan. These auto-enrollment arrangements are typically not structured as brokerage accounts, where the participant directly engages the broker-dealer to provide brokerage services. Rather, in the auto-enrollment context, the broker-dealer acts as a service provider to the retirement plan in a more limited role at the time of or after enrollment (*e.g.*, by interfacing with participants about plan features, benefits and investment options, executing securities transactions for the plan, and, if applicable, providing advice to plan participants on plan investment

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15 *Form CRS Relationship Summary*, 83 Fed. Reg. 21419 (May 9, 2018).
16 *Regulation Best Interest*, 83 Fed. Reg. 21675 (May 9, 2018).

options). TIAA's subsidiary TC Services acts in such a limited capacity when providing services to employer sponsored retirement plans for which TIAA serves as recordkeeper. This includes, where authorized by the plan sponsor, providing participants with point-in-time, non-discretionary advice regarding participants' plan account balances that is sourced from an independent financial expert and delivered via an in-person consultation or phone session with a TC Services representative or via a digital interface.

To accommodate the various scenarios under which a retail investor may engage a broker-dealer's services, including those described above, we recommend that the SEC define the term "engage" for purposes of Form CRS as the earlier of (1) the point when a retail investor first opens a brokerage account with a broker-dealer or (2) if no brokerage account is opened by the customer in connection with advice to be rendered by the broker-dealer or its representative, the point when a customer engages the broker-dealer to provide advice services. We would also ask the SEC to modify Regulation Best Interest such that broker-dealers are similarly required under that proposal to provide disclosures before or at the point a retail investor first "engages" the broker-dealer's services (as that term would be defined in Form CRS, per our recommendation), rather than before or at the point the broker-dealer gives a recommendation, thus harmonizing the timing of required disclosures under Regulation Best Interest and Form CRS.

Modifying the timing requirements for disclosures in this way would be particularly helpful where a broker-dealer provides a recommendation to a retail customer over the phone. Regulation Best Interest as currently drafted would require the broker-dealer to interrupt the conversation with the customer to first send all mandated disclosures electronically before providing the recommendation. But the broker-dealer would also need to obtain the customer's informed consent to electronic delivery of those disclosures under current requirements. Requiring broker-dealers to provide all necessary disclosures at or prior to the time of account opening, rather than at or prior to the time of a recommendation, would mitigate this issue.

As an alternative to our suggested approach, the SEC could make the disclosure requirements in both Regulation Best Interest and Form CRS more flexible, such that broker-dealers have more options with respect to the method of delivery of required disclosures (*e.g.*, paper, electronic, web-based). Specifically, the SEC could allow broker-dealers to satisfy their Regulation Best Interest and Form CRS disclosure requirements by orally or otherwise directing customers to the place on the broker-dealer's website where required disclosures are provided. Under this approach, broker-dealers would be required to give customers the option of requesting a paper copy of the disclosures, though delivery of such paper copy would be permitted to occur after a recommendation is provided. Broker-dealers could provide this oral direction at the point a recommendation is made or when the customer engages the broker-dealer's services – whichever is earlier. This

alternative approach would make it easier for broker-dealers to provide all necessary disclosures before making a recommendation over the phone.

Finally, Regulation Best Interest notes that "while certain forms of disclosure may be standardized, certain disclosures may need to be tailored to a particular recommendation, for example, if the standardized disclosure does not sufficiently identify the material conflicts presented by the particular recommendation."[17] We urge the Commission to provide greater clarity as to the instances in which a broker-dealer "may need" to provide personalized disclosures. While we understand the Commission's concern that certain material conflicts of interest might render a standardized disclosure inadequate or inaccurate, in practice it would be very difficult for broker-dealers to identify such instances and provide personalized disclosures in response, while still meeting the timing requirements of Regulation Best Interest. We respectfully request that the Commission provide specific examples of circumstances which would require personalized disclosures to help broker-dealers better understand when they may need to deviate from their standardized versions.

5. <u>The SEC should clarify broker-dealers' fund fee disclosure requirements</u>.

Under Regulation Best Interest, broker-dealers are required, at or before the time a recommendation is made, to reasonably disclose to the retail customer in writing the material facts relating to the scope and terms of the relationship, including all material conflicts of interest that are associated with the recommendation.[18] As part of this requirement, broker-dealers would be obligated to disclose the fees and charges associated with a customer's transactions and accounts, including by disclosing "quantitative information, such as amounts, percentages or ranges" of fees and charges.[19] We are concerned that these disclosure obligations will require broker-dealers to disclose the fees associated with registered funds to retail customers directly, rather than allowing broker-dealers the option of directing customers to a fund's prospectus for fee information. We are also concerned that broker-dealers may be required to provide personalized fee information to individual retail customers. As discussed in more detail below, we respectfully request that the SEC clarify that broker-dealers are not obligated under Regulation Best Interest to provide fund-level fee disclosures outside of a fund prospectus or to provide individualized fee disclosures to retail customers.

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17 *Id* at 21605.
18 *Id.* at 21599.
19 *Id.* at 21605.

The SEC notes in Regulation Best Interest that "an important aspect of the broker-dealer's best interest obligation is to facilitate its retail customers' awareness of certain key information regarding their relationship with the broker-dealer" – namely, by disclosing material facts relating to the scope and terms of the relationship, including all material conflicts of interest.[20] We understand that as part of this best-interest obligation, it is important for broker-dealers to inform customers about the fees and expenses associated with the broker-dealer's services. But we do not believe it is appropriate to require broker-dealers to provide fund-level fee information outside of a fund prospectus in order to meet their disclosure obligations. Funds, which are already required to include detailed, standardized fee disclosures in their prospectuses, are far better situated to provide information about their own fees and expenses to investors. Requiring broker-dealers to calculate or disclose individualized fund-level fees may result in inaccurate or inconsistent disclosures, leading to even greater investor confusion. Instead, we urge the SEC to clarify that broker-dealers may direct customers to a fund's prospectus for comprehensive, standardized information about the fees and expenses associated with that particular fund.

As compared to Form CRS, which would require "a brief and general description of the types of fees and expenses that retail investors will pay," under Regulation Best Interest's disclosure obligation, the SEC "would generally expect broker-dealers…to provide more specific fee disclosures relevant to the recommendation to the retail customer and the particular brokerage account for which recommendations are made."[21] We are concerned that the SEC may expect broker-dealers to provide personalized fee disclosures to retail customers as part of Regulation Best Interest's disclosure obligations. Mandating the disclosure of individualized fee information at the time a recommendation is made would require broker-dealers to anticipate the fees a customer will pay for a future transaction, possibly before the customer has even made an investment. Calculating individualized fee information for any individual customer would be difficult, and broker-dealers might inadvertently provide inconsistent or inaccurate fee estimates, which would only increase customer confusion. Moreover, broker-dealers will need to expend significant resources to build new systems and compliance programs in order to provide individualized fee disclosures across their various products and services and monitor the provision and ongoing accuracy of that information to customers. We do not believe the benefit of providing individualized fee disclosures outweighs the difficulty of providing timely, detailed, and accurate information and the potential confusion that inaccurate fee estimates would cause for investors. As such, we urge the SEC to clarify that the disclosure obligations in Regulation Best Interest do not require broker-dealers to provide personalized fee disclosures.

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[20] *Id.* at 21599.
[21] *Id.* at 21600.

6. The SEC should modify the definition of a material conflict of interest and clarify the circumstances under which such a conflict must be eliminated.

Regulation Best Interest would require broker-dealers to "(1) establish, maintain, and enforce written policies and procedures reasonably designed to identify, and disclose, or eliminate, all material conflicts of interest that are associated with recommendations covered by Regulation Best Interest; and (2) 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 associated with" recommendations covered by Regulation Best Interest.[22] We applaud the SEC for its approach to addressing conflicts of interest (though we would request certain changes to this section of Regulation Best Interest, as discussed in more detail below). More specifically, we commend the SEC for establishing a two-part framework for treating broker-dealer conflicts of interest – one that sets forth different requirements for handling conflicts related to recommendations versus those related to financial incentives pertaining to recommendations. We would like the SEC to confirm our understanding that the "financial incentives associated with…recommendations" as referenced in this section of Regulation Best Interest are those specifically related to registered representatives' compensation. Given the nature of conflicts associated with compensation-related financial incentives at the registered representative level, and the potential threat these conflicts can pose to retail investors, we believe it is appropriate that Regulation Best Interest requires broker-dealers to not only disclose, but disclose *and mitigate*, compensation-related conflicts at the registered representative level that are not eliminated altogether. The current two-part framework ensures that compensation-related conflicts at the registered representative level, which are an area of greater concern under Regulation Best Interest, are at least mitigated, if not eliminated, while still providing broker-dealers flexibility to address conflicts unrelated to registered representative compensation through a required disclosure or elimination of such conflicts.

The term "material conflict of interest" is defined 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."[23] We acknowledge that similar language has previously been used in federal case law to describe the fiduciary standard under the Advisers Act,[24] but we believe that using such language to define "material conflict of interest" in the context of Regulation

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22 *Id*. at 21617.
23 *Id*. at 21602.
24 *See S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

Best Interest is inappropriate. The Regulation Best Interest definition, with its reference to what might incline a broker-dealer to "consciously or unconsciously" make a recommendation that is not disinterested, is so vague and subjective that it will likely raise more questions than it answers and provide little guidance for broker-dealers seeking to understand which conflicts of interest are truly material. We believe the definition's ambiguity will ultimately lead broker-dealers to provide excessive disclosures that will overwhelm many investors, thus undermining the SEC's goal of streamlining and clarifying disclosures for retail customers.

Instead, we recommend that the SEC include a definition of "materiality" in Regulation Best Interest that mirrors the language used by the U.S. Supreme Court in *Basic v. Levinson*.[25] In that decision, the Court articulates that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[26] Adopting this standard, which focuses on the importance a reasonable investor would place on omitted information, will ensure that Regulation Best Interest includes a definition of "materiality" that reflects the long-established interpretation of the courts specifically within the context of federal securities laws. This is preferable to the proposed definition of a "material conflict of interest," which we believe is overbroad, unhelpful, and likely to result in retail customers being overloaded with excessive and confusing disclosures.

Additionally, the SEC does not provide examples of the types of conflicts that would need to be eliminated altogether, rather than disclosed and mitigated. Instead, the Commission leaves it to broker-dealers to "exercise their judgment as to whether…[a] conflict can be effectively disclosed, determine what conflict mitigation methods may be appropriate, and determinate whether or how to eliminate a conflict, if necessary…"[27] While we appreciate the flexibility this approach provides, without guidance as to the circumstances in which it may be necessary to eliminate, rather than disclose and mitigate, a conflict, it will be difficult for broker-dealers to ensure that their policies and procedures for handling conflicts are reasonable and adequate. If the SEC were to provide more specific direction as to which conflicts are significant enough to warrant complete elimination, broker-dealers would be better able to effectively address material conflicts of interest in a manner consistent with the SEC's goals and preferred approach.

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25 *See Basic Inc. v. Levinson,* 485 U.S. 224 (1988) ("*Basic Inc.*").
26 *Basic Inc.*, 485 U.S. at 231.
27 *Regulation Best Interest,* 83 Fed. Reg. 21602 (May 9, 2018).

7. <u>The definition of "retail customer" in Regulation Best Interest and the definition of "retail investor" in Form CRS should be harmonized with the FINRA definition of "retail investor."</u>

Regulation Best Interest defines a "retail customer" as "a person, or the legal representative of such person, who: (1) receives a recommendation of any securities transaction or investment strategy involving securities from a broker, dealer or a natural person who is an associated person of a broker or dealer, and (2) uses the recommendation primarily for personal, family, or household purposes."[28] This definition covers not only natural persons, but *any* persons who primarily use a recommendation for personal, family, or household purposes, including non-natural persons such as trusts that represent the assets of a natural person.[29] The SEC's Form CRS proposal, on the other hand, defines a "retail investor" as "a prospective or existing client or customer who is a natural person (an individual)."[30] The Form CRS definition covers all natural persons, regardless of net worth (including accredited investors, qualified purchasers, etc.), but does *not* cover non-natural persons such as trusts or similar entities representing a natural person.[31] The disparities in these definitions can lead to problematic inconsistencies. For example, under the proposals as currently drafted, an individual retail customer who uses a broker-dealer's recommendation for business purposes, rather than personal, family, or household purposes, would *not* be covered by Regulation Best Interest, but *would* receive Form CRS – which includes representations that would lead the customer to believe that Regulation Best Interest does in fact apply to his or her relationship with the broker-dealer. This is a confusing and undesirable outcome for customers and broker-dealers alike.

Some commenters have recommended that the SEC simply harmonize the definition of "retail customer" in Regulation Best Interest with the definition of "retail investor" in Form CRS. However, we believe the better approach is to make both definitions consistent with the definition of "retail investor" in FINRA Rule 2210(a)(6): "any person other than an institutional investor, regardless of whether the person has an account with a member."[32] The FINRA definition's exclusion of institutional investors is appropriate for purposes of both proposals, as institutional investors are not the

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28 *Regulation Best Interest*, 83 Fed. Reg. 21595 (May 9, 2018).
29 *Id.* at 21596.
30 *Form CRS Relationship Summary*, 83 Fed. Reg. 21419 (May 9, 2018).
31 *Id*. at 21420.
32 The definition of "institutional investor" is set forth in FINRA Rule 2210(a)(4) and includes an "institutional account," which is defined in FINRA Rule 4512(c) as "the account of: (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million."

intended audience of Form CRS, nor are they meant to benefit from the heightened standard of conduct under Regulation Best Interest. Broker-dealers are already subject to a suitability standard under FINRA rules when providing advice to institutional investors, and we believe this standard of conduct is adequate. Given that FINRA's definition of "retail investor" is already well-known and accepted by the industry, we feel it would be unhelpful and confusing to create two new definitions, or even a single, additional harmonized definition, under Regulation Best Interest and Form CRS. Instead, we urge the SEC to model the definitions in Form CRS and Regulation Best Interest after the established FINRA definition, which will make the two proposals more consistent and better serve each of their underlying purposes. If a separate definition of "retail customer" and/or "retail investor" is maintained, we suggest that such term(s) be no more broadly defined than the current FINRA definition.

Further, if the definition of "retail customer" in Regulation Best Interest is not modified to be made consistent with the FINRA definition of "retail investor," we urge the SEC to explicitly state that a "legal representative" of a person, as referenced in the Regulation Best Interest definition, does not include a bank, broker-dealer, RIA, family office, or other financial institution or intermediary that exercises its own judgment in evaluating a broker-dealer's recommendation on behalf of a retail customer. These institutions are treated under current FINRA rules as institutional accounts and are sufficiently sophisticated such that they do not need the protections afforded by Regulation Best Interest, nor are they the intended beneficiaries of the proposed best-interest standard. It would be inappropriate and unnecessary, in our view, to subject broker-dealers to Regulation Best Interest requirements when making recommendations to institutions and intermediaries that have access to extensive investment resources and can rely on their own informed judgment in assessing a recommendation. If the SEC does not provide clarity on this point, broker-dealers that make recommendations to these sophisticated intermediaries will be required to operate under a best-interest standard and provide unnecessary retail disclosures, even if they have no true retail customers.

8. The SEC should clarify the meaning of "otherwise identical" securities.

In Regulation Best Interest, the SEC shares its preliminary belief that "under the Care Obligation, 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."[33] But the SEC does not define the term "otherwise identical"

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[33] *Regulation Best Interest*, 83 Fed. Reg. 21588 (May 9, 2018).

securities – and without further clarification, it will be difficult for broker-dealers to ensure that their recommendations fulfill Regulation Best Interest's duty of care.

It is rare for two securities with different costs to be identical in every other respect, with identical "unusual features, liquidity, risks and potential benefits, volatility and likely performance." Other features of securities offered by different firms with different cultures, reputations, financial strengths, characteristics, services, etc., could render the securities sufficiently different to provide a reasonable basis for a broker-dealer to believe that one security warrants consideration over the other. We would appreciate the SEC providing examples of securities it would consider "otherwise identical" to further elucidate the meaning of the term.

FORM CRS

1. The SEC should shorten and streamline Form CRS and allow firms to provide electronic links to additional disclosures.

The SEC has stated that the purpose of Form CRS is to "alert retail investors to important information for them to consider when choosing a firm and a financial professional, and…prompt retail investors to ask informed questions," as well as to "facilitate comparisons across firms that offer the same or substantially similar services"[34] – and we support this goal. But in order to ensure that the disclosures provided via Form CRS are effective and easily understood by customers, we believe the form should be streamlined to use fewer words and avoid unnecessary complexity. We also believe Form CRS should be made more flexible by allowing firms to include links to additional disclosures and information that firms may choose to make available on their websites. Under our recommended approach, the SEC would either provide guidance as to the content of Form CRS itself, or provide mandated language to be used in Form CRS – but firms would be permitted to add links to their websites where additional disclosures may be made available. This would allow firms to use a substantially shortened version of Form CRS at the start – which we believe would facilitate retail customers' attention to and understanding of the disclosures in the form – while still permitting firms to provide customers with more in-depth information that is better tailored to each firm's individual business model, as appropriate.

Streamlining Form CRS would be particularly appropriate for RIAs, which are already required to make extensive public disclosures in Form ADV. As currently designed, Form CRS would essentially provide a summary of the more thorough RIA disclosures provided in Part 2 of Form ADV (the "Brochure"). While we appreciate the SEC's desire to provide investors with a shorter, more easily digestible set of

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[34] *Form CRS Relationship Summary*, 83 Fed. Reg. 21420 (May 9, 2018).

disclosures, we are concerned that Form CRS will give investors an incomplete and potentially misleading snapshot of the detailed information provided in the Brochure, while also leading them to believe that they can rely solely on the disclosures in Form CRS and do not need to review the Brochure. Thus, Form CRS may ironically leave investors even *less* informed about their RIA's advisory services, which we recognize is not the SEC's goal. Instead, we recommend that the SEC consider a more layered approach for RIAs under which Form CRS provides a shorter, more streamlined description of the key aspects of the relevant RIA relationship and the services to be provided while directing investors to the appropriate place in the Brochure where more detailed disclosures about the relationships and services can be found.

We note that certain trade associations have submitted their own recommendations for improvements to Form CRS, and we applaud the efforts of these organizations to develop a streamlined version of the form. Specifically, we would urge the SEC to consider the recommended changes to Form CRS submitted by the Investment Adviser Association (IAA) and the Securities Industry and Financial Markets Association (SIFMA). We believe these changes will make it easier for customers to read and understand Form CRS, while still allowing for all necessary disclosures to be provided.

2. <u>Dual registrants should be permitted to choose which version of Form CRS to provide</u>.

The SEC's Form CRS proposal includes a hypothetical relationship summary form to be provided by firms that are dually registered as both an RIA and broker-dealer.[35] That form provides information about the brokerage and advisory services the dual registrant may provide in a side-by-side format that allows the customer to easily compare and contrast the various elements of a brokerage account versus an advisory account. However, given that some dual registrants may provide only brokerage or advisory services to particular customers, mandating that all dual registrants provide customers with the dual registrant version of Form CRS risks confusing those customers who may need information about only one type of account. Overwhelming a customer with extraneous information that is not relevant to his or her particular relationship with a dually-registered firm defeats the inherent purpose of Form CRS. To address this issue, we recommend that the SEC give dually-registered firms the option of providing either the dual registrant version of Form CRS or, where appropriate, the separate brokerage and/or advisory account forms. This approach will give firms the flexibility to provide disclosures that are more closely tailored to each individual customer relationship and mitigate the risk

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[35] *Id.* at 21559-21562.

that customers will be confused or overwhelmed by information that is not pertinent to their individual circumstances.

3. <u>The SEC should specify that the "key questions" in Form CRS are not required disclosures and do not create new disclosure or recordkeeping requirements</u>.

The hypothetical versions of Form CRS provided in the SEC's proposal each include "key questions" for customers to ask their financial professional.[36] We understand that by including these questions in Form CRS, the SEC intends to encourage retail customers and their financial professionals to have a conversation about important elements of the relationship and the services to be provided – which may not otherwise take place without specific prompting. But we would respectfully ask the SEC to clarify that these "key questions" are meant to be suggestions or conversation starters, rather than required disclosures that may trigger compliance and recordkeeping requirements. It would be very difficult, if not impossible, for broker-dealers and RIAs to keep accurate records of these conversations, if required to do so – and some of the questions themselves would be difficult for broker-dealers and RIAs to answer in a single conversation with a customer. For these reasons, we would appreciate greater clarity from the SEC that the "key questions" listed in Form CRS are intended to be conversational prompts, rather than mandated disclosures triggering recordkeeping and compliance requirements.

4. <u>The SEC should identify the material changes that would require delivery of Form CRS to an existing customer</u>.

The SEC's Form CRS proposal requires broker-dealers and RIAs to deliver Form CRS to an existing customer "before or at the time (i) a new account is opened that is different from the retail investor's existing account(s); or (ii) changes are made to the retail investor's existing account(s) that would materially change the nature and scope of the relationship with the retail investor," including before or at the time the broker-dealer or RIA recommends that the retail investor transfer from an advisory account to a brokerage account (or vice versa) or move assets from one type of account to another in a transaction not in the ordinary course of dealing.[37] The SEC does not specify what type of change, other than the enumerated examples, would "materially change the nature and scope" of the relationship between the retail investor and the broker-dealer or RIA such that delivery of Form CRS would be required. We respectfully request that the Commission identify any additional material changes, other than those already enumerated, that would trigger this requirement.

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[36] *Id.* at 21449.
[37] *Id.* at 21547-21548.

INVESTMENT ADVISER INTERPRETATION

1. The SEC should clarify whether the concept of an "investment profile" applies to institutional customers and customers seeking advice through an intermediary.

The SEC's Investment Adviser Interpretation notes that an RIA's duty of care includes a duty "to make reasonable inquiry into a client's financial situation, level of financial sophistication, investment experience, and investment objectives (which we refer to collectively as the client's "investment profile") and a duty to provide personalized advice that is suitable for and in the best interest of the client based on the client's investment profile."[38] We respectfully request that the SEC clarify that the concept of a client "investment profile" applies to retail clients only, and is not intended to apply to institutional clients (of which TIAA's subsidiary Nuveen has many). Some of the elements that make up an "investment profile" as described by the SEC (*e.g.*, a client's level of financial sophistication and investment experience) are not appropriate for institutional clients, or even very sophisticated individual clients with significant investing experience. RIAs should consider a variety of factors when making recommendations with respect to institutional clients and sophisticated individual clients, but ultimately what is in the best interest of such clients depends on the arrangement that is negotiated and established between the parties. If RIAs are in fact expected to make reasonable inquiry into their institutional clients' investment profiles, we recommend that the SEC modify the description of an "investment profile" to better represent the factors RIAs actually consider when making suitability determinations for a broad range of clients, as well as the investment policies and guidelines that may be required by such clients. We echo the recommendation made by the IAA in its comment on this proposal – namely, that the SEC take a more principles-based approach to describing an "investment profile" that includes non-exclusive examples of the factors an RIA may consider in meeting its duty of care with respect to both retail and institutional clients. We would also ask the SEC to clarify whether RIAs are obligated to inquire about the investment profiles of clients who seek advice through an intermediary, as this scenario is not explicitly contemplated in the Investment Adviser Interpretation.

2. The SEC should clarify the meaning of "otherwise identical" securities.

As in Regulation Best Interest, the SEC notes in the Investment Adviser Interpretation that "an adviser could not reasonably believe that a recommended security is in the best interest of a client if it is higher cost than a security that is

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[38] *Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers,* 83 Fed. Reg. 21206 (May 9, 2018).

otherwise identical, including any special or unusual features, liquidity, risks and potential benefits, volatility and likely performance."[39] We reiterate our request above that the SEC clarify what it means by "otherwise identical" securities and more explicitly describe the circumstances under which it would view two securities offered by different firms as identical for purposes of the Investment Adviser Interpretation. Doing so will help RIAs ensure that they are fulfilling their duty to provide advice that is in their clients' best interest.

OTHER COMMENTS

1. **We urge the SEC to work with standard-setting bodies and state regulators and legislatures to establish a consistent standard of conduct for retail investment advice nationwide.**

While the U.S. Department of Labor's Fiduciary Rule may have been vacated by the Fifth Circuit Court of Appeals, national standard-setting organizations and state legislatures and securities regulators continue to focus on standards of conduct – which can result in layering additional standards on top of the SEC's standards for RIAs and broker-dealers. For instance, Nevada recently passed a law subjecting all "financial planners" (including RIAs and broker-dealers) to a fiduciary standard of conduct (which is currently undefined and subject to future state rulemaking) – despite the fact that broker-dealers would not be held to a fiduciary standard under Regulation Best Interest.[40] Other states, including Connecticut, New York, New Jersey, and Maryland, have recently considered or are now considering similar laws.

The Certified Financial Planner Board of Standards, Inc. (the "CFP Board"), which licenses and sets standards for certified financial planners (CFPs), released a new version of its Code of Ethics and Standards of Conduct (the "Code") in March that will extend a fiduciary standard of conduct to all CFPs as of October 1, 2019.[41] Under the new Code, CFPs are required to act in the best interest of their clients at all times when they provide financial advice – and not just when they construct financial plans, as is the case under currently effective CFP Board rules. CFPs must also meet certain disclosure and conduct requirements to satisfy their fiduciary duty under the Code. This development is particularly significant given that many CFPs operate as broker-dealers, and are therefore currently subject to a different suitability standard under FINRA rules (and will be subject to a different best-interest standard if Regulation Best Interest is finalized). The CFP Board's decision to subject CFPs to

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39 *Id.* at 21207.
40 *See* Nevada Senate Bill No. 383, 79th Sess. (2017).
41 *See* CFP Board Code of Ethics and Standards of Conduct (Mar. 2018), available at: https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/CFP-Board-Code-and-Standards.

a fiduciary standard before the SEC has finalized its own rule on standards of conduct for retail advice adds another layer to an already complicated issue.

The New York Department of Financial Services (NYDFS) also recently finalized amendments to New York's Insurance Regulation 187, which will change the current suitability standard of care that applies to retail annuity transactions to a best-interest standard of care for recommendations and transactions with respect to both retail annuities and life-insurance policies.[42] The National Association of Insurance Commissioners (NAIC) is also working to develop a best-interest standard of conduct for annuities transactions.[43] If the definition of "best interest" used by NYDFS and NAIC and the related disclosure requirements are not consistent with the standard and obligations set forth in Regulation Best Interest and Form CRS, it will be significantly challenging for broker-dealers to ensure they are fulfilling all applicable laws and regulations when recommending or selling retail annuities and life-insurance policies.

Imposing disparate standards of conduct on RIAs and broker-dealers based solely on the state where the investment advice is provided or the financial professional's licensing status creates unnecessary confusion for consumers and added compliance costs for firms – particularly those that provide services nationwide, like TIAA. A patchwork of inconsistent nationwide and state rules would not be in the best interests of investors, financial professionals, or regulators. We strongly recommend that the Commission engage with the standard-setting bodies and state securities and other financial regulators and legislatures referenced above to achieve consistency and predictability in the standards of conduct that apply to RIAs and broker-dealers nationwide.

2. <u>The SEC should provide firms with an 18-month implementation period after the effective dates of Regulation Best Interest and Form CRS</u>.

Firms will need to expend significant time and resources to prepare for compliance with the new standard of conduct and disclosure requirements set forth in Regulation Best Interest and Form CRS. In order to fulfill their obligations under these proposals, firms will need to develop new forms, policies, and procedures, train their employees, and build new compliance systems. As such, we request that the SEC allow firms an implementation period of at least 18 months after the effective date of

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[42] *First Amendment to 11 NYCRR (Insurance Regulation 187), Suitability and Best Interests in Life Insurance and Annuity Transactions*, New York State Department of Financial Services (Jul. 17, 2018), available at: https://www.dfs.ny.gov/insurance/r_finala/2018/rf187a1txt.pdf.

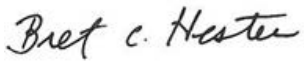
[43] *Draft Suitability and Best Interest Standard of Conduct in Annuity Transactions Model Regulation*, National Association of Insurance Commissioners (Nov. 24, 2017), available at: https://us.eversheds-sutherland.com/portalresource/cmte_a_aswg_exposure_draft_revisions_275.pdf.

Regulation Best Interest and Form CRS to give them adequate time to put the necessary infrastructure in place to achieve compliance.

Conclusion.

TIAA commends the Commission for its focus on these issues. We believe that applying a best-interest standard of conduct to any provider of personalized investment advice to retail investors, enhancing the related disclosure obligations, and clarifying the fiduciary standard that applies to RIAs are essential steps in reducing investor confusion and protecting investor interests. We would welcome the opportunity to engage further on any aspects of the foregoing.

Sincerely yours,



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