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[redacted]

September 26, 2017

The Honorable Jay Clayton
Chairman
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549
Via Email to: rule-comments@sec.gov

Re: <u>Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers</u>

Dear Chairman Clayton:

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 the Securities and Exchange Commission's public statement concerning the regulatory framework applicable to investment advisers and broker-dealers.[1] We hope that our perspective will assist the Commission in its assessment of the current framework.

TIAA previously 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[2] and the Commission's 2013 request for data and other information relating to the benefits and costs of various alternative approaches to the

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[1] *See* SEC Public Statement, *Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers* (June 1, 2017), available at: https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31.

[2] *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.

standards of conduct and other obligations of broker-dealers and investment advisers.[3] 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 registered investment advisers ("RIAs") or broker-dealers. We specifically offer responses to Questions 1, 6, and 8.

About TIAA.

Founded in 1918, TIAA is the leading provider of retirement services for those in academic, research, medical, and cultural fields. Over our nearly 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. Across the enterprise, TIAA has 18 RIA affiliates and three broker-dealer affiliates. Today, TIAA manages over $954 billion in assets, and our investment model and long-term approach aim to benefit the 5 million retirement-plan participants we serve across more than 15,000 institutions.[4] With our strong nonprofit heritage, the mission we embarked on in 1918 still rings true as we remain dedicated to serving the financial needs of those who serve the greater good.

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 clients – both at the plan and individual investor level. This structure makes TIAA particularly sensitive to the potential for additional costs, which ultimately fall to our participants through additional fees and/or lower investment returns.

TIAA supports a best-interest standard of conduct for investment advice given to retail customers about retirement and non-retirement accounts.

"Put the customer first" has always been a core TIAA value – and we believe this should be the industry standard. We support a clear and enforceable best-interest standard that applies to all investment advice provided to retail customers for retirement and non-retirement assets – regardless of whether the advice is provided by an RIA or broker-dealer.

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[3] *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.

[4] Asset and participant data are as of June 20, 2017.

We commend the Commission for its commitment to collaboration with the Department of Labor ("DOL") on standards of conduct for RIAs and broker-dealers providing advice to retirement investors. To guard against consumer and industry confusion, we urge the Commission and DOL to adopt consistent standards of conduct that require RIAs and broker-dealers to act in the customer's best interest when providing personalized investment advice to retail customers, for both retirement and non-retirement accounts. While respecting the Commission and DOL's differing jurisdictions and regulatory frameworks, we believe that by articulating a consistent standard, the Commission and DOL can alleviate investor confusion and ensure that retail customers' best interests are protected.

Responses to the Commission's Questions.

Question 1: Retail investors have expressed confusion about the type of professional or firm that is providing them with investment advice, and the standards of conduct applicable to different types of relationships. To what extent has this reported confusion been addressed? If meaningful confusion remains, is the confusion harming retail investors or resulting in other costs? If so, what steps should be taken to address this situation? What disclosures, advertising, or other information do investment advisers and broker-dealers provide to retail investors currently, and how do those contribute to or mitigate any investor confusion? Are there specific disclosure requirements or other steps the Commission should consider to address any confusion regarding applicable standards?

We agree that investors do not consistently appreciate and understand the distinctions between the suitability standard to which broker-dealers are presently subject and the securities-law fiduciary standard to which RIAs are subject – and this investor confusion is not sufficiently addressed by the current disclosure regime. Beyond the lack of understanding by investors, we view these distinctions as counter to investors' best interests. A retail investor should be able to assume that *all* financial advisers providing personalized advice are acting in the investor's best interest, regardless of the adviser's title.

Setting an equivalent standard of conduct for broker-dealers and RIAs would alleviate confusion for retail investors, while also making clear to broker-dealers their obligations when providing advice to retail customers. As the primary regulator of broker-dealers, the Commission is in the best position to implement such a standard of conduct. We believe a standard of conduct that requires the advice provider to act in the customer's best interest should apply whenever personalized advice about securities is provided to retail investors, for both their retirement and non-retirement accounts. In establishing such a standard, we urge that the Commission also enhance disclosure requirements to ensure that investors clearly understand advisers' duties.

Question 6: As of the applicability date of the Fiduciary Rule, there will be different standards of conduct for accounts subject to the Department of Labor's rule and those that are not, as well as existing differences between standards of conduct applicable to broker-dealers and those applicable to investment advisers when providing investment advice. What are the benefits and costs of having multiple standards of conduct?

As discussed above, we believe that because distinctions between the standards of conduct that apply to RIAs and broker-dealers are largely lost on investors, perpetuating those distinctions is not in investors' best interests. In addition to the divergent standards of conduct that the Commission applies to RIAs and broker-dealers, the DOL's conflict-of-interest (fiduciary) rule creates yet another potentially applicable standard, imposing a heightened fiduciary standard for advice when an individual invests in an Individual Retirement Account or retirement plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). Given DOL's jurisdiction, its rule will apply regardless of whether the advice provider is an RIA or a broker-dealer. But in practice, a broker-dealer or RIA that provides advice regarding retirement assets is highly likely also to render advice regarding non-retirement assets. These divergent standards are likely to further increase investor confusion.

Appreciating that the Commission and DOL have differing jurisdictions, and that the legal implications of being a fiduciary differ under the securities law as compared to ERISA, we urge the Commission and DOL to work together to implement a consistent best-interest standard of conduct that applies to RIAs and broker-dealers when they provide personalized investment advice to retail customers for retirement or non-retirement accounts. Through such a standard, the Commission and DOL can mitigate investor confusion and help to protect the best interests of retail customers. Given that aspects of the DOL fiduciary rule have already become applicable, we urge prompt and efficient collaboration between the Commission and DOL.

Additionally, state securities regulators have begun to focus on standards of conduct – which can result in layering additional standards. For instance, in anticipation of the potential delay or elimination of the DOL's fiduciary rule, 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 are held to a lower suitability standard by the Commission.[5] Other states, including Connecticut, New York, and New Jersey, have passed or are now considering similar laws.

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[5] *See* Nevada Senate Bill No. 383, 79th Sess. (2017).

Imposing disparate standards of conduct on RIAs and broker-dealers based solely on the state where the investment advice is provided or the recipient resides creates unnecessary confusion for consumers – and added compliance costs, particularly for firms like TIAA that provide services nationwide. A patchwork of state rules would not be in the best interests of investors, financial professionals, or regulators. We respectfully request that the Commission engage with state securities regulators to achieve consistency and predictability in the standards of conduct that apply to RIAs and broker-dealers nationwide.

Question 8: If the Commission were to proceed with a disclosure-based approach to potential regulatory action, what should that be? If the Commission were to proceed with a standards-of-conduct-based approach to potential regulatory action, what should that be? Should the standards for investment advisers and broker-dealers be the same or different? Why?

TIAA supports a standards-of-conduct-based approach that would impose a best-interest standard on all providers of personalized investment advice to retail investors.

We urge the Commission to proceed with a standards-of-conduct-based approach that would require *all* advice providers – whether RIAs or broker-dealers – to act in the best interest of their retail customers when providing personalized investment advice.

The protection of retail investors should be the goal of any Commission action. Investors should understand the standards of conduct that apply to the financial advisers who give them advice – but today's disparate standards can easily lead to investor confusion. Moreover, the fact that broker-dealers are held to only a suitability standard at present means that financial advisers do not always put their retail customers' best interests first. The Commission now has an opportunity to address these issues by imposing a best-interest standard on any advice provider who gives personalized investment advice to retail investors, thus heightening the standard that applies to broker-dealers.

The Commission should implement an enhanced disclosure regime for broker-dealers that accommodates different methods of providing investment advice.

Alongside a heightened standard of conduct for broker-dealers, TIAA recommends that the Commission implement an enhanced up-front disclosure regime. This regime should be flexible enough to accommodate different methods of providing investment advice, while still helping to ensure that investors clearly understand the applicable standard of conduct when they receive advice. Given the various ways in which financial advisers may deliver advice (*e.g.*, in person, over the phone, over the internet), it is critical that any enhanced disclosure regime allow broker-dealers to select the form and manner of delivery of disclosure (*e.g.*, paper, electronic, web-based) that best suits each broker-dealer's particular business model.

For example, TIAA, through TC Services (one of its broker-dealer subsidiaries), provides incidental, point-in-time, non-discretionary advice on retirement plan investments to plan participants through both in-person meetings and telephone consultations. Such advice is provided in compliance with DOL Advisory Opinion 2001-09A (also known as the "SunAmerica Opinion"),[6] without which the advice would be considered an ERISA prohibited transaction. Under the SunAmerica Opinion, we must source the advice provided from an independent financial expert. We cannot change or affect the third-party advice and must compensate the financial expert without regard to the type or brand of products recommended. This ensures that the advice is not skewed in favor of our affiliated products. We make this independent, objective advice available to individual participants without charge.

In addition to being free of charge and sourced from an unbiased third party, the advice is appealing to our retirement-plan participants because it is relatively simple and quick to receive. We deliver the financial expert's advice through one brief counseling session that lasts 30 to 45 minutes via either an in-person consultation (typically at the participant's workplace) or through a telephone session.

This incidental investment advice has been well received by both our plan participants and plan sponsors. We have observed that it helps participants improve their chances of funding an appropriate retirement balance, increases their savings rate, and improves their diversification.

TIAA believes that applying a best-interest standard to this incidental investment advice would, by itself, require little change.[7] But we are concerned that if (as we seek) broker-dealers become subject to a heightened standard of conduct, the Commission may implement enhanced point-of-sale disclosure requirements that are inappropriate for broker-dealers providing advice under the SunAmerica Opinion. Because a large portion of TC Services' advice sessions are conducted entirely by

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[6] Advisory Opinion 2001-09A (Dec. 14, 2001). In this advisory opinion, the DOL opined favorably on a structure where a retirement platform provider outsourced to an independent financial expert the design, control and operation of a computerized investment advice program considering both proprietary and nonproprietary investment options. The advisory opinion allows retirement plan service providers to provide advice consistent with the Employee Retirement Income Security Act's ("ERISA") prohibited transaction provisions by retaining an independent third party to serve as the source of the advice if, among other things, the third party's compensation does not vary based on which securities are recommended. This so-called "SunAmerica" approach has been adopted by many providers.

[7] After all, the advice is sourced from an independent third party, TC Services cannot alter the advice, and the third party is compensated without regard to the products or the product brands that are recommended. The third party builds its model portfolios with only one goal in mind—the best interest of the plan participant.

telephone, any requirement to deliver a physical point-of-sale disclosure document could greatly complicate this proven method of participant engagement – for instance, turning a short advice session into two sessions, which would add cost, complexity, and burden to both TIAA and the plan participant. Offering the service without any additional charge could become infeasible, possibly discouraging participation.

To ensure that any disclosure regime resulting from the application of a best-interest standard to broker-dealers is appropriate for the various business models employed by broker-dealers (including broker-dealers who provide advice under the SunAmerica Opinion), TIAA encourages the Commission to adopt principle-based enhanced disclosure standards that accommodate a variety of methods for providing investment advice.

The securities-law fiduciary standard that currently applies to RIAs should be maintained.

While TIAA urges the Commission to raise the standard of conduct applicable to broker-dealers, we also believe the securities-law fiduciary standard that already applies to RIAs should be maintained. The fiduciary standard established under the Investment Advisers Act of 1940, as amended (the "Advisers Act") has served RIAs and their customers well for decades, allowing RIAs to advise a wide range of customers with diverse investment needs according to the highest duties of care and loyalty. To the extent the Commission is considering creating a single, harmonized standard for both RIAs and broker-dealers, we are concerned that such a standard might impose less stringent duties on RIAs than the currently applicable fiduciary standard does, to the detriment of retail investors. We urge the Commission not to weaken the robust fiduciary standard that applies to RIAs under the Advisers Act. Instead, we recommend that the Commission establish a new best-interest standard under the Securities Exchange Act of 1934 (the "Exchange Act") for broker-dealers who provide personalized investment advice to retail investors and preserve the securities-law fiduciary standard for RIAs. We believe that implementing a best-interest standard for broker-dealers under the Exchange Act would be consistent with the continued application of a securities-law fiduciary standard to RIAs, such that investor confusion would be alleviated and investors' best interests would be protected.

Broker-dealers should not be subject to the Advisers Act.

Applying a best-interest standard to broker-dealers should not result in the application of the Advisers Act to broker-dealers. Rather, the Commission should seek to preserve the existing broker-dealer exclusion in section 202(a)(11)(C) of the Advisers Act. Eliminating this exclusion could reduce investor access to advice, as it would impose a second layer of regulation on broker-dealers, increasing the costs and burdens for firms in a number of areas (*e.g.*, registration and licensing, books and records, and policies and procedural requirements). These increased regulatory costs could force many broker-dealers to stop providing incidental advice to smaller balance accounts – for example, broker-dealers may no longer be able to service these accounts without incurring a loss or charging a fee that would be prohibitive for smaller investors.

Moreover, any such increased costs and burdens would not be offset by meaningful additional investor protection. Already, broker-dealers are subject to a comprehensive regulatory regime under the Exchange Act and the rules thereunder, as well as Financial Industry Regulatory Authority ("FINRA") rules. All substantive areas of broker-dealer conduct (including the provision of incidental investment advice) are already regulated and examined by the Commission and FINRA.

The Commission has in the past acknowledged the need to avoid duplicative regulatory schemes. It noted that the broker-dealer exclusion to the Advisers Act was designed "not to except broker-dealers whose advice to customers is minor or insignificant, but rather to avoid additional and duplicative regulation of broker-dealers, which were regulated under provisions of the Exchange Act that had been enacted six years earlier."[8] This is as true today as when the broker-dealer exclusion was enacted. The regulatory scheme governing broker-dealers has greatly expanded and affords even more investor protections today than at the time that the broker-dealer exclusion was adopted.

Additionally, Congress itself acknowledged the importance of retaining the broker-dealer exclusion. The Dodd Frank Act maintains the broker-dealer exclusion even though an earlier discussion draft provided by then-Chairman Dodd of the Senate Banking Committee proposed the exclusion's elimination.[9]

TIAA believes supporting a best-interest standard of conduct for broker-dealers who provide personalized advice to retail investors is not inconsistent with opposing a wholesale application of the Advisers Act to broker-dealers. Outside of advice, many functions performed by broker-dealers are quite distinct from those of RIAs and do not squarely lend themselves to oversight by the Advisers Act.

Conclusion.

TIAA commends the Commission for its focus on this issue. We believe that

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[8] *Certain Broker-Dealers Deemed Not To Be Investment Advisers,* SEC Release No. 34-50980, 70 Fed. Reg. 2719 (Jan. 14, 2005), available at: https://www.sec.gov/rules/proposed/34-50980.pdf.

[9] *See* Staff of S. Comm. On Banking, Housing, and Urban Affairs, 111th Cong., Restoring American Financial Stability Act of 2009, at 634 (Comm. Print 2009).

applying a best-interest standard of conduct to any provider of personalized investment advice to retail investors is an essential step in reducing investor confusion and protecting investor interests. We would welcome the opportunity to engage further on any aspects of the foregoing.

Sincerely yours,

Derek B. Dorn