



August 2, 2018

Filed Electronically

Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

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

Dear Secretary Fields:

As the second-largest retirement services provider in the U.S. with 8.5 million people in the plans we serve, Empower Retirement appreciates the opportunity to share our comments regarding the Securities and Exchange Commission's (SEC's) recently proposed Form CRS Relationship Summary (Form CRS) and Regulation Best Interest (RBI). Our comments will focus on the interaction of the proposed rules with retirement savings.

American workers face a major challenge in accumulating sufficient retirement savings to supplement Social Security and reliably replace their income in retirement. There are a number of tools that can help plan participants and other individuals saving for retirement meet this challenge, including plan design elements that encourage participation and education programs that help participants understand the amount of retirement savings they will need to meet their goal. Another key element in helping retirement savers succeed is access to professional guidance while saving for retirement.

In a survey Empower conducted among a representative sample of the plan participants for whom we provide administrative services, access to a financial advisor was desired by 42%.<sup>1</sup> Other industry surveys have shown that working with a financial professional helps consumers earn an additional 1.59% in annual returns which, over time, leads to 22.8% more income in retirement.<sup>2</sup> We fully support efforts to make fees transparent and to ensure that investment advice is in the best interest of the customer, and we believe those goals can be accomplished without unduly preventing access to helpful advice. We appreciate the efforts the SEC has taken during the drafting of the proposed rules to ensure continued access to the products and guidance that will help American workers reach their retirement goals. At Empower Retirement we have always been committed to operating in our clients' best interests and applaud the SEC's efforts.

We have noted that the preamble to the RBI made numerous references to the Best Interest Contract exemption (BIC) and the impartial conduct standards contained in Department of Labor (DOL) rulemaking efforts regarding the definition of the term "fiduciary," the conflict of interest rule and related prohibited transaction exemptions. It

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<sup>1</sup> Cogent, "DC Participant Landscape – Findings for Empower Retirement," January 2018.

<sup>2</sup> Morningstar, "Alpha, Beta, and Now ... Gamma," 2012.

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would appear the SEC's proposed best interest standard is intended to achieve many of the same goals as the DOL's BIC while minimizing the administrative burdens and recognizing that some level of conflict of interest is inherent in any sales relationship.

While we believe the SEC is the appropriate regulatory agency to take the lead in developing the standards of conduct regarding investment guidance, we appreciate the SEC taking the DOL rule into consideration when developing the RBI. When the DOL rule was finalized in 2016, retirement service providers committed significant resources in preparation for compliance.

While the DOL rule was vacated by the United States Court of Appeals for the Fifth Circuit in March 2018, many service providers had already developed and put into place policies and procedures to comply with the impartial conduct standards during the interim period pending the rule's final effective date of July 1, 2019. By taking into consideration the key principles of the DOL rule and avoiding many of its more burdensome aspects, the SEC proposal would allow service providers to leverage those efforts.

### **Form CRS Relationship Summary**

One of the core elements of the layered disclosure approach under the SEC's proposed best interest standards is Form CRS. As proposed, Form CRS would be no more than four pages in length and would cover eight specifically prescribed sections.<sup>3</sup> Broker-dealers (BDs) and registered investment advisors (RIAs) would be required to provide Form CRS to retail investors at the beginning of any relationship and update it if there is a material change in the relationship. We would have the following comments regarding Form CRS.

Under Form CRS "retail investor" is defined as: "A customer or prospective customer who is a natural person (an individual). This term includes a trust or other similar entity that represents natural persons, even if another person is a trustee or managing agent of the trust."<sup>4</sup>

The SEC has requested comment on whether the definition of retail investor should be expanded to cover plan participants in workplace retirement plans.<sup>5</sup> We do not believe this is necessary. Individual retirement plan accounts differ from normal retail accounts in a number of ways. Qualified retirement plans are covered by the Employee Retirement Income Security Act (ERISA) and have named fiduciaries responsible for ensuring each plan is operated in the best interest of plan participants. One of a plan fiduciary's responsibilities is to select and monitor investment alternatives and make them available to plan participants after taking into account fees, performance and any conflicts of interest related to those investment choices. Plan fiduciaries are already obligated pursuant to ERISA §404a-5 to provide participants with detailed disclosures related to those investment choices.

Another responsibility of plan fiduciaries is to select and monitor service providers, including any broker or other investment consultant, who may help participants make allocation decisions among the available investments. Investment help (which is often intended to be educational and not involve individualized investment recommendations) may be offered in person, via paper communications or electronically and in either group or

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<sup>3</sup> 83 Fed. Reg. 21419 (May 9, 2018).

<sup>4</sup> 83 Fed. Reg. 21547 (May 9, 2018).

<sup>5</sup> 83 Fed. Reg. 21423 (May 9, 2018).

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individualized settings. This scenario is very different from the typical broker/retail investor relationship through which the individual investor must assess fees, performance and conflicts and has an unlimited universe of investments from which to choose. Given these differences, we believe the protections afforded by ERISA and the realities of how investment help is provided in participant-directed plans are sufficient and make the distribution of Form CRS to plan participants unnecessary and a needless expense.

We also believe Form CRS should not be required for participants in state and local governmental plans not covered by ERISA. Similar to ERISA-covered plans, state and local governmental plans must hold plan assets in trust and are subject to fiduciary duties under state statutes and regulations. In many states, these duties are almost identical to ERISA's duties of loyalty and prudence related to plan participants and beneficiaries. Governmental plan fiduciaries are responsible for ensuring each plan is operated in the best interest of the plan participants and have the duty to select and monitor the investment alternatives made available to plan participants after taking into account fees, performance and any conflicts of interest related to those investment choices. State statutes also impose the duty to diversify plan assets and avoid conflicts of interest on fiduciaries of state and local governmental plans.

As noted above, the proposed Form CRS includes eight prescribed sections. The General Instructions to Form CRS provide guidance on the order, form and content of these sections or, as the instructions refer to them, "items." Under the instructions Item 8 covers key questions to ask. Ten questions are listed, the second of which reads: "Do the math for me. How much would I pay per year for an advisory account? How much for a typical brokerage account? What would make those fees more or less? What services will I receive for those fees?"<sup>6</sup>

We would like clarification that the intent of Form CRS is not to require or set the expectation of the calculation of an exact dollar amount of fees. Form CRS is designed to be delivered at the very early stages of the relationship between the retail investor and the BD or RIA. At that point in time it may not be possible to arrive at an exact calculation of fees. We would suggest changing the question to read: "Help me with the math. Give me an estimate of what I might expect to pay per year for an advisory account. Give me an estimate of how much I might pay for a typical brokerage account. What would make those fees more or less? What services will I receive for those fees?" We believe this wording would set a more reasonable expectation for the retail investor.

### **Regulation Best Interest**

The proposed RBI would require BDs when making any security transaction recommendations to a retail customer to act in the best interest of the customer without placing the financial or other interest of the BD ahead of the customer interest. We believe this is an appropriate standard, and it is one to which we adhere. This differs from the standard under the DOL BIC that would have required acting "without regard to the financial interests." We agree with the SEC's concern expressed in the preamble to the RBI that the "without regard to" language "could be inappropriately construed to require a broker-dealer to eliminate all of its conflicts (i.e., require recommendations that are conflict free)."<sup>7</sup>

We commend the SEC for looking to FINRA interpretations and Rule 2111 regarding the interpretation of "recommendation." However, given broker-dealers' best interest obligations under the proposed RBI, we would

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<sup>6</sup> 83 Fed. Reg. 21558 (May 9, 2018).

<sup>7</sup> 83 Fed. Reg. 21586 (May 9, 2018).



recommend that the SEC formally define “recommendation” in the final rule. Specifically, we believe FINRA 2111.03 provides a reasonable description of things 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 for that retail customer to take action or refrain from taking action. “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 investments; (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) assessments 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 FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) if the asset allocation model is an "investment analysis tool" covered by Rule 2214
- (d) Interactive investment materials that incorporate any of the above

We would also note that the standard of care is owed to “retail customers.” In the RBI “retail customer” is defined as “A person, or the legal representative of such person, who: (A) Receives a recommendation of any securities transaction or investment strategy from a broker, dealer, or a natural person who is an associated person of a broker or dealer; and (B) Uses the recommendation primarily for personal, family or household purposes.”<sup>8</sup> In the preamble to the RBI, the SEC states the definition would cover “participants in ERISA-covered plans and IRAs.”<sup>9</sup> Our interpretation of the definition is that it would not include any recommendations made to sponsors of qualified retirement plans or plan representatives. This is based on the requirement that the recommendation be primarily used for personal, family or household purpose, and a party making investment decisions for a retirement plan is required to act for the benefit of the plan. It would be helpful if the SEC could confirm that the definition of “retail customer” under the RBI does not include advice to managers of retirement plans or to their fiduciaries or representatives.

The proposed RBI does not define the term “best interest.” The proposal sets forth three obligations that must be met to satisfy the requirements of the best interest standard. These include a disclosure obligation, a care obligation and a conflict of interest obligation. Our comments concerning these obligations are listed below.

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<sup>8</sup> 83 Fed. Reg. 21682 (May 9, 2018).

<sup>9</sup> 83 Fed. Reg. 21598 (May 9, 2018).

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## Disclosure Obligation

The proposed RBI requires that “The broker-dealer, or natural person who is an associated person of a broker or dealer, prior to or at the time of such recommendation, reasonably discloses to the retail customer, in writing, the material facts relating to the scope and terms of the relationship with the retail customer, including all material conflicts of interest that are associated with the recommendation.”<sup>10</sup> The preamble to the proposal clarifies that material facts include the capacity in which the person is acting and the scope of services offered as well as fees and charges. Disclosure of material conflicts includes commissions and third-party payments as well as the extent of any adverse interest or economic self-interest.<sup>11</sup> Material conflicts requiring disclosure include sale of proprietary products or a limited range of products, the recommendation of one share class over another, securities underwritten by the BD, the rollover or transfer of assets (for example from an ERISA plan to an IRA), and the allocation of investment opportunities among retail customers.<sup>12</sup> The goal is to provide sufficient information to enable the retail customers to make an informed decision about the recommendation and to do so in a concise, clear and understandable manner.<sup>13</sup>

Our comments on the disclosure obligation are focused on disclosures to participants in ERISA-covered and other retirement plans and to rollover IRA account holders. We support the SEC’s view that, in light of the variation in relationships and circumstances in which recommendations are made, there is flexibility in terms of how this standard can be satisfied. We support the concept of a layered approach to disclosure. As we know from our own experience communicating financial information to retirement investors and from numerous studies on this issue (e.g., GAO Report 14-92, December 17, 2013), these investors already receive an overwhelming amount of required disclosures that often confuse more than they inform. We know that the majority of our plan participants, including 52% of participants aged 62-71, prefer to receive communications electronically.<sup>14</sup> We also know that engaging participants in an electronic environment in which they can easily “click” to find details relevant to them is a very effective way to make complex information understandable and actionable.<sup>15</sup> We therefore make the following recommendations regarding disclosures to retirement investors:

1. The initial disclosure should be concise, with the goal of alerting investors to areas they may want to explore in more detail.
2. To the extent more detailed information is already available to the investor in another legally required document, cross-referencing that document should be deemed sufficient disclosure regardless of whether the document is required to be delivered by a third party. For example, since plan fiduciaries in ERISA participant-directed plans are required to provide disclosure of investment fees and other information,<sup>16</sup> it would be duplicative to require a BD to also provide that information.

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<sup>10</sup> Prop. Reg. 17 CFR § 240.15l-1(a)(2)(i).

<sup>11</sup> 83 Fed. Reg. 21600 (May 9, 2018).

<sup>12</sup> 83 Fed. Reg. 21603 (May 9, 2018).

<sup>13</sup> 83 Fed. Reg. 21604 (May 9, 2018).

<sup>14</sup> Cogent, “DC Participant Landscape – Findings for Empower Retirement,” January 2018.

<sup>15</sup> Empower Retirement, “Experience Matters: The Connection between Personalized Projected Retirement Income and Retirement Readiness,” 2017.

<sup>16</sup> ERISA §404a-5; 29 CFR §2550.404a-5.

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3. The engagement of investors in the electronic environment of their choice for purposes of providing disclosures should be encouraged. We have already seen a tremendous evolution of investors preferring electronic over paper, or preferring access via a phone or other mobile device over computer access. This evolution will undoubtedly continue in ways that cannot be envisioned today. Given this reality, as well as the benefits noted earlier of providing access to information in an actionable environment, the rule should encourage electronic or website delivery of required information and should be flexible with regard to the method(s) used. We also know based on our experience using automatic enrollment in 401(k) plans and other interactions with plan participants that the result most likely to occur is the one requiring the least effort. We believe that, while it is important to preserve investors' right to receive information in paper form, the default method of delivery must be electronic.

With regard to disclosure of material conflicts, it would be helpful to clarify that, for internal compensation practices not tied to the recommendation of any particular security or product, a general disclosure alerting the customer to the existence of the practice should be sufficient to satisfy the disclosure requirement. For example, if employees receive a bonus based on acquisition or retention of customer assets (such as in a rollover transaction) without regard to how those assets are invested, a satisfactory disclosure could read "If you decide to follow this recommendation, I may receive additional compensation from my employer. The amount of any additional compensation will not vary based on your investment decisions." Employees making these disclosures would be subject to the RBI requirement to act in the customer's best interest, taking into account the investor's individual circumstances, and would not be permitted under the rule to allow the potential to receive additional compensation to take precedence over that result. Since internal compensation practices are considered proprietary information to the companies offering them and personal to the employees participating in them, any added value to the customer of providing such details is not justified by the downside of making this type of information publicly available.

### Care Obligation

There are three components to the care obligation. For purposes of this comment letter we are focused on the obligation to exercise "...reasonable care, skill and prudence to have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks and rewards associated with the recommendation..."<sup>17</sup> The preamble clarifies that while the standard does not require analysis of all possible securities or the recommendation of a "single best" or "least expensive" security, reasonable alternatives must be considered, and the ultimate recommendation cannot put the broker's own interest ahead of the retail customer's interest.<sup>18</sup>

As stated earlier, we support the SEC decision to eliminate the "without regard to" language found in the DOL fiduciary rule from the RBI and its recognition that this language was a key factor in some of the negative unintended consequences of the DOL rule referred to earlier in this letter. We believe the SEC approach of focusing on the need to collect and analyze relevant information about both the customer and the product being recommended and the inviolate rule of putting the customer's interests first provides robust protection to retail investors. Retirement investors tend to be "buy-and-hold" investors, so the DOL rule's push to move all accounts

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<sup>17</sup> Prop. Reg. 17 CFR §240.15/-1(a)(2)(ii)(B).

<sup>18</sup> 83 Fed. Reg. 21609 (May 9, 2018).

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to fee based versus commission or transaction based in order to comply with the “without regard to” language was not in the best interest of many retail retirement investors.

The SEC has specifically sought comment on the use of the word “prudence” in the definition of the duty of care, and we do have some concerns in this regard. That term is a core term used almost exclusively to describe fiduciary responsibilities under ERISA and trust law and, since its interpretation is fact-specific and the consequences of violating it can be significant, plan fiduciaries are always 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 people not acting as ERISA fiduciaries in situations in which interpretation of the word will be made in 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.

### **Conflict of Interest Obligation**

The conflict of interest obligation requires that: “(A) The broker or dealer establishes, maintains, and enforces written policies and procedures reasonably designed to identify and at a minimum disclose, or eliminate, all material conflicts of interest that are associated with such recommendations; and (B) The broker or dealer establishes, maintains, and enforces written policies and procedures reasonably designed to identify and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with such recommendations.”<sup>19</sup>

In the preamble to the RBI, the SEC proposes defining “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.”<sup>20</sup>

We would note some concerns with this definition. First, the inclusion of “unconsciously” in the definition is somewhat confusing and would seem to require making a determination of the unconscious thought process of the BD. Second, the language speaks to a material conflict that would result in making a recommendation that is “not disinterested.” This would seem to run contrary to the SEC’s earlier analysis behind replacing “without regard to” with “without placing the financial or other interest ahead of the customer interest.” Just as recommendations are not completely conflict-free, they are also not completely disinterested.

Regarding the definition of a “material conflict of interest,” we would suggest utilizing the general definition of “materiality” under federal securities law as established and reaffirmed under federal case law. In accordance with this generally recognized definition, a conflict of interest would be “material” if there is a substantial likelihood that a reasonable investor would consider the information important when making an investment decision. We believe this definition would provide greater clarity and reflect the goals and intent of the RBI.

The conflict of interest obligation also requires the establishment and enforcement of written policies and procedures reasonably designed to identify and disclose and mitigate, or eliminate, material conflicts of interest. We appreciate the SEC’s flexible approach to allowing firms to determine when mitigation and disclosure are

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<sup>19</sup> 83 Fed. Reg. 21682 (May 9,2018).

<sup>20</sup> 83 Fed. Reg. 21602 (May 9, 2018).

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sufficient and when elimination may be required. However, we believe the proposed distinction between conflicts that have to be mitigated and conflicts that have to be eliminated is a source of significant confusion and should be removed from the proposal. Instead, the SEC should explain in the adopting release for the final rule that, in some circumstances, firms may conclude that elimination is the appropriate form of mitigation.

The preamble to the RBI also states that “certain material conflicts of interest arising from financial incentives may be more difficult to mitigate, and may be more appropriately avoided in their entirety... These practices may include the payment or receipt of certain non-cash compensation that presents conflicts of interest for broker-dealers, for example, sales contests, trips, prizes, and other similar bonuses that are based on sales of certain securities or accumulation of assets under management”.<sup>21</sup> We believe the SEC should clarify that the conflict of interest obligation should apply only to advisor-level conflicts and not to firm-level conflicts. Since advisor-level conflicts potentially impact the specific recommendations being made, it is those conflicts that must be addressed and understood. Including firm-level conflicts would create confusion and would not help the retail customer make an informed decision.

We also believe asset-gathering or account-retention incentives should not be subject to the same level of scrutiny as incentives aimed at increasing sales of particular securities. The potential for a conflict of interest to result in a bad outcome for a retail investor is much higher when a recommendation is related to individual securities rather than the type of account in which such securities should be held.

We appreciate this opportunity to comment on the SEC’s proposal and applaud its efforts to increase retail investor protections while preserving access and choice. We hope you find our suggestions regarding how best to apply the proposal in the context of retirement savers to be useful and would gladly discuss them further with you.

Sincerely,

A handwritten signature in black ink that reads "Edmund F. Murphy, III".

**Edmund F. Murphy, III** | President  
**Empower Retirement**

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<sup>21</sup> 83 Fed. Reg. 21621 (May 9, 2018).

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