



August 7, 2018

Filed electronically at rule-comments@sec.gov

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

Re: Regulation Best Interest—File Number S7-07-18

Dear Mr. Fields:

On behalf of The Guardian Life Insurance Company of America and its affiliates (“Guardian”), I am pleased to respond to the U.S. Securities and Exchange Commission’s (“SEC” or “Commission”) proposed rulemaking related to Regulation Best Interest (“Regulation BI” or “the Proposal”).¹ Under Regulation BI, the SEC proposes to establish an enhanced standard of care for broker-dealers.

Guardian is a Fortune 250 global financial services company that provides individuals and small businesses with diversified financial product and service solutions, including life insurance, disability income insurance, annuities, wealth management and investments, which can help Americans achieve long-term financial security and guaranteed income for life. Guardian has approximately 8,800 employees and a network of over 2,750 financial representatives in more than 58 agencies nationwide. Approximately 2,200 of the financial representatives are registered persons with Park Avenue Securities LLC (“PAS”), which is a full-service broker-dealer and registered investment advisory firm that is registered with the SEC and is a member of the Financial Industry Regulatory Authority (“FINRA”) and the Securities Investor Protection Corporation. For nearly 160 years, Guardian’s success as a mutual company has been inextricably linked to ensuring our customers receive products and services that are in their best interest. It is from this customer-focused perspective that I submit this letter.

Guardian is supportive of Regulation BI, which we believe appropriately recognizes the value of professional financial advice and the utility of a range of appropriate financial products. However, the Commission should consider several important improvements and clarifications necessary to make the Proposal workable for broker-dealers, and meaningful and understandable for customers, while preserving

¹ 83 Fed. Reg. 21,574 (May 9, 2018) (“Proposing Release”).

investor choice and customer access to a broad range of appropriate investment products. As described in more detail below, Guardian recommends that:

- The Commission should clarify the term “reasonably available alternatives” under the care obligation;
- The role of cost under the best interest obligation should be carefully calibrated so it does not eliminate distribution channels or negatively impact the ability of a customer to choose from a broad range of products;
- The disclosure obligations under Regulation BI should be clarified and integrated with other broker-dealer disclosure obligations; and
- Conferences and non-cash compensation programs permitted by and offered in compliance with existing FINRA rules should be deemed compliant with Regulation BI; and,
- The Commission should coordinate with other regulators.

The Commission Should Clarify the Term “Reasonably Available Alternatives” Under the Care Obligation. The Proposal provides information on whether and how the “care” obligation under Regulation BI² would play out in certain factual scenarios. One concern commonly articulated in an analysis of an enhanced standard of care is whether it might require the recommendation of the “best” security. The Proposal provides some guidance about the need to recommend the “best” security:

While to satisfy proposed Regulation Best Interest, a broker-dealer would not be required to analyze all possible securities, other products or investment strategies to find the single “best” security or investment strategy for the retail customer, broker-dealers generally should consider reasonably available alternatives offered by the broker-dealer as part of having a reasonable basis for making the recommendation, as required under the Care Obligation.³

Guardian supports the interpretation of the best interest obligation confirming that there is no obligation to recommend the “best” security. However, we believe that the guidance indicating that the broker-dealer “generally should consider reasonably available alternatives” needs additional clarification. Many broker-dealers offer, for example, hundreds of possible mutual fund choices for their customers, and ten or more choices of variable annuities. Broker-dealers prefer to have such abundant choices available to allow financial representatives a broad range of investment options to meet the needs of a diverse group of customers, with different financial objectives.

Guardian urges the SEC to clarify that broker-dealers do not need to consider “all” alternatives to the recommended security, but simply need to consider a reasonable selection of their available alternatives appropriate for the individual customer. Without this type of modification to the care obligation, broker-dealers would likely not be comfortable maintaining the existing broad range of their product portfolio. An unintended consequence may be that broker-dealers choose to significantly limit their product offerings if Regulation BI required a review of *all* available alternatives. Such a reduction in the product offering would negatively impact investment product choices that are currently available to retail customers.

² See 17 CFR § 240.15-1(a)(2)(ii).

³ 83 Fed. Reg. at 21,587-88.

The Role of Cost under the Best Interest Obligation Should Be Carefully Calibrated So It Does Not Eliminate Distribution Channels or Customer Choice.

Guardian believes having an overall financial game plan that is developed with the help of recommendations from a financial representative, and may include lifetime income and protection products, is key to achieving ones' short and long-term financial objectives. A recent Guardian survey that examined the drivers of financial confidence in millennials found that the process to most effectively achieve financial success requires a balance between digital and human experience; an inclusion of multi-generational aspects; and, the right professional strategic relationship in accordance with ones' values and passions.⁴ Our survey found that, overall, millennials see professional financial advisors as a source of sound financial advice in helping them achieve their short- and long-term financial objectives, and that millennials give advisors the benefit of the doubt when it comes to doing the right thing for their clients. As the millennial generation enters and advances to mid-career, it is critical the regulatory environment encourages early successful financial habits and behaviors that will result in a lifetime of financial security. Some key findings from the survey include:

- Millennials have an appetite for in-person learning and engagement to reach financial confidence;
- 87 percent of millennials surveyed said that if they knew more about financial services and products, they would be more confident about reaching their financial goals; and,
- Creating a financial plan with an advisor nearly doubles millennials' confidence in being "very comfortable" that they are on track to meet their financial objectives.

Guardian is concerned that certain statements in the Proposal will likely cause the standard of care to be misunderstood and therefore misapplied, resulting in reduced investor access to products and distribution channels. For example, the Proposal states:

We preliminarily believe that, in order to meet its Care Obligation, when a broker-dealer recommends a more expensive security or investment strategy over another reasonably available alternative offered by the broker-dealer, the broker-dealer would need to have a reasonable basis to believe that the higher cost of the security or strategy is justified (and thus nevertheless in the retail customer's best interest) based on other factors (e.g., the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions), in light of the retail customer's investment profile.⁵

This text could be interpreted to suggest that the only way, or more likely, the easiest way, to satisfy the best interest standard is to recommend the lowest cost product. This reading will lead to the unintended consequences of reducing investor access to

⁴ Guardian, "Millennials and money: Understanding what drives financial confidence, 2018". Research based on online interviews with 3,061 Americans with household incomes of \$50,000 or more, ages 21 to 72, working full or part-time and never retired. Results are weighted to U.S. Census Bureau parameters for such adults.

⁵ 83 Fed. Reg. at 21,588.

products and distribution channels that provide real value to investors. It is reasonable to conclude that concern about this language could lead broker-dealers on a “race to the cheapest” from a fear that making recommendations of other than the cheapest product would result in potentially violating Regulation BI. Regulation BI should be crafted in a manner that leads to the best possible advice to meet the needs of each particular customer, and risks departing from that goal if there is too much emphasis placed on the cost of the product.

Guardian recommends that the SEC make clear that the lowest cost alone does not equate to best interest. Including a standard of care analysis that effectively funnels all broker-dealers and investors into the lowest cost products will not provide the best investment results for customers. It will do a disservice to meeting the needs of the customers by always pointing them to cheaper products, and could lead to a decrease in the range of investment options available for customer investment. Among the products that Guardian believes could be impacted are variable annuities, which have an important role in meeting the retirement needs of customers, by providing lifetime income, but are generally more expensive than other securities products due to their inherent financial guarantees. Additionally, within the variable annuity category, Guardian believes that non-cost factors, such as the financial strength of the issuing insurance company, should be acknowledged by the Commission as important in supporting the recommendation of products that can provide guaranteed income payments for many decades.

Guardian also believes that the Commission should clarify that minor differences in costs should not be viewed as evidence that the best interest obligation has not been satisfied. For example, if two similar mutual funds have slightly different expense ratios, recommending the marginally more expensive fund should not, by itself, be viewed as a potential violation of the best interest obligation that needs to be justified.

The Disclosure Obligations under Regulation BI Should Be Clarified and Integrated with other Broker-Dealer Disclosure Obligations. Regulation BI includes a disclosure obligation on broker-dealers as follows:

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.⁶

Guardian supports the concept of full disclosure as a laudable goal and a layered disclosure model. We note, however, that the disclosure regime proposed by Regulation BI for the sale of certain types of securities products will now include at least the following:

- The newly designed Form CRS that is a 4-page description of, among other things, the relationship between the broker-dealer and the customer, the standard of conduct, and conflicts of interest;
- The disclosure required under Regulation BI, which, like Form CRS, also requires disclosure about the relationship with the customer and conflicts of

⁶ 17 CFR § 240.15-l(a)(2)(i).

- interest, but in greater detail, as well as additional disclosures; and,
- Product specific disclosure such as those provided in prospectuses for mutual funds and variable annuities.

The Proposal also appears to provide limited guidance on the required timing of providing the disclosure:

The timing of the disclosure is critically important to whether it may achieve the effect contemplated by the proposed rule. Investors should receive information early enough in the process to give them adequate time to consider the information and promote the investor's understanding in order to make informed investment decisions, but not so early that the disclosure fails to provide meaningful information (e.g., does not sufficiently identify material conflicts presented by a particular recommendation, or overwhelms the retail customer with disclosures related to a number of potential options that the retail customer may not be qualified to pursue). The timing of the required disclosure should also reflect the various ways in which retail customers may receive recommendations and convey orders.⁷

Guardian believes that, while preserving flexibility that takes into account different distribution models, the disclosure obligations would benefit from additional clarification that allow broker-dealers and customers to better understand the required content, sequencing, and frequency of delivery of all required disclosures, as the description in the Proposal does not provide an integrated or clear view. In particular, Guardian urges the SEC to provide specific examples of how it perceives a standard, face-to-face interaction between a registered person and a customer might play out in terms of delivery of the Form CRS and the disclosures required under Regulation BI. Guardian is concerned that clear and consistent general guidance related to the timing and content of providing any required disclosure is needed to avoid potential customer confusion due to inconsistency in approach from one broker-dealer to another and information overload if similar information is required to be provided in multiple phases of the layered disclosure process.

One example relates to mutual fund fee disclosures. Guardian believes that the summary prospectus is an effective vehicle for disclosing this information and that additional disclosure of these fees is not necessary in another format. Another example is disclosure of material conflicts. The disclosure of material conflicts in the current draft of the Form CRS is very proscriptive and is primarily limited to conflicts related to financial incentives. Regulation BI requires the disclosure of **all** material conflicts and may include conflicts not disclosed in Form CRS. It would be very reasonable for a customer to believe that all material conflicts would be covered by the Form CRS and confusing to the same customer if the disclosure of conflicts in another document adds more conflicts to be considered.

Guardian also believes that Regulation BI and the interpretations included in the Proposal are not clear as to the level of specificity of certain aspects of the required disclosures. For example, the requirement to disclose conflicts of interest should provide express guidance as to how detailed such disclosure must be. Guardian urges

⁷ 83 Fed. Reg. at 21,605.

the SEC to provide guidance indicating that disclosure of conflicts of interest can be “generic” (i.e., can be provided in the form of ranges of compensation and charges) and does not need to provide specific, numerical information based on a unique recommendation to any specific customer.

Conferences and Non-Cash Compensation Programs Offered in Compliance with FINRA Rules Should Be Deemed to Comply with Regulation BI. One component of Regulation BI’s enhanced standards of conduct focuses on broker-dealer conflicts of interest. The Proposal indicates that certain types of financial incentives, in particular certain non-cash compensation programs, cause significant concerns under Regulation BI and suggests that it may not be possible to mitigate the conflicts of interest resulting from certain types of financial incentives, and thus satisfy the best interest obligation. Guardian believes that any non-cash compensation programs constructed in a manner consistent with FINRA’s guidelines should be presumed to be compliant with the financial incentive mitigation provisions of Regulation BI.

Guardian affiliates itself with the comments made by the American Council of Life Insurers in its comment letter to the SEC filed in August 2018 pertaining to Regulation BI and FINRA’s tested and effective non-cash compensation regulatory framework. We agree that non-cash compensation programs permitted under FINRA rules that pay for the costs associated with attendance at company-sponsored meetings such as annual conferences should not be required to be eliminated under Regulation BI. In Guardian’s experience, these conferences provide a meaningful forum for educational and training sessions, and allow for networking opportunities (including the formation of product and compliance study groups) that are extremely valuable to further the business acumen and compliance mindset of financial representatives. Importantly, our customers and policyholders also benefit from the education and training elements of these conferences, as they often include a focus on expanding our financial representatives’ product and compliance knowledge.

The Commission Should Continue to Coordinate with Other Regulators. While not expressly apparent in Regulation BI, Guardian believes it is critical that the SEC continue to work and coordinate with other regulators (including state regulatory authorities) to develop a workable standard of care framework across various regulators and jurisdictions. Guardian believes it is very important for the SEC to create a framework that, to the greatest extent possible, will be palatable to other regulatory regimes, and will avoid the potential problems of creating the ability to allow for regulatory arbitrage depending on the type of securities products that are made available.

Thank you for providing Guardian with the opportunity to comment. If I can provide any further assistance, please contact me.

Respectfully submitted,



Eric Dinallo
Executive Vice President & General Counsel