



August 7, 2018

Via: Rule-comments@sec.gov

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: **RIN 3235-AL27**
File No. S7-08-18
Request for Comment on the Form CRS Relationship Summary

Dear Chairman Clayton:

On behalf of our 38 million members and all Americans saving for retirement, AARP¹ writes today to applaud this important first step to accomplishing one of the most important reforms the Security and Exchange Commission (Commission) can undertake to benefit retail investors: ensuring that all financial professionals who provide clients with advice about securities are held to a clear and uniform standard of conduct where the advice is solely in the interest of the retail investor. AARP appreciates the opportunity to respond to the Commission's request for comment on the proposed Customer Relationship Summary (CRS) forms.

The Commission's proposed Regulation Best Interest (Reg BI) places a significant emphasis on the use of disclosures, including the CRS Forms, to inform retail investors about how financial professionals are compensated and the nature of conflicted advice. The proposal also considers disclosure to be an adequate approach to manage and potentially mitigate certain conflicts. However, for both of these purposes, disclosure is an inadequate investor protection tool and may also prove counterproductive. Ensuring all securities professionals who offer investment advice to retail customers are subject to a fiduciary standard is needed to foster a level and transparent market for consumers

¹ AARP, with its nearly 38 million members in all 50 States, the District of Columbia, and the U.S. territories, is a nonpartisan, nonprofit, nationwide organization that helps empower people to choose how they live as they age, strengthens communities, and fights for the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

seeking investment advice. As you move forward, AARP urges the Commission to maintain its mission of protecting investors and implement a strong and clear standard of care for financial professionals who provide personalized investment advice to retail investors.

I. The proposed CRS forms should be simplified to better meet the needs of retail investors.

AARP applauds the Commission's objectives in proposing the CRS forms, which seeks to "fill the gaps" between retail investor expectations and legal requirements by "mandating clear disclosures" about how financial professionals describe the customer relationship.² We also appreciate that the Commission is committed to testing these proposed disclosures with retail investors who will be able to provide valuable insight into the form's efficacy. We believe that the CRS forms, plus a strong and enforceable best interest standard, could provide invaluable investor protections to Americans saving for retirement.

AARP encourages the Commission to amend and test its CRS forms in order to ensure a more easily used and valuable resource for retail investors. A short, plain language, user-friendly form -- with key information, enabling retail investors to evaluate broker-dealer's (BD) and investment adviser's (IA) obligations to them -- is essential for any disclosure to become a useful tool. It is imperative that the CRS forms provide information in a manner that is clear, understandable, and not overwhelming in order to facilitate the retail investor's ability to make informed decisions about their investments.

Retail investors should understand their choices and what they are selecting -- especially when their hard earned savings are on the line. Numerous surveys have shown that consumers need and want complete disclosures concerning their investment options in order to help them make informed decisions about their investments.³ Financial professionals should be required to tell prospective and engaged retail investors the applicable standard of care and nature of their relationship. The more consistent the standards of care available, the less confusion we anticipate on the part of retail investors. In addition, clarity is key to breaking through investor confusion -- especially around complex financial investment instruments. During the April 18, 2018, open meeting on Standards of Conduct for Investment Professionals, Chairman Clayton stated:

² <https://www.sec.gov/news/public-statement/clayton-overview-standards-conduct-investment-professionals-rulemaking>.

³ *401(k) Participants' Awareness and Understanding of Fees*, <https://assets.aarp.org/rgcenter/econ/401k-fees-awareness-11.pdf>.

Misalignment between reasonable investor expectations and actual legal standards can cause investor harm. For example, retail investors may be harmed if they do not understand when BDs and IAs may have conflicting financial interests. In addition, without sufficient clarity, retail investors may be more deferential to, or place greater reliance on, their BD or IA than they otherwise would. I believe that clarifying the legal standards of conduct that apply and reducing investor confusion through disclosure can significantly mitigate these potential harms as well as increase investor protection.⁴

Chairman Clayton further stated, “Put bluntly, we want investors to understand who they are dealing with, i.e., what category — IA, BD, or dual-hatted — their investment professional falls into and, then, what that means and why it matters.”⁵ This intent, as described by Chairman Clayton, is exactly the right one and would benefit retail investors. In order to meet that objective, however, the CRS forms should be updated to meet a number of critical core components.

First, the standard of care should be clear, concise, and defined. Distinctions between different standards of care should be clear and easy for “Mr. and Mrs. 401(k)”⁶ -- the average retail investor -- to understand. The standard of care should be explained in plain language and terms like “fiduciary” and “best interest,” which are used in the three iterations of the relationship summary currently available, must be well-defined.

In addition, the CRS forms should be reformatted. The forms should be short, preferably with key information on no more than one page (a few supplemental pages with additional information may be helpful) in order to avoid information overload. The information disclosed should be written plainly and concisely, for the purpose of informing the investor, not simply to meet a legal standard. The fee structure should be straightforward and should avoid technical jargon. Finally, the forms should be shared with retail investors in a timely manner, prior to any decisions or actions that may be taken.

⁴ Chairman Jay Clayton, *Overview of the Standards of Conduct for Investment Professionals Rulemaking Package* (Apr. 18, 2018), <https://www.sec.gov/news/public-statement/clayton-overview-standards-conduct-investment-professionals-rulemaking>.

⁵ *Id.*

⁶ Chairman Jay Clayton before the Economic Club of New York (July 12, 2017) <https://www.sec.gov/news/speech/remarks-economic-club-new-york>; See also <https://www.sec.gov/news/testimony/testimony-clayton-2017-09-26>.

a. Standards of Care must be clearly defined.

The SEC's hypothetical, four-page CRS forms are intended to explain and clarify whether retail investors are working with an IA, BD, or dually registered representative. Unfortunately, we believe the intended clarity is lost in the forms as currently drafted.

For example, under "Obligations to You," the CRS forms fail to distinguish between the BD's new "best interest" standard and the IA's existing "fiduciary" obligation.⁷ The duty of IAs is explained as, "We are held to a fiduciary standard that covers our entire investment advisory relationship with you." Nowhere in the CRS forms is the term "fiduciary standard" defined. The BD's obligation is illustrated as "We must act in your best interest and not place our interest ahead of yours when we recommend an investment strategy involving securities." However, the practical definition and application of acting in the "best interest" is not articulated in the standalone CRS form for BDs.⁸ This leaves many open questions – particularly, what is the meaning of best interest and how does it differ from a fiduciary standard, if at all. Even an expert would struggle to understand the difference and a retail customer would surely be confused. Because of this lack of clarity, AARP is concerned that the forms will further confuse investors, or worse, provide them with a false sense of security.

Another example of where the CRS forms can be improved is on the dual registrant's disclosure. In that form, the relationship summary attempts to provide useful guidance on dual registrants, including tabular formatting that illustrates advisory and brokerage services side-by-side. However, although the visual formatting is helpful, the substantive information laid out within the table remains technical and is likely to be confusing to the average retail investor -- someone who does not have expertise in complex financial products. In addition, the form does not explain how and when these financial professionals must notify investors if they are switching hats. Such information is critical and should be included in order to assist the retail investor with understanding the potential fluidity of the relationship.

b. The relationship summary should be reformatted to ensure accessibility to key information.

Clear, complete, and accurate information is essential for making informed decisions, understanding how investments and financial relationships operate, and preparing for retirement. Based on our experience, the format of disclosure forms, as well as, the

⁷ <https://www.sec.gov/rules/proposed/2018/34-83063-appendix-c.pdf>.

⁸ <https://www.sec.gov/news/statements/2018/annex-b-2-bd-registrant-mock-up.pdf>.

vocabulary used can have a significant impact on the comprehension and value of the information being shared with retail customers. We encourage the SEC to strike a balance between sharing concise, non-technical information in as short a form as possible.

We believe that the current four page CRS forms are too long, technical, and therefore too onerous for the average retail investor and household to process. The text of the relationship summary should be simply written and should avoid technical terms like “fiduciary” and “asset-based fee” unless such complex terms are clearly defined. Behavioral science has shown that when faced with a complicated choice, people often simplify by focusing on only two or three aspects of the decision.⁹ The less they are able to frame the decision in narrow terms, the more likely they will end up overwhelmed, undecided or procrastinating. As with other disclosure statements, it is best if key information can be included on one page – additional secondary information can be attached as supplemental information. A good disclosure statement will highlight the information most important to the consumer.

AARP commissioned a report in 2007 to determine the extent to which 401(k) participants were aware of fees associated with their accounts and whether they knew how much they actually were paying in fees. The report revealed participants’ lack of knowledge about fees as well as their desire for a better understanding of fees. In response to these findings, the report suggested that information about plan fees be distributed regularly and in plain English, including a chart or graph that depicts the effect that the total annual fees and expenses can have on a participant’s account balance.¹⁰

A form that is perceived as easy to understand and helpful is more likely to be used to weigh the advantages and disadvantages of available options and to make informed decisions than one that is more confusing. Layout and design elements can be used to enhance understanding of key information in the relationship summary. Side by side comparisons can be helpful, but the information should be simplified and reduced to the key elements. For example, using bold type, underlining, bullets, and borders to highlight important information may enhance comprehension by drawing attention to it. In addition, while tables are a viable way to convey information, testing to ensure retail investors think the specific tables contained in the form are helpful would be beneficial.

⁹ Daniel Read et al., *Choice Bracketing*, 19 J. Risk & Uncertainty 171, 171–73 (1999).

¹⁰ *401(k) Participants’ Awareness and Understanding of Fees*, http://www.aarp.org/research/financial/investing/401k_fees.html.

c. The Commission should embrace plain language concepts in the development of the CRS Form.

AARP believes that a first step in addressing the adequacy of the CRS Form is identifying the Commission's target audience. If the average retail investor, Mr. and Mrs. 401k,¹¹ is the target then we believe significant modifications must be made in order to render the final CRS Forms readable and effective at facilitating informed decision making. The Commission itself has referenced studies that show variability in financial literacy among sub-sections of the general population.¹² We believe the Commission should focus on plain language in order to ensure that retail customers can find the information they need, understand the information, and use the information to educate themselves as it relates to choosing a financial professional, type of account, or service.

Plain language is designed to ensure that the reader understands the information presented – so they can find what they need, understand what they find, and use what they find to meet their needs.¹³ “The Plain Language Act of 2010” was enacted¹⁴ with the purpose of improving the effectiveness and accountability of federal agencies to the public.¹⁵ By requiring the use of plain language in the CRS Form, the Commission will facilitate the creation of forms that retail investors will be able to easily read and understand -- avoiding complex language and industry jargon that the average retail investor will not be able to comprehend.

We suggest that the Commission provide guidelines for firms that focus the plain language or plain English concepts set forth by a variety of resources and advocates. In fact, many of these concepts are discussed in the SEC's own “A Plain English Handbook: How to create clear SEC disclosure documents”¹⁶ and other resources such as the Federal Plain Language Guidelines.¹⁷ According to the SEC handbook, retail investors need to read and understand disclosure documents to benefit fully from the protections offered by our federal securities laws. Many investors are neither lawyers, accountants, nor investment bankers. Therefore, the handbook encourages the creation of disclosure documents that investors can understand.¹⁸ The handbook states that using plain English assures the orderly and clear presentation of complex information so that retail customers have the best chance of understanding it. Plain English requires

¹¹ *Id.*

¹² *Id.* at 15.

¹³ <https://www.plainlanguage.gov/>

¹⁴ <https://www.gpo.gov/fdsys/pkg/PLAW-111publ274/pdf/PLAW-111publ274.pdf>

¹⁵ *Id.*

¹⁶ <https://www.sec.gov/pdf/handbook.pdf>

¹⁷ <https://plainlanguage.gov/media/FederalPLGuidelines.pdf>

¹⁸ *Id.*

analyzing and deciding what data points investors need to make informed decisions, before words, sentences, or paragraphs are considered.¹⁹ The Federal Plain Language Guidelines may also be a resource. Developed in the mid-90s and periodically revised, these guidelines set forth relevant concepts for making documents clear and concise. Utilizing the concepts set forth in these two government-created guides can assist the Commission and firms in creating documents that will ensure that retail investors can easily read and understand the important information presented.

II. The delivery of the relationship summary should allow adequate time for review and questioning.

Of particular importance to AARP is when the relationship summary will be delivered to the retail investor. When a retail investors fails to receive accurate and complete information regarding financial professionals' potential conflicts then they are seriously disadvantaged and unable to make an informed decision about their financial security. Given the importance of these forms and potential actions by retail investors, the timing and method by which they receive this information is significant. Investors should have clear and reasonable opportunities to protect their interests and discuss conflicts that may place them at a disadvantage.

As currently drafted, retail investors would receive a relationship summary at the beginning of a relationship with a firm, and would receive updated information following a material change. AARP recommends that such information be made available upon the first interaction with a prospective retail investor with time allowed for review.

Furthermore, the relationship summary should also include information such as the timing of when, and if, the financial professional has an obligation to notify the investor if a conflict arises.

III. Disclosure alone is not enough. Evidence shows that disclosures can do more harm and may add confusion.

AARP agrees that all financial professionals should disclose and mitigate or eliminate material conflicts of interest. The Commission should require financial professionals to eliminate practices that directly conflict with the best interest standard appropriate for personalized advice such as bonuses, competitions, and rewards. A best interest standard that does not require firms to prohibit incentives that reward and encourage

¹⁹ <https://www.sec.gov/pdf/handbook.pdf>

advice that is not in investors' best interest is likely to be a best interest standard in name only.

Recent behavioral science studies have shown that disclosures are largely ineffective because they tend to increase conflict in advisers and make the investor more likely to trust the adviser and thus follow biased advice.²⁰ Indeed, simply disclosing conflicts does not provide adequate protection and does not shield investors from potential financial harm of conflicted advice. Disclosure may even have unintended effects, such as making a consumer more confident that a financial professional is meeting a higher standard than he or she actually may be meeting. In fact, the less substantive protection there is in the Reg BI, the more critical the need for a strong relationship summary that discloses the critical components of the investor-financial professional relationship.

Research across a range of household financial products indicates the limited benefits of disclosure. The context in which a BD provides disclosures is highly relevant to effectiveness. As observed in the mortgage market, while some sales practices may involve overt misrepresentation, even seemingly clear disclosures may be poorly timed, incomplete, or incompatible with customers seeking the best deal available.²¹ Given the high-pressure environment of retail investors receiving financial advice and financial professionals looking to secure a client relationship, these similar dynamics are likely in play.

Relying on disclosure as the primary basis for investor protection, as Reg BI proposes, may also have negative effects. The presence of a standardized disclosure may give a "veneer of legality and authority," and suggest that greater protections exist on paper than in practice.²² When entering into an agreement, customers may also express overconfidence in reading or understanding terms and unjustifiably hold themselves responsible for unfavorable outcomes.²³ Even prominent federal judges have admitted to not reading consumer disclosures or contract language.²⁴ It is hard to expect the average retail investor to do otherwise.

²⁰ Sunita Sah, *Gray Matter: The Paradox of Disclosure*, NEW YORK TIMES, July 8, 2016, https://www.nytimes.com/2016/07/10/opinion/sunday/the-paradox-of-disclosure.html?_r=0; Sunita Sah and George Loewenstein, *Nothing to Declare: Mandatory and Voluntary Disclosure Leads Advisors to Avoid Conflicts of Interest*, 25(2) PSYCHOL. SCI. 575–584 (2014); cf. Sunita Sah, Angela Fagerlin, and Peter Ubel, *Effect of physician disclosure of specialty bias on patient trust and treatment choice*, <http://www.pnas.org/content/113/27/7465.full.pdf>.

²¹ Lauren Willis, *Decision-making and the Limits of Disclosure: The Problem of Predatory Lending*: Price, *Md. L. Rev.*, Vol. 65 No. 3 (2006).

²² *Id.*

²³ Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, *Iowa L. Rev.*, Vol. 99 (2014).

²⁴ Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print*, *ABA J.* (Oct. 20, 2010), http://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt

Any effort to offer new, standardized disclosures should be tested to ensure that it actually works as intended. As stated above, prior empirical testing has revealed that even after having terms explained, the majority of retail investors remain unable to understand the nature of compensation arrangements and identify potential conflicts. Retail investors frequently do not understand the various classifications, compensation arrangements, and standards of care that apply -- even if they have had a longstanding relationship with a financial professional.²⁵ Given that prior efforts, including those undertaken by the Commission, have been largely ineffective at educating retail investors, the SEC should delay any final rule until testing of its proposed disclosures successfully demonstrates that they would sufficiently clear this bar.

The CRS Form should include a duty on the financial professional's part to document key aspects of the client relationship. This should include precise capturing of what the client wanted, what the financial professional recommended and why. The financial professional should also be required to document not only if conflicts exist, but also how they will be mitigated or minimized, and when and how this conflict was disclosed to the retail investor. The financial professional should acknowledge his/her standard of care, agree to adhere to the standard of care, and document steps taken to comply with that standard. This acknowledgement should be disclosed and delivered in writing to the retail investor and with adequate time for the investor to review (and follow up with questions) prior to engagement.

Furthermore, the Commission should require advisers to provide fee disclosures any time financial professionals make a recommendation and should not take a narrow approach to the type of account, particularly "retail" accounts. First, advisers frequently ask potential or existing clients to disclose all assets in all accounts. Second, advisers do not typically limit their recommendations to retail accounts. Advisers will often provide advice on institutional accounts such as 401(k), 403(b), 457 and Roth accounts as well as recommendations to roll-over or transfer institutional accounts to retail accounts. Individuals often have institutional and retail accounts and advisers often serve multiple type of products. The key factor is the adviser recommending an

[read the computer fine print](http://www.abajournal.com/news/article/judge_posner_admits_he_didnt_read_boilerplate_for_home_equity_loan). Debra Cassens Weiss, *Judge Posner Admits He Didn't Read Boilerplate for Home Equity Loan*, ABA J. (June 23, 2010), http://www.abajournal.com/news/article/judge_posner_admits_he_didnt_read_boilerplate_for_home_equity_loan.

²⁵ Siegel & Gale, LLC and Gelb Consulting Group, Inc., *Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures*, Report to the Securities and Exchange Commission (Mar. 10, 2005), <https://www.sec.gov/rules/proposed/s72599/focusgrp031005.pdf>; Angela A. Hung, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND Institute for Civil Justice (2008), https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.

investment. A retail investor cannot make a determination to invest if they do not know the risks, rewards, conflicts and fees in advance of their decision.

Additionally, all key disclosures should be made significantly in advance of an investment decision. To the extent the current SEC rules permit disclosure at the time of, simultaneous with, or after an investment sale, all such rules should be promptly amended. Individuals need to know key terms and conditions in order to make an informed decision, including the fees on an investment and any monetary or other conditions for cancelling or modifying the investment. Indeed, tens of thousands of complaints are filed each year because advisers did not disclose or explain the fees or penalties for investment changes.

At the time of or immediately prior is simply not adequate disclosure. Some advisers will hand a packet of fee and other disclosures as the transaction is being signed or finalized. The Commission should make it clear that this is inadequate.

The Commission must also consider all of the implications of electronic versus paper disclosures. A prospectus or summary of additional information can be over 100 pages long. Key information, fees, and conditions must be highlighted to ensure online investors see the information. Waivers should be short and clear so investors actually read them. The SEC should prohibit advisers from simply providing an electronic address for disclosures. Advisers should not be permitted to require investors to search for or use another medium to obtain critical consumer disclosures. Furthermore, oral disclosures should never be permitted unless confirmed by paper disclosures. Advisers should always be required to provide disclosures in advance and on paper. Advisers should be required to document the types of investments the investor wanted, what the adviser recommended, what the investor agreed to, and all key terms and conditions. A paper copy should be provided to the retail investor.

All fee, conflict of interest, and surrender and change of contract charge disclosures should be provided substantially before the completion of the sale and execution of a transaction. If BDs are making investment recommendations, then they should be held to the same investment recommendation standards as other advisers.

IV. AARP urges the SEC to permit reply comments for 90 days after testing results are made public.

We are disappointed that the results of the Commissions' usability testing are not yet available and thus we have not had the opportunity to comment on those testing results during the comment period. AARP views the issue of usability testing as of critical

importance. Therefore, we have joined with other organizations to engage an independent disclosure expert Susan Kleimann, who also testified before the SEC's Investor Advisory Committee on June 14, 2018, to conduct testing on our behalf. We expect to have results from that testing to submit to the Commission within 45 days. While we recognize that our submission will fall outside the formal comment period on the regulatory proposal, we rely on the Chairman's assurances, including before the House Financial Services committee, that the Commission will continue to accept and consider comments received after the comment deadline has passed as has traditionally been the Commission's practice.

A fundamental premise of the Commission's proposed regulatory approach is that a summary disclosure document can be developed that will enable retail investors to better understand the differences between brokerage and advisory accounts, including the standards of conduct that apply, and make an informed choice among the available accounts and services. Until the Commission's testing results are published, then we cannot properly evaluate the Commission's proposal. This is especially critical given that past testing has shown how difficult it is to communicate simple concepts in a way that investors understand. If testing shows that the proposed relationship disclosures do not provide the intended clarity then that would have vast implications for the three-part regulatory proposal. Furthermore, if multiple iterations of testing occur, AARP would want to review the findings of each version of the disclosure forms and provide feedback.

If the testing results demonstrate continued investor confusion, the Commission will need to take additional steps to distinguish BDs from IAs, including but not limited to possibly making further changes to its proposed forms, developing tighter restrictions on titles and marketing practices, and further minimizing differences between the standards that apply to BDs and IAs.

Information gained through testing will prove important not only to our comments on specific aspects of the CRS, but on the fundamental adequacy of Reg BI. Until we know whether an effective disclosure document can be developed, any comment on the overall proposed regulatory approach will be merely speculative.

V. Conclusion

AARP remains committed to the strongest possible fiduciary standard for retirement investment advice and recommends a similar standard for all other investment advice. There is a growing need to update the rules that accurately reflects the realities of the marketplace today and provides investors with the protections they need to save and

invest for retirement. We urge the Commission to implement a uniform fiduciary standard to protect investors.

We look forward to working with you and your colleagues to ensure that the Commission's rulemaking, and its companion proposals 3235-AM35 and 3235-AM36, deliver meaningful investor protections for the customers of investment advisers and broker-dealers. As we review the issues raised in other comments, AARP may respond with further comments of our own. If you have any questions, please feel free to contact me or Jasmine Vasquez of our Government Affairs office at [REDACTED] or at [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner
Legislative Counsel and Legislative Policy Director