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August 7, 2018

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

**Re: Regulation Best Interest (File No. S7-07-18); Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles (File No. S7-08-18)**

Dear Mr. Fields,

The National Association of Government Defined Contribution Administrators (“NAGDCA”) appreciates the opportunity to provide comments on the Securities and Exchange Commission’s (“SEC”) proposed Regulation Best Interest.<sup>1</sup>

Founded in 1980, NAGDCA is the leading professional organization of public employer-sponsored deferred compensation and defined contribution plan administrators. NAGDCA’s mission is to support plan sponsors and service providers of government-sponsored defined contribution retirement plans in creating successful retirement security outcomes for their plan participants. NAGDCA governmental members oversee plans for participants from 60 state and territorial government entities and 146 local government entities, including counties, cities, public safety agencies, school districts and utilities. NAGDCA’s members administer governmental deferred compensation and defined contribution plans, including Section 457(b), 401(k), 401(a), and 403(b) plans (“DC Plans”). The association provides a forum for us to work together to improve DC Plan operations and outcomes by sharing information on investments, marketing, administration, and the federal laws and regulations governing DC Plans.

The SEC’s stated goals for Regulation Best Interest—“to enhance investor protection, while preserving, to the extent possible, access and choice for investors who prefer the ‘pay as you go’ model for advice from broker-dealers, as well as preserve retail customer choice of the level and types of advice provided and the products available”<sup>2</sup>—align closely with NAGDCA’s goal of enhancing the protection of participants of DC Plans (“Participants”) as investors in order to

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<sup>1</sup> Regulation Best Interest, Securities Exchange Act Release No. 83062, 83 Fed. Reg. 21574 (May 9, 2018); Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles, Securities Exchange Act Release No. 83063, Investment Advisers Act Release No. 4888, 83 Fed. Reg. 21416 (May 9, 2018).

<sup>2</sup> See *id.* at 21575.

promote their retirement security. We believe that it is essential for public employees to build supplemental retirement savings through DC Plans alongside their employer-sponsored defined benefit pensions and/or Social Security benefits. To that end, our members provide access to high-quality and low-cost retirement vehicles for millions of eligible Participants who have accumulated hundreds of billions in supplemental retirement assets.

Motivated by the concerns of its members and the creativity of states and local governments in designing DC Plans that encourage employees to work toward the goal of retirement security, NAGDCA has over the years identified, published and promoted best practices to assist in achieving this goal.

In that spirit, NAGDCA is pleased to offer the following comments and questions on the proposed regulation.

### **1. How Will Regulation Best Interest Apply to DC Plans, Sponsors, Representatives and Participants?**

In our experience, DC Plans are established under varying structures of governance, oversight and decision-making, which include parties such as Participants, governmental employers sponsoring DC Plans (Sponsors), authorized representatives of DC Plans (Representatives) and third-party advisers, broker-dealers and other service providers (Service Providers). As such, the application of Regulation Best Interest in the context of a DC Plan is more complex than application to a simple investor/broker relationship. With this in mind, we would like to raise the following questions:

#### *a. Who Is a "Retail Customer" Under Regulation Best Interest?*

NAGDCA respectfully requests that the SEC clarify the definition of "retail customer" in Regulation Best Interest. As proposed, Regulation Best Interest defines "retail customer" as "a person, or the legal representative of such person, who (A) [r]eceives a recommendation of any securities transaction or investment strategy involving securities from a broker, dealer, or a natural person who is an associated person of a broker or dealer; and (B) [u]ses the recommendation primarily for personal, family, or household purposes."

It appears the SEC did not intend to include Plans, Sponsors, and Representatives in the definition of retail customer. Nonetheless, we request that the SEC confirm this should it adopt Regulation Best Interest. For example, the SEC could limit retail customer to include only natural persons, or by specifically excluding DC Plans and business entities (and those acting on behalf of business entities), including Sponsors and their Representatives.

It is also unclear whether Participants would be considered retail customers under Regulation Best Interest. While the proposed regulation states that "[a]s proposed, the definition of 'retail customer,' including the limitation, would cover, for example, participants in ERISA-covered

plans and IRAs[,]”<sup>3</sup> the SEC did not address whether Participants of DC Plans that are not covered by ERISA<sup>4</sup> would be considered retail customers. Of course, DC Plans are subject to different SEC rules, regulations and interpretive guidance as compared to ERISA-covered plans and IRAs and so we request that the SEC provide specific guidance on the applicability, or exclusion from applicability, of these rules to the millions of public employees participating in DC Plans.

Moreover, in the context of a participant-directed DC Plan, a Service Provider typically contracts with the Sponsor and/or Representatives on behalf of the DC Plan rather than with Participants directly. The Sponsor and/or the Representatives are generally responsible for choosing the investment menu available in the DC Plan. While in many cases Participants may have authority to direct the investment of their account balances, the DC Plan’s trust is generally the legal owner of such assets. As such, we also request that the SEC confirm whether under these circumstances, Participants in DC Plans are “retail customers” for the purposes of Regulation Best Interest.

*b. Who Is a “Legal Representative” Under Regulation Best Interest?*

The SEC provides limited guidance in Regulation Best Interest on what it means to be a “legal representative of such person” (other than providing that a trust that represents the assets of a natural person is a “legal representative”).<sup>5</sup> We might expect that the SEC would view “legal representative” to include the common meaning of representatives, such as executors, conservators, and persons with a durable power of attorney over the affairs of another; and that it would not include DC Plans, Sponsors, and Representatives. As such, we request that the SEC further clarify who is a “legal representative,” particularly in the circumstances presented by DC Plans maintained by NAGDCA’s members.

*c. What “Uses” of a Recommendation Are Covered by Regulation Best Interest?*

We believe that in the context of a DC Plan, neither a DC Plan, Sponsor, nor Representative would receive a recommendation that would be used “primarily for personal, family, or household purposes.”<sup>6</sup> Instead, we expect such parties would use recommendations with respect to the DC Plan for other purposes, which may or may not include business or commercial purposes. We request the SEC’s clarification that recommendations made to the Sponsor or Representative in connection with the establishment and operation of a DC Plan are not covered by Regulation Best Interest.

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<sup>3</sup> See *id.* at 21598.

<sup>4</sup> See 29 U.S. Code § 1003(b)(1).

<sup>5</sup> See Regulation Best Interest, 83 Fed. Reg. at 21595.

<sup>6</sup> See *id.*

## **2. What Is a “Recommendation” in the Context of DC Plans and Participants?**

The SEC has stated that the determination of whether a recommendation has occurred depends on existing broker-dealer regulation under the federal securities laws and rules governing self-regulated organizations (SROs). The SEC further stated that certain communications that provide general investor education (e.g., a brochure discussing asset allocation strategies) or limited investment analysis tools (e.g., a retirement savings calculator) are excluded under existing securities law rules and regulations.<sup>7</sup>

We agree that providing general investor education or limited investment analysis tools to a DC Plan Participant should not be deemed a “recommendation” for purposes of Regulation Best Interest. While not stated in the proposing release, we expect that the SEC also meant to exclude descriptive information about DC Plans and interactive investment materials, similar to Financial Industry Regulatory Authority (FINRA) Rule 2111.03. As such, we request that the SEC provide in Regulation Best Interest that a “recommendation” does not include any communication that is excluded by FINRA Rule 2111, or any successor rules thereto.

In addition, we note the SEC’s assertion that “[a] recommendation concerning the type of retirement account in which a customer should hold his retirement investments typically involves a recommended securities transaction.”<sup>8</sup> We request that the SEC clarify the terms “retirement account” and “retirement investments,” including whether the terms include Section 457(b), 401(k), 401(a), and 403(b) DC Plans (including whether or not the DC Plan is subject to ERISA is material) and Participant’s accounts.

## **3. Will the Form CRS Delivery Requirements Apply to DC Plans and/or Participants?**

As proposed, certain Service Providers, such as broker-dealers, investment advisers, or dual registrants, would be required to deliver Form CRS to “retail investors.” The proposed regulation regarding Form CRS defines “retail investor” as “a customer [or client] or prospective customer [or client] who is a natural person (an individual)[,] . . . include[ing] a trust or other similar entity that represents natural persons, even if another person is a trustee or managing agent of the trust.”<sup>9</sup> This definition differs from the definition of “retail customer” under Regulation Best Interest. Similar to our request to clarify the definition of “retail customer,” we ask that the SEC more specifically clarify whether DC Plans and Participants are “retail investors” for the purposes of Form CRS delivery requirements.

## **4. How Will Regulation Best Interest Apply to Rollovers?**

Regulation Best Interest states that it would not “extend to recommendations of account types generally, unless the recommendation is *tied to a securities transaction* (e.g., to roll over or

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<sup>7</sup> See *id.* at 21593 (citing FINRA Rule 2111.03).

<sup>8</sup> See *id.* at 21595.

<sup>9</sup> See *id.* at 21597.

transfer assets such as IRA rollovers).”<sup>10</sup> However, the SEC has not explained this concept. We are concerned that the ambiguity this concept presents may cause confusion among Participants and Service Providers in regards to transactions involving assets of DC Plans. For example, under what circumstances would a recommendation to rollover the assets of a DC Plan to an IRA be a recommendation tied to a securities transaction? Would a recommendation to take a lump-sum distribution in cash from a DC Plan be considered a recommendation tied to a securities transaction? We request that the SEC provide clarity on the specific kinds of discussions about rollovers that would be “recommendations” triggering Regulation Best Interest specifically in the context of DC Plans.

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NAGDCA appreciates the opportunity to offer comments on the proposed Regulation Best Interest and hope that you will consider our views and the needs of DC Plans, Sponsors, Representatives and Participants as you proceed with the rulemaking process.

We would also welcome the opportunity to meet with the Commission to further discuss these and other ideas to promote simplicity, fairness, efficiency and increased retirement security for our DC Plan Participants. While our members are focused on public employees, NAGDCA supports all efforts to make it possible for the average person to achieve retirement security. Thank you in advance for considering our views.

Please contact Paul Beddoe, NAGDCA’s Director of Government Affairs at [paul@pvbga.com](mailto:paul@pvbga.com) or (202) 899-0187 if we can be a resource and a reference on governmental defined contribution DC Plan issues.

Sincerely,



R. Keith Overly  
President

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<sup>10</sup> See *id.* at 21595 (emphasis added).