CFA Consumer Federation of America

July 11, 2017

The Honorable Bill Huizinga
Chairman
Capital Markets, Securities
and Investments Subcommittee
Financial Services Committee
U.S. House of Representatives

Carolyn B. Maloney
Ranking Member
Capital Markets, Securities
and Investments Subcommittee
Financial Services Committee
U.S. House of Representatives

Dear Chairman Huizinga, Ranking Member Maloney, and Members of the Subcommittee:

We are writing in advance of this week's Subcommittee hearing on the impact of the Department of Labor (DOL) fiduciary rule to express our strong opposition to the recently released discussion draft from Rep. Ann Wagner (R-MO), which we understand will be a focus of that hearing. While the draft bill purports to impose a best interest standard on broker-dealers' investment recommendations, it would dramatically weaken existing protections for retirement savers without providing meaningful new protections for investors in non-retirement accounts. As such, it would continue to put at risk working Americans and retirees who turn to financial professionals for advice on how to finance important long-term goals, such as saving for retirement, to purchase a home, or to fund a college education.

**The bill would repeal the Department of Labor (DOL) conflict of interest rule just as it is beginning to deliver the best interest advice that retirement savers need and deserve.** Since the DOL rule was finalized more than a year ago, firms have announced implementation plans that show that the rule is reducing the cost of advice, improving the quality of investment products, and preserving access to advice through both fee and commission accounts for even the smallest account holders.[1] Indeed, since brokers and insurance agents are now required to provide fiduciary advice and not just self-interested sales recommendations dressed up as advice, retirement savers' access to *genuine* advice has been dramatically expanded as a result of the rule. The main thing preventing retirement savers from receiving the full potential benefits of the rule is uncertainty over its ultimate fate as a result of the Trump Administration's reconsideration of the rule.[2]

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[1] For examples of how the rule is benefitting retirement savers, see CFA Fact Sheets, "The Department of Labor Conflict of Interest Rule is Already Delivering Benefits to Workers and Retirees: Delay Puts Those Benefits at Risk," Jan. 31, 2017, available here: http://bit.ly/2sIbgV3 and "6 Ways the DOL Fiduciary Rule Improves Protections for Retirement Savers," April 27, 2016, available here: http://bit.ly/1rCwanQ. For a more detailed discussion of the rule's benefits, see April 17, 2017 comment letter to Department of Labor from Barbara Roper, Director of Investor Protection, and Micah Hauptman, Financial Services Counsel, Consumer Federation of America, available here: http://bit.ly/2oXIZfq.

[2] See, for example, Michael Wursthorn and Sarah Krouse, "New Class of Mutual Fund Shares in Limbo as 'Fiduciary' Rule Is Delayed," *Wall Street Journal*, March 5, 2017, http://on.wsj.com/2mUDBaL. ("The delay of a rule that tightens

**In the DOL rule's place, the bill would apply a best interest standard in name only to brokers' retirement and non-retirement account investment recommendations.** The DOL rule recognizes that the key to promoting best interest advice by sales-based "advisers" is requiring firms to eliminate the complex web of toxic financial incentives that encourage and reward advice that is *not* in customers' best interest. In contrast, the draft bill would not require firms to avoid, or even appropriately manage, these toxic conflicts. Instead, it would give firms the choice of addressing conflicts exclusively through disclosure. Under this approach, brokers would give lip service to acting in customers' best interests while still paying their sales reps more to recommend substandard products that are more profitable for the firm, for example, or setting quotas for the sale of proprietary products. While such egregious conflicts are permitted, however, there is no reason to believe that brokers will abide by a vague and ill-defined best interest standard. And study after study has shown that disclosure alone does not enable investors to protect themselves from the harmful impact of conflicts.

**The bill denies regulators the ability to redress its many shortcomings.** Under the bill, both the Securities and Exchange Commission (SEC) and the Departments of Labor and Treasury would be precluded from adopting any requirements for brokers' recommendations that are "in addition to" the bill's requirements. State authority would also be broadly preempted. Thus, if these agencies wanted to adopt clarifying rules, shore up ineffective protections, or address unforeseen problems that may emerge in the future, they would be unable to do so.

**The draft bill would increase investor confusion.** By scrupulously avoiding using the term "fiduciary duty" to describe its best interest standard, and by requiring no meaningful limits on conflicts, the bill strongly suggests that something less than a true fiduciary standard is intended to apply to brokers' recommendations. This implication that a weaker standard is intended is further reinforced by the bill's broad preemption of state laws that do impose a fiduciary duty on brokers and by its elimination of the requirement in Section 913 of the Dodd-Frank Act that the standard for brokers be no weaker than the existing standard under the Investment Advisers Act. Indeed, it is not clear from the bill's text that it offers protections that are significantly stronger than those afforded by the "suitability" standard that currently applies to brokers' non-retirement account recommendations.[3] Furthermore, the draft bill would allow insurers and others to satisfy their obligations as fiduciaries under ERISA and the tax code by meeting standards that are "substantially similar," but not identical, to those outlined in the bill. This leaves open the very real possibility that even weaker standards could apply to certain products sold to retirement investors, such as fixed-indexed annuities, than would apply under this bill to securities recommendations. As a result of all

standards on brokerages' retirement-savings advice is disrupting efforts to roll out a new class of mutual-fund shares designed to comply with the regulation") See also, Dianna Britton, "DOL in the Real World," *WealthManagement.com*, June 19, 2017, available here: http://bit.ly/2tAwYgm. ("There has been only a handful of fund companies that actually launched T shares as of the June 9 applicability date. Whereas if you asked that question 60 days ago, we had a list of probably 20 fund families who were all indicating they were going to be launching T shares for June 9. And I think that's been a little bit of this kind of circular dynamic between the asset managers trying to understand what the distribution side of the industry wants and needs, and the distribution side sort of asking the asset managers what they're going to have.")

[3] The suitability standard also gives lip service to "best interest" without restraining the conflicts of interest that conflict with that standard.

these factors, the bill would further diminish, rather than enhance, the uniformity of standards that apply to investment advice.

**The bill does nothing to address investor confusion.** Despite the fact that the bill continues to set a weaker standard for brokers' recommendations than that imposed under the Investment Advisers Act, it does nothing to constrain brokers' ability to label their sales representatives as advisers or to market their services as advisory in nature. It eliminates the requirement that the SEC develop a plain English, pre-engagement disclosure document for brokers and advisers. In its place, the bill requires point-of-first-sale disclosures by brokers, delaying until a transaction is about to be finalized disclosures that are needed to help investors make an informed choice at the outset of the relationship among different types of financial professionals. Thus, the bill's provisions are not only inadequate to reduce investor harm, they are also inadequate to reduce investor confusion. And, as noted above, the bill limits the ability of the SEC and state regulators to redress those deficiencies.

There are other severe drafting problems with the bill. It never actually defines what constitutes best interest, although it goes to some length to list the types of practices that would *not* violate the best interest standard. Its preemption of DOL authority to define who is a fiduciary under ERISA is so sweeping it could affect existing rules far beyond those specifically addressed in this legislation. In defining recommendation it makes a bewildering distinction between discretionary and non-discretionary recommendations with unknown effects on the reach of the statute. It ties key provisions of the bill to FINRA rules, potentially locking those rules in place in perpetuity. And its disclosure requirements are written in such a way that they could preempt other existing disclosures, including some unrelated to the issues addressed in the bill. In short, this is an ill-conceived and poorly drafted bill.

As their response to the DOL conflict of interest rule has made clear, sales-based "advisers," such as broker-dealers and insurance agents, desperately want to be able to claim they act in customers' best interests without being legally accountable for doing so. This draft bill would give them precisely what they want without delivering the enhanced protections that investors both expect and deserve. We urge you to oppose this bill.

Respectfully submitted,

Barbara Roper, Director of Investor Protection

Micah Hauptman, Financial Services Counsel

Cc: Chairman Hensarling, Ranking Member Waters, Members of the Financial Services Committee