Consumer Federation of America

AMERICANS FOR FINANCIAL REFORM
ACCOUNTABILITY • FAIRNESS • SECURITY

May 22, 2013

The Honorable Scott Garrett	The Honorable Carolyn Maloney
Chairman	Ranking Member
Capital Markets and Government Sponsored Entities Subcommittee	Capital Markets and Government Sponsored Entities Subcommittee
Financial Services Committee	Financial Services Committee
U.S. House of Representatives	U.S. House of Representatives

Dear Chairman Garrett, Ranking Member Maloney and Members of the Committee:

We are writing on behalf of Consumer Federation of America and Americans for Financial Reform to express our opposition to the untitled draft legislation to amend Section 913 of the Dodd-Frank Act that is scheduled to be considered at this week's legislative hearing in the Capital Markets Subcommittee. The overall effect of the proposed legislation would be to place unreasonable conditions on the Securities and Exchange Commission as it considers whether to raise the standard of conduct that applies to brokers when they give personalized investment advice to retail investors.

Millions of average Americans turn to financial professionals to help them make the investment decisions that will determine whether they can afford to fund their child's college education and retire in comfort. Most don't realize, however, that the "financial advisers" who work for broker-dealers aren't subject to the same fiduciary duty to act in their customers' best interests that other investment advisers must meet. Instead, those broker-based financial advisers are free to recommend investments that are more costly or otherwise inferior to other available alternatives, as long as the investment is generally suitable for the investor. Over the long term, this can cost middle income Americans with limited financial resources tens of thousands of dollars that could have gone to fund their financial goals.

The discussion draft would impose a series of additional requirements on the Commission as it considers whether to move forward with rulemaking to close this regulatory gap. Among these is a requirement that the Commission conduct another layer of cost-benefit analysis on an issue that has already been the subject of extensive study. The draft bill also includes unnecessary and duplicative provisions directing the agency to determine that investors are being harmed under the existing regulatory approach, conclude that the rule's benefits justify its costs, and formally find that the rule would reduce retail investor confusion. To the extent that these requirements seek to ensure that the reasons for and approaches to rulemaking are seriously considered before the SEC proceeds, they are entirely redundant.

The SEC is currently collecting data to support an economic analysis before any rulemaking is undertaken. As the Commission's request for information makes clear, that analysis is designed to help it determine:

- whether rulemaking is needed in this area, which by definition includes the question of whether investors are being harmed under the current regulatory approach;
- what alternative regulatory approaches are available to address the problem should the Commission determine that a regulatory solution is needed; and
- among the various alternatives, which offers the greatest benefits to investors at a reasonable cost to the financial services firms that would be affected by the rule.

The economic analysis that is currently underway follows over a decade of study of this issue. Those studies have already shown that brokers today are engaged in extensive advisory activities not contemplated when they were exempted from the Investment Advisers Act, that they offer those services under a less investor-protective standard than their professional competitors, that investors cannot distinguish between brokers and advisers and do not understand the different legal standards that apply to their advice, and that investors therefore are unable to make an informed choice among financial professionals. Those studies include both the SEC staff study required by Section 913 and the earlier RAND Study, which was commissioned precisely because previous testing by the agency had determined that disclosure alone was not effective in eliminating investor confusion.

Given the analysis already conducted by the SEC, and the analysis currently underway, one is left to wonder whether the primary intent of the bill's new cost-benefit requirements is to provide a further basis for legal challenge should the SEC determine to move forward with rulemaking or simply to delay any possible rulemaking.

The draft legislation also includes a provision requiring the Commission to coordinate its efforts with other federal agencies "to minimize conflicts among regulations promulgated by other Federal agencies." Both the current SEC Chair and her predecessors have reported that they are in regular communication and coordinating closely with the Department of Labor as it considers changes to its fiduciary definition under ERISA. They and the DOL have provided repeated assurances that they will work to ensure that there are no conflicts between their rules. It is difficult to see what more they would need to do to satisfy this requirement. If the intent of this provision is in fact to try to force the DOL to adopt an approach more similar to that contemplated by the SEC, a step which we would strongly oppose, the SEC does not have the authority to bring that about, and nothing in this legislation changes that.

Among the more troubling aspects of the bill is the double standard inherent in its final provision. Under this provision, the Commission could not impose a fiduciary duty on brokers' investment advice unless it also adopted rules "to address any harm to retail customers from differences in the registration, supervision, and examination requirements applicable to brokers, dealers, and investment advisers.'' As a result, the Commission could not proceed with rulemaking to address a well-documented and extensively studied problem unless it also adopted rules in an area where little or no study has been conducted and no evidence of harm has been produced. (The one area where there is evidence that investors are harmed by the inconsistency in regulatory approach between brokers and advisers is in the infrequency of investment adviser inspections. But that is a problem caused by Congress's refusal to provide adequate resources for investment adviser oversight and is not within the Commission's power to solve through rulemaking.) Like other provisions in the bill, this final provision would likely further delay long-overdue rulemaking and could result in a layer of new regulatory requirements for investment advisers that may or may not offer any meaningful new protections for investors.

Investors place their trust in broker-dealers and investment advisers alike. They deserve the assurance that any advice they receive, regardless of whether it is offered by a broker or an investment adviser, will be designed to promote their best interests. The SEC is following a careful and deliberate approach to rulemaking in this area. This legislation would make it more difficult for the SEC to act while doing nothing to improve the quality of the rules. We urge you to oppose it. Feel free to contact Barbara Roper (719-543-9468, bnroper@comcast.net) if you have additional questions about our position on this issue.

Respectfully submitted,

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