Congress of the United States
Washington, DC 20515

September 12, 2018

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

Dear Chairman Clayton:

We write to urge the Securities and Exchange Commission (SEC) to put retail investors first and revise its proposed regulations governing the standards of care owed by broker-dealers when providing retail investors with personalized investment recommendations (referred to herein as "Regulation BI").

For far too long, certain financial professionals have been able to game the system and choose a standard of care that allows them to put their interests and profit motives ahead of their retail clients. As a result, hardworking Americans have lost out on millions of dollars that could have been used to save for their children's college, buy a home, or save for retirement. While we are pleased that the SEC is finally acting to address this issue, Regulation BI falls woefully short.

The best way for the SEC to protect investors and reduce confusion is require all brokers and advisers, regardless of their titles, to comply with the same fiduciary standard that puts their clients' interests first. In passing Section 913(g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress provided the SEC with the authority to do this so that the standard of conduct for a broker or dealer would be the same high fiduciary standard applicable to an investment adviser. Under Section 913(g) brokers, dealers and investment advisers would be required to "act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice." That section was motivated by clear evidence that the current standards were confusing to investors, unfair to professionals, and not sufficiently protective of investors.[i] [ii] [iii] [iv]

However, the SEC has proposed Regulation BI under Section 913(f), a less specific subsection that authorizes the SEC to conduct rulemaking on the standards of care for advisers considering the results of the mandatory study under Section 913(b). This decision has led to a less protective proposal for investors that applies two distinct standards: a "best interest" standard for brokers and a "fiduciary" standard for investment advisers, neither of which, as described by the Commission, matches the strong, enforceable standard set by Congress in 913(g). This is not

what Congress intended and undermines the compromise that the House and Senate reached in Dodd-Frank.[v]

Moreover, it appears that the SEC did not adequately consider the results of its own study, as required by Section 913(f). As you know, that study specifically recommended that the SEC conduct rulemaking under Section 913(g).[vi] Instead, the proposal would impose some ill-defined best interest standard on brokers that requires them to act "without placing the financial or other interest . . . ahead of the interest of the retail customer." This phrasing may seem similar to the language in Section 913(g), but its actual meaning and impact on brokers' conduct is unclear. The SEC explains its decision on this aspect of the draft proposal based on the concern that brokers may inappropriately interpret the requirement in Section 913(g), to act "without regard to the financial or other interest," to require broker-dealers to eliminate all conflicts of interest. That was clearly not Congress's intent since, as the SEC acknowledges, Section 913(g) expressly provides that neither commission-based compensation nor offering only proprietary products would alone violate any uniform fiduciary standard.

We urge the SEC to revise its proposal consistent with Section 913(g) and require brokers to abide by the same high standard that currently applies to investment advisers so that their advice to retail investors is provided without regard to their financial or other interests. That standard must require brokers and investment advisers to put their clients' best interests first under a duty of loyalty, and disclosure, while important, should not relieve them of this duty. Regulation BI for brokers and the SEC's interpretation of the "fiduciary" obligation owed by investment advisers fail to clearly do this, enabling investors to "consent" to harmful conduct in complex and legalistic disclosures that most will never read and would not understand if they did.

While the proposal makes clear that the "best interest" standard is not the same as the detailed standard Congress set forth in Section 913(g), it fails to adequately explain just what it would require of brokers that is different from the status quo. Instead, the proposal suggests that a broker would violate its standard "if any recommendation was predominantly motivated by the broker-dealer's self-interest." Nowhere does the proposal define either "best interest" or "predominantly motivated."

If the SEC intends to adopt a "best interest" standard, that standard should clearly differ from the current "suitability" standard, which has also been interpreted to require "that a broker make only those recommendations that are consistent with the customer's best interest [and] prohibits a broker from placing his or her interests ahead of the customer's interest."[vii] In any final rule, the SEC must clearly explain the standard, what it requires and prohibits, and how it differs from the status quo. Without that clarification, retail investors will not be able to understand the difference between a fiduciary standard and a weaker "best interest" standard.

We appreciate that the proposal requires all brokers to have written policies and procedures reasonably designed to identify and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with such recommendations. However, the SEC should make clear that these policies and procedures should reduce the impact of conflicts in order to ensure that conflicts of interest do not undermine compliance with the best interest standard.

We are also concerned that proposed Regulation BI relies heavily on disclosures to investors without any evidence suggesting that these disclosures would be effective. At best these disclosure forms may further confuse investors; at worst they could lead to a false sense of security that the advice is in their best interest. While the various proposed forms summarizing the adviser-client relationship will be subject to investor testing to ensure their understanding, this must be an iterative process and language changes should be retested and subject to public notice and comment. These changes must inform and be incorporated into any final rule.

Finally, we welcome the SEC's attempt to address investor confusion by prohibiting professionals that are not registered investment advisers from calling themselves "adviser" or "advisor." However, the proposed approach is too narrow of a fix that fails to address the numerous other titles professionals use, including wealth manager, financial consultant, financial manager, money manager, investment manager, financial planner, or investment consultant. These titles are often used interchangeably between investment advisers, broker-dealers, and dual registrants. As a result, most retail investors cannot easily distinguish between financial advisers who are mere salespeople and those that are investment advisers that must provide advice that is in the best interests of the investor. To address this, we urge the SEC to adopt a more principles-based approach to preclude brokers from holding themselves out as investment advisers or acting in an advisory capacity.

For all of the foregoing reasons, we believe the SEC needs to amend proposed Regulation BI before it is finalized to ensure that investors' hard-earned savings are protected and their interests are put first. If the SEC believes that it would be necessary to re-propose the rulemaking to make the changes discussed above, the Commission should do so.

Sincerely,

Maxine Waters
Ranking Member
Committee on Financial Services
U.S. House of Representatives

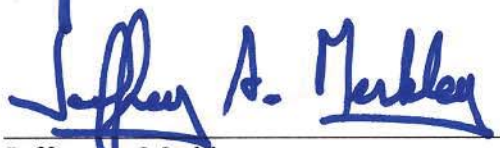
Sherrod Brown
Ranking Member
Committee on Banking, Housing, and Urban Affairs
U.S. Senate

Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives

Patty Murray
Ranking Member
Committee on Health, Education, Labor, and Pensions
U.S. Senate

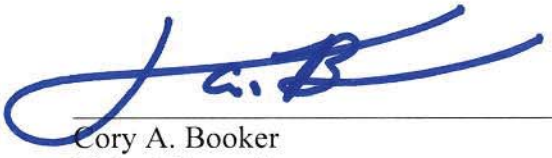
Elizabeth Warren
United States Senator

Kirsten Gillibrand
United States Senator



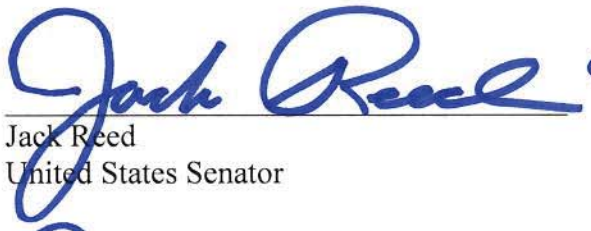
Jeffrey A. Merkley
United States Senator

Catherine Cortez Masto
United States Senator



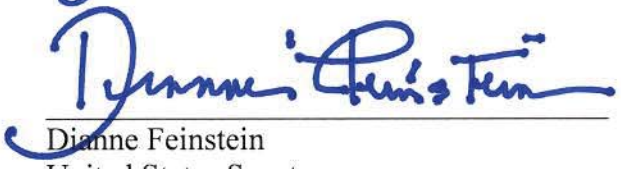
Cory A. Booker
United States Senator

Richard J. Durbin
United States Senator



Jack Reed
United States Senator

Robert Menendez
United States Senator



Dianne Feinstein
United States Senator

Tammy Duckworth
United States Senator

Bernard Sanders
United States Senator

Suzanne Bonamici
Member of Congress

Michael E. Capuano
Member of Congress

David N. Cicilline
Member of Congress

Yvette D. Clarke
Member of Congress

Elijah Cummings
Member of Congress

Mark DeSaulnier
Member of Congress

Keith Ellison
Member of Congress

Adriano Espaillat
Member of Congress

Al Green
Member of Congress

Raul M. Grijalva
Member of Congress

Pramila Jayapal
Member of Congress

Hakeem Jeffries
Member of Congress

Marcy Kaptur
Member of Congress

Barbara Lee
Member of Congress

Stephen F. Lynch
Member of Congress

Carolyn B. Maloney
Member of Congress

Marcia L. Fudge
Member of Congress

Eleanor Holmes Norton
Member of Congress

Jan Schakowsky
Member of Congress

Nydia M. Velázquez
Member of Congress

[i] *See* Statement of Denise Voigt Crawford, Texas Securities Commissioner and President of North American Securities Administrators Association, before the House of Representatives Committee on Financial Services (Oct. 6, 2009), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg55810/pdf/CHRG-111hhrg55810.pdf ("This is such an important issue for investors that Congress should explicitly direct the SEC to adopt rules no later than 1 year from passage of the Act mandating compliance by broker-dealers with the fiduciary duty standard established by the 1940 Investment Advisers Act."); Statement of Richard G. Ketchum, Chairman and CEO, the Financial Industry Regulatory Authority (FINRA), before the House of Representatives Committee on Financial Services (Oct. 6, 2009), ("The Administration has proposed that the SEC write rules establishing consistent fiduciary standards of care for investment advisers and brokers providing investment advice. FINRA stands in agreement with numerous interested parties that the standard of care in both channels should be a fiduciary standard for the provision of advice. . . there should be no question that the requirement should be to put the customer first, and we believe that a fiduciary standard is the right way to do that."); Statement of Mercer E. Bullard, Associate Professor, University of Mississippi School of Law, and President of Fund Democracy, before the House of Representatives Committee on Financial Services (Oct. 6, 2009), ("I strongly support the Act's position that brokers should be subject to a fiduciary duty with respect to retail personalized investment advice."); Statement of John Taft, Head of U.S. Wealth Management, on behalf of the Securities Industry and Financial Markets Association, before the House of Representatives Committee on Financial Services (Oct. 6, 2009), ("We are not proposing to water down or narrow the fiduciary standard. Quite the opposite. What we are proposing to do is extend its reach from the small set of activities it applies to, investment advisory activities, to all the activities and services we provide to individual investors."); Statement of David G. Tittsworth, Executive Director and Executive Vice President, Investment Adviser Association, before the House of Representatives Committee on Financial Services (Oct. 6, 2009), ("I wish to reiterate our strong support for the Administration's recommendation to require broker-dealers who provide investment advice to be subject to the same fiduciary standard as investment advisers."); Statement of Stuart Kaswell, Executive Vice President and General Counsel, Managed Funds Association, before the House of Representatives Committee on Financial Services (Oct. 6, 2009), ("Investment advisers are subject to an existing, robust fiduciary standard with respect to their clients. We support extending that standard to broker-dealers . . .").

[ii] Statement of Fred J. Joseph, President, North American Securities Administrators Association, before the Senate Committee n Banking, Housing, and Urban Affairs (Mar. 26, 2009), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-111shrg53176/pdf/CHRG-111shrg53176.pdf ("NASAA also urges Congress to apply the fiduciary duty to all financial professionals who give investment advice regarding securities—broker-dealers and investment advisers alike. This step will enhance investor protection, eliminate con and even promote regulatory fairness by establishing conduct standards according to the nature of the services provided and not the licensing status of the provider."); Prepared Statement of Barbara Roper, Director of Investor Protection, Consumer Federation of America, before the Senate Committee on Banking, Housing, and Urban Affairs (Mar. 26, 2009), ("All those who offer investment advice should be required to place their clients' interests ahead of their own, to disclose material conflicts of interest, and to take steps to minimize those potential conflicts."); Prepared Statement of David G. Tittsworth, Executive Director and Executive Vice President, Investment Advisers Association, before the Senate Committee on Banking, Housing, and Urban Affairs (Mar. 26, 2009), ("[W]e believe any 'harmonization' of laws and regulations governing brokers and investment advisers should extend the investor protection benefits of investment adviser fiduciary standards to anyone who offers investment advice.").

[iii] Statement of the Honorable William Francis Galvin, Secretary of the Commonwealth of Massachusetts, before the House of Representatives Committee on Financial Services (Mar. 20, 2009), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg48871/pdf/CHRG-111hhrg48871.pdf ("I urge the committee and the Congress to require that brokerages be in a fiduciary relationship with their customers, at least with respect to individual retail customers.").

[iv] Prepared Statement of Paul Schott Stevens, President and Chief Executive Officer, Investment Company Institute, before the Senate Committee on Banking, Housing, and Urban Affairs (Mar. 10, 2009), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-111shrg51395/pdf/CHRG-111shrg51395.pdf (" The Capital Markets Regulator should have explicit authority to harmonize the regulatory regimes governing investment advisers and broker-dealers. . .We recommend that both types of intermediaries be held to a fiduciary duty to their clients."); Statement of Mercer E. Bullard, Associate Professor, University of Mississippi School of Law, and President of Fund Democracy, before the Senate Committee on Banking, Housing, and Urban Affairs (Mar. 10, 2009), ("Congress should enact legislation that imposes a fiduciary duty on any persons who provide individualized investment advice or sell products pursuant to their providing of s ch individualized investment advice. Americans who naturally expect those providing fiduciary services to act solely in their clients' best interests are entitled to nothing less."); Prepared Statement of T. Timothy Ryan, Jr., President and Chief Executive Officer, Securities Industry and Financial Markets Association, before the Senate Committee on Banking, Housing, and Urban Affairs (Mar. 10, 2009), ("SIFMA has long advocated the modernization and harmonization of the disparate regulatory regimes for investment advisory, brokerage and other financial services in order to promote investor protection.").

[v] Changes to the standards of conduct applied to broker-dealers and investment advisers were present in both the House and the Senate versions of financial regulatory reform. However, the House and the Senate had different approaches to this issue. The House approach was to harmonize the fiduciary standard for brokers, dealers, and investment advisers. The Senate approach was to have the SEC conduct a study to evaluate the effectiveness of existing standards of conduct for brokers, dealers, and investment advisers; submit a report of the study, with conclusions and recommendations, to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services; and begin rulemaking concerning any gaps or overlaps found by the study. Dodd-Frank forged a compromise between the House and Senate approaches.

[vi] SEC, Study on Investment Advisers and Broker-Dealers (Jan. 2011), https://www.sec.gov/news/studies/2011/913studyfinal.pdf

[vii] FINRA Regulatory Notice 12-25.