



Consumer Federation of America

DOL Rule Proposal Meets Standards Industry Rule Opponents Claim to Support

Alternatives Supported by Industry, including Roskam and Roe Bills, Fall Short

When people turn to financial professionals for investment advice, they expect and deserve advice that serves their best interests. Unfortunately, current rules under both our securities laws and the Employee Retirement Income Security Act (ERISA) allow financial firms to profit at their customers' expense when providing services investors reasonably rely on as objective advice.

Both the Securities and Exchange Commission (SEC) and the Department of Labor (DOL) have a role to play in fixing that problem. The SEC is responsible for eliminating the double-standard that has enabled broker-dealers to offer investment advice about securities without having to meet the fiduciary standard appropriate to a relationship of trust. The DOL is responsible for eliminating loopholes in ERISA regulations that have enabled brokers, insurance agents, and others to offer self-interested advice to retirement plans, plan participants and Individual Retirement Account (IRA) investors.

While many financial firms and their lobbyists profess to support SEC rulemaking to impose a uniform "best interest" standard on investment advice, those same industry groups have strongly opposed DOL rulemaking. One argument they make to justify their opposition to the DOL rule is that it is inconsistent with Section 913 of the Dodd-Frank Act, which they say provides the framework that should govern standards for investment advice. While there are flaws in the argument that DOL should be bound by securities law principles, the truth is that DOL's proposed regulatory approach provides an excellent model of what a pro-investor rule under Section 913 might look like. Moreover, the alternatives that have gained industry support – including two bills currently under consideration in Congress – do not begin to meet the Section 913 standard industry claims to support.

A side-by-side detailed comparison of key provisions of Section 913, the DOL rule proposal, and H.R. 4293 and 4294 is provided [here](#).

Section 913 and the DOL Rule Proposal Close Loopholes in the Definition of Investment Advice.

The Investment Advisers Act includes a broad, functional definition that encompasses personalized advice about securities for compensation. But in implementing the Advisers Act, the SEC has excluded broker-dealers from that definition, even when they hold themselves out as advisers and offer extensive advisory services. As a result, broker-dealers are able to offer investment advice under a lower "suitability" standard, rather than the fiduciary "best interest" standard that would otherwise apply.

Similarly, ERISA includes a broad definition of fiduciary investment advice, but the regulations adopted by the DOL in the 1970s include a five-part test that requires, among other things, that the advice is ongoing and that there is a mutual agreement between the customer and the adviser that the advice will form the primary basis for the customer's investment decision. Broker-dealers, insurance agents, mutual fund companies and other sales-based advisers routinely rely on these provisions to disclaim any fiduciary obligation to their retirement advice customers.

Section 913 addresses the problem of inconsistent standards for investment advice by authorizing the SEC to impose a uniform fiduciary standard on broker-dealers and investment advisers when they provide personalized investment advice about securities (but not about non-securities investments). The DOL rule proposal achieves the same result for advice to retirement plans, plan participants, and IRA investors (including advice about non-securities) by replacing its five-part test with a functional definition of retirement investment advice. In both cases, the definition would turn on whether compensation is received and whether the advice is both actionable and particularized for the customer.

DOL and Section 913 Apply a Consistent Best Interest Standard to Investment Advice.

Even more notable is the consistency between the standards imposed on fiduciary investment advice under Section 913 and the DOL rule proposal's best interest contract exemption. Both are designed to show how a fiduciary standard can be applied to investment advice when the adviser's compensation varies depending on the investments recommended. Section 913 makes clear that commissions are permitted, as does the DOL rule proposal. Both also permit recommendations from a limited menu of proprietary products. Moreover, in crafting the best interest contract exemption, DOL borrowed directly from Section 913 in requiring the adviser to act in the "best interest" of the customer, "without regard" to the firm's or the adviser's financial or other interests.

In other words, under both Section 913 and the DOL rule proposal, fiduciary advisers are permitted to have conflicts of interest as long as they act in the best interests of their customers. Both also recognize that disclosure alone is insufficient to address such conflicts. Section 913 requires the SEC to examine and, where appropriate, limit or ban practices that create unacceptable conflicts. The DOL rule proposal seeks to mitigate the potentially harmful impact of conflicts by requiring firms to minimize and appropriately manage their conflicts and rein in practices that encourage their advisers to work against their clients' interests.

Roskam and Roe Bills Are Weaker than Current Law, Section 913, or the DOL Rule Proposal.

Even as industry groups fight a DOL rule proposal that incorporates the Section 913 principles they claim to support, they have endorsed alternatives that fail to meet the 913 standard. This includes, most recently, bills introduced by Rep. Phil Roe (H.R. 4293) and Rep. Peter Roskam (H.R. 4294). As the accompanying chart makes clear, neither bill effectively closes the loopholes in the definition of fiduciary investment advice. As a result, they fail to achieve the basic purpose behind Section 913 and the DOL rule proposal not to mention their own stated goal of ensuring that all financial advisers are required to act in the best interests of their customers. In addition, neither bill includes a robust, enforceable best interest standard that requires firms and advisers to set aside their own financial interests. Instead, both rely exclusively on disclosures to address conflicts of interest, an approach that has been shown time and again to be ineffective in protecting investors.

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While financial firms and their lobbyists have given lip service to support for a best interest standard consistent with Section 913 of Dodd-Frank, they have opposed key aspects of the DOL rule proposal that meet that standard and endorsed alternatives, such as the Roskam and Roe bills, that do not. This suggests that what financial firms really want is a rule that allows them to claim to act in customers' best interests without requiring them to change the way they currently do business. Working families saving for a secure and independent retirement deserve better. They deserve the strong protections afforded by the DOL rule proposal.