Consumer Federation of America

Statement of CFA Director of Investor Protection Barbara Roper at Joint CFA-PIABA-Better Markets Press Briefing on SEC's Regulation "Best Interest"

June 4, 2019

The set of regulations the Securities and Exchange Commission will vote on tomorrow is being promoted as a big win for investors, but it will instead leave investors worse off than if the Commission had failed to act at all.

As Christine already discussed, one part of that package, Regulation Best Interest, will make it easier for brokers to market themselves as trusted advisers committed to putting their customers' interests first without actually requiring them to recommend the investments they reasonably believe are the best available option for the investor. Nor will Reg BI effectively rein in the incentives brokers have to recommend investments that are *not* in their customers' best interests. On the contrary, it will weaken protections that currently apply – under state common law fiduciary standards – when customers are in long-term relations of trust and confidence with their brokers.

Reg BI's shortcomings have gotten a lot of attention in the build-up to tomorrow's vote. What has gotten less attention is that the Commission is also poised to adopt a dramatically weakened interpretation of the Investment Advisers Act fiduciary duty – one that leaves investors devoid of meaningful protections. We know this based not just on our careful reading of the regulatory proposal, but also based on our meeting with the Chairman in April, where he made it very clear that, when it comes to strengthening the Advisers Act guidance, his mind is closed.

For many years, the SEC has steadfastly maintained that investment advisers are fiduciaries who are required to put the client interests first at all times, who must not subordinate their client's interests to their own, and who cannot disclose or negotiate that obligation away. Like me, many of you have probably written articles, based on those assurances, in which you advised investors who want investment advice they can trust, advice that is untainted by conflicts of interest, to seek out a registered investment adviser because they are held to this highest of standards.

The SEC's enforcement of the Advisers Act fiduciary standard has never lived up to its rhetoric. Instead, when it comes to enforcement, the SEC has been satisfied with disclosure to address virtually all conflicts and virtually all harmful conduct. And these disclosures, which are supposed to suffice to protect investors, are typically buried deep inside a document few investors are likely to read and fewer still will understand. We saw that a few years ago when JP Morgan was accused of pressuring its advisers to push inferior in-house products in their advisory accounts, and we've seen it in the Commission's recent share class settlements. In neither case did the Commission require the firms in question to abandon their harmful practices. Instead, increased disclosure was all the Commission required.

Nobody who's read one of these ADV forms can seriously suggest that this protects investors. But that disclosure-based approach is enshrined in the Commission's proposed guidance on the standard of conduct for investment advisers. And when we suggested even the most modest of changes in our meeting with Chairman Clayton – drawing a distinction between conflicts of interest, which can be disclosed and consented to by clients, and harmful conduct, which cannot – he made it clear that he was not willing to entertain *any* such suggestions. Worse, we've heard rumblings since then that the Advisers Act Guidance may actually get *worse* before the Commission's vote on Wednesday. Not only does this weak disclosure-based interpretation of the Advisers Act standard fall far short of the protections investors need and deserve, but enshrining it as official SEC policy will make it harder for a future SEC that's more willing to flex its enforcement muscles to do so.

And this is bewildering. After all, we know why Regulation Best Interest is so weak. The brokerage industry lobbied the SEC to simply re-brand the FINRA suitability standard as a best interest standard, and that's exactly what the SEC did. What we can't understand is why they are weakening the Advisers Act standard, when the vast majority of advisers embrace a higher standard than the Commission is willing to enforce. These advisers take seriously their obligation to avoid conflicts, put the client first at all times, and manage conflicts to the benefit of the client. And they emphatically *reject* the notion that disclosure alone is, or should be, sufficient to satisfy their fiduciary obligations.

And it's *not* that the SEC lacks the authority to adopt and enforce a standard that goes beyond disclosure, as Chairman Clayton insisted when we met with him. Even if you believe that his is the correct reading of the Investment Advisers Act fiduciary duty, and we do not, Congress gave the agency all the authority it needs in Section 913(g) of the Dodd-Frank Act to rectify any weaknesses in the Advisers Act standard. It specifically authorized the agency to adopt a strong, explicit fiduciary standard for brokers and advisers alike that requires them to act in the best interests of their customers, without regard to their own conflicting interests. And it specifically authorized the agency to limit or ban sales practices, conflicts of interest, and compensation schemes that are not consistent with investor protection and the public interest. The Chairman made a deliberate choice not to use that authority.

In short, the regulations being voted on tomorrow are not a disappointingly weak, but modest improvement on the status quo. They are a complete betrayal of the "Mr. and Ms. 401(k)" investors SEC Chairman Jay Clayton pledged to protect when he undertook this rulemaking. They will mislead investors into expecting protections the rules do not deliver and deprive them of protections they currently receive.