FINANCIAL SERVICES INSTITUTE | VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS AND INDEPENDENT FINANCIAL ADVISORS

Written Testimony to the Maryland Financial Consumer Protection Commission

October 10, 2018

The Honorable Gary Gensler
Chairman, Maryland Financial Consumer Protection Commission
3 East, Miller Senate Office Building
Annapolis, MD 21401

RE: Discussion on U.S. Department of Labor rule and any Actions of SEC in Addressing Conflicts of Interest in Broker–Dealers Offering Investment Advice by Aligning the Standard of Care for Broker–Dealers with that of the Fiduciary Duty of Investment Advisors

Dear Chairman Gensler:

Thank you for the opportunity to share our view on issues related to a state-specific fiduciary standard of care currently being considered by the Maryland Financial Consumer Protection Commission. The Financial Services Institute (FSI)[1] and its financial advisor[2] members are concerned that if Maryland moves forward with adopting a state-specific fiduciary standard of care it will have the unintended consequence of severely limiting access to high-quality, individually-tailored advice for many hard-working Americans. This issue is of strong concern to FSI's Maryland membership, as FSI currently has a significant presence of 2 broker-dealer firms and 570 financial advisors operating within the state.

Independent financial advisors are small business owners who typically have strong ties to their communities and know their clients personally. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI broker-dealer firms and their affiliated financial advisors are especially well-positioned to provide middle-class Americans with the financial advice, products and services necessary to achieve their investment goals.

FSI has long supported a federal uniform fiduciary standard of conduct for broker-dealers and investment advisors. However, we strongly believe the Securities Exchange

[1]The Financial Services Institute (FSI) is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has successfully promoted a more responsible regulatory environment for more than 33,000 independent financial advisors, and more than 100 independent financial services firms who represent upwards of 160,000 affiliated financial advisors. We effect change through involvement in FINRA governance as well as constructive engagement in the regulatory and legislative processes, working to create a healthier regulatory environment for our members so they can provide affordable, objective advice to hard-working Main Street Americans. For more information, please visit www.financialservices.org.

[2] The use of the term "financial advisor" or "advisor" as referred to by FSI in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, or a dual registrant. The use of the term "investment adviser" or "adviser" in this letter, is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

Commission (SEC) is the appropriate agency to create a uniform standard and are concerned that state-specific standards would create significant expense and compliance burdens without enhancing investor protection. The additional cost and compliance burdens imposed by the bill would inevitably be passed on to investors. The increasing costs will limit investors' access to affordable professional financial advice or discourage investors from seeking professional financial advice to increase their individual wealth. This would be an unfortunate result because investors who work with financial advisors save more, are better prepared for their retirement, and have greater confidence in their retirement planning. For example, individuals without the help and support of financial advisors are less likely to open an IRA, leading to increased cash-outs when changing jobs and lower savings rates compared with advised individuals. Unadvised individuals are likely to carry excess portfolio risk due to less diversification and less frequent re-balancing.[3] Thus, it is imperative that investors maintain full access to affordable professional financial advice.

It is also important to note that investment advisers and dual registrants are already subject to a fiduciary duty under Section 206 of the Investment Advisers Act of 1940, as interpreted by the U.S. Supreme Court in SEC v. Capital Gains Research Bureau.[4] Similarly, independent broker-dealer firms (IBDs) are subject to the suitability standard[5], which FINRA has made clear requires IBD firms and their investment adviser representatives to act in their customer's best interests.[6] Therefore, we believe state-specific fiduciary standards of care will not providing any additional benefits to investors.

Under Section 913 of Dodd-Frank,[7] Congress granted the SEC complete rule-making authority to establish a uniform fiduciary standard for broker-dealers and investment advisers. That authority remains in effect and has not been withdrawn or modified. The explicit Congressional intent was that the SEC create a uniform federal standard. In fact, the SEC has proposed a new rule under the Securities Exchange Act of 1934 ("Exchange Act") establishing a standard of conduct for broker-dealers and natural persons who are associated persons of a broker-dealer when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer.[8] State-specific standards would conflict with Congressional intent and the SEC's effort to provide investors throughout the country with best interest advice.

Additionally, Section 103 of the National Securities Markets Improvement Act of 1996expressly preempts states from enacting regulations that impose new or different recordkeeping requirements than those established under the Securities and Exchange Act.[9]

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[3] Oliver Wyman, The Role Of Financial Advisors In The Us Retirement Market 6, 16 (Jul. 2015), *available at*, http://www.fsroundtable.org/wp-content/uploads/2015/07/The-role-of-financial-advisors-in-the-US-retirement-market-Oliver-Wyman.pdf

[4] Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., et al. Supreme Court of the United States 375 U.S. 180 (1963), *available at*, https://www.sec.gov/divisions/investment/capitalgains1963.pdf

[5] FINRA Rule 2111. Suitability, *available at*, http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=9859

[6] FINRA Rule 2010. Standards of Commercial Honor and Principles, available at, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5504

[7] Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, *available at*, https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf

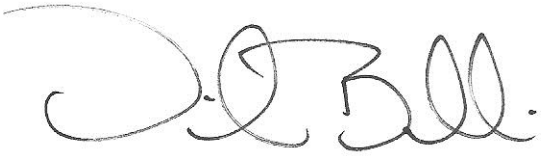
[8] Regulation Best Interest Proposed Rule, available at, https://www.sec.gov/rules/proposed/2018/34-83062.pdf

[9] Section 103 of the National Securities Markets Improvement Act of 1996, *available at*, https://www.congress.gov/104/plaws/publ290/PLAW-104publ290.pdf

Without a doubt, creating a state-specific fiduciary standard of care would require broker-dealers to create and maintain new records to demonstrate compliance with the mandatory disclosure standards. We believe this would result in pre-emption of the rule under NSMIA.

As always, we remain committed to constructive engagement with the Maryland Financial Consumer Protection Commission and therefore, welcome the opportunity to discuss this issue further. If FSI or its membership can be of assistance at any point on this important issue, please be sure to contact my colleague, Michelle Carroll Foster, at 202-517-6464.

Respectfully submitted,



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