Consumer Federation of America

Statement of CFA Director of Investor Protection Barbara Roper
In Support of the Department of Labor's Conflict of Interest Rule

(Delivered at the Public Hearing August 10, 2015)

As you enter this next phase of the rulemaking process, you all face the unenviable prospect of digging through thousands of pages of comments that have been submitted in response to this rule to find the relatively few valuable nuggets – genuine suggestions to improve the rule – buried within this huge pile of verbiage. The good news is that those nuggets are there. Concrete suggestions have been submitted to improve the rule, whether by clarifying key points or making it easier to implement, that can and should win support from a broad range of stakeholders in this debate. But I'd like to focus today on a few issues that we believe you can safely ignore as the last gasp efforts of industry to maintain a status quo that has been hugely profitable for them, but far less beneficial for the working families and retirees who struggle to afford a secure and independent retirement.

1) The first is the argument that industry supports a best interest standard, just not the apparently fatally flawed best interest standard you've put forward here.

I'd be prepared to make a small wager that virtually every industry representative who testifies here this week will, at some point in their remarks, profess their support for a best interest standard. Some of them may even mean it. But when you look at the details of the standard they actually support, you will find that in the vast majority of cases, there is considerably less there than meets the eye.

So, for example, they will be happy to support a best interest standard as long as it doesn't cover the full range of services that retirement investors perceive and rely on as objective investment advice. Toward this end, they argue for broad new exemptions – an expansion of the seller's carve-out to the retail market is a popular one – that would have the effect of recreating using different words precisely those loopholes this rule was intended to close.

Or they will support a best interest standard as long as no one actually expects them to seek to do what is best for the customer. You know, I've been doing this for a long time, but I was frankly shocked to see FINRA make this argument in its comment letter, in which they basically suggested that "best interest advice" and "suitable advice" are really just two different names for essentially the same thing. I can assure you that that's not how investors see it.

Or, and this is absolutely crucial, industry groups will be happy to support a best interest standard as long as no one expects them to set aside their own financial interests as they seek to determine the best course of action for the customer, as long as they don't have to dismantle the complex web of financial

incentives they've created to pay and reward their advisers for advice that is not in the customer's best interest.

In short, they support a best interest standard as long as it doesn't require them to do what is best or to make any meaningful changes in the way they do business today.

The Department's standard, which recognizes that best interest should set a higher bar than suitability and which backs that standard with real, meaningful mitigation of conflicts is absolutely consistent with the reasonable expectations of retirement savers when they turn to financial professionals for advice. It is industry's best interest standard in name only that is fatally flawed.

2) The second argument that we would encourage you to ignore is that argument that the Department should step aside and let securities regulators take the lead in order to avoid the confusion that could arise if different accounts were subject to different standards.

There are so many holes in this argument it would be impossible to catalog them all in the time available here today. But, it is worth noting that, if the SEC were eventually to get around to adopting a rule – something that is far from guaranteed, at CFA we've been waiting for a little over 15 years – it would by definition be limited to recommendations regarding securities. It would not apply to recommendations of insurance products, which form a pretty important part of the retirement market, or other non-securities investment that are sold to investors through retirement accounts. The result would be a single standard for all securities accounts, which would admittedly ease compliance for broker-dealers, at the expense of different standards for different products sold *within* retirement accounts, which would be far more confusing for retirement savers and expose them to greater risks.

The irony here is that the Department has gone out of its way to incorporate securities law principles as it was crafting this rule. Your definition of investment advice is virtually identical to the securities law definition. Your best interest standard is borrowed directly from Section 913 of Dodd-Frank, where Congress identified this "best interests, without regard to the financial or other interests of the adviser" as the standard that should apply if the SEC were to adopt rules under the securities laws. You even deal with issues related to ongoing duty of care and sales from a limited menu of proprietary products in ways that are consistent with the principles in Dodd-Frank. Indeed, the SEC could do far worse than to follow the Department's lead if it does eventually get around to drafting a fiduciary rule for the securities markets.

There is no doubt that the Department's job would have been easier if the SEC had provided leadership – if it had adopted a strong fiduciary standard for brokers, if it had taken steps to rein in the toxic conflicts that pervade the broker-dealer business model, or if it had even just adopted clear disclosures regarding the costs and conflicts associated with that advice. But it has done none of those things despite decades of entreaties from investor advocates. All of which leads me to wonder whether the real reason industry lobbies so enthusiastically for securities regulators to take the lead on this issue is that they know this is a good way to ensure that nothing ever happens, or else believe that they have a far better chance of getting the watered down standard they've been lobbying for if securities regulators write the rule.

We don't know at this point where the SEC will ultimately come out on this issue, and we hope for better things. But when you listen to the noises that have been coming out of FINRA lately and from one particularly vocal SEC commissioner, industry has good reason to believe their prospects for a watered down standard from securities regulators are pretty good.

3) I would be remiss if I didn't mention here industry's favorite argument against the rule – that many brokers will simply stop serving this market if the rule is adopted and that investors, particularly small savers, will be harmed if they lose access to advice or are forced into more expensive fee accounts.

Here again, there are many holes in this argument, not least that there is actually no compelling evidence that commission-based brokerage accounts are consistently more affordable than fee accounts when the total cost of investing are taken into account. But the more fundamental point you need to keep in mind is that this is what they always say when faced with a rule they don't like.

A recent example arose when the SEC was considering whether to regulate all fee-based accounts as advisory accounts under the Investment Advisers Act. Many of these same organizations, indeed some of the same individuals, made exactly the same arguments they've made here, that brokers would be forced to stop offering the accounts and investors would lose access to valued services, if the accounts were regulated as advisory accounts. The SEC backed down, but, in a rare win for investors, its decision was overturned in court. As a result, all fee based accounts today are regulated as advisory accounts. And, guess what? The sky didn't fall. Brokers didn't stop offering the accounts. On the contrary, there's more money in fee-based accounts at broker-dealers today than ever before.

So, while there are good reasons as you finalize the rule to seek to make it as streamlined and easy to implement as possible consistent with a strong and effective rule, there is absolutely no reason to believe that financial firms are going to voluntarily walk away from a multi-trillion-dollar market if you finalize a rule based on this proposal.

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I'd like to conclude by noting that we have a retirement market today that works really, really well for the broker-dealers, and insurance companies, and mutual fund companies that reap billions of dollars in profits providing services to our tax-subsidized retirement accounts. But it works a lot less well for working families and retirees – individuals with no particular financial sophistication – who struggle with complex decisions about how best to save and invest for and in retirement, and who bear the full risks when those decisions turn out badly. This rule can help to ensure that, when they turn to financial professionals for investment advice, they actually get real, objective advice and not just a sales pitch dressed up as advice. That won't solve every problem with our retirement system, but it is a goal very much worth fighting for. So we urge you to move forward without further delay to finalize this rule and we look forward to working with you to achieve that goal.

Thank you.

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Consumer Federation of America (CFA) is a non-profit association of nearly 300 consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.