

[DISCUSSION DRAFT]

JULY 5, 2017

115TH CONGRESS
1ST SESSION

H. R. _____

To amend the Securities Exchange Act of 1934 to establish standards of conduct for brokers and dealers that are in the best interest of their retail customers.

IN THE HOUSE OF REPRESENTATIVES

Mrs. WAGNER introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Securities Exchange Act of 1934 to establish standards of conduct for brokers and dealers that are in the best interest of their retail customers.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the [“_____ Act
5 of 2017”].

1 **SEC. 2. REPEAL OF DEPARTMENT OF LABOR FIDUCIARY**
2 **RULE.**

3 The final rule of the Department of Labor titled
4 “Definition of the Term ‘Fiduciary’; Conflict of Interest
5 Rule— Retirement Investment Advice” and related pro-
6 hibited transaction exemptions published April 8, 2016
7 (81 Fed. Reg. 20946) shall have no force or effect.

8 **SEC. 3. STANDARDS OF CONDUCT FOR BROKERS AND**
9 **DEALERS.**

10 (a) STANDARD OF CONDUCT FOR BROKERS AND
11 DEALERS WHEN MAKING RECOMMENDATIONS TO RETAIL
12 CUSTOMERS.—

13 (1) IN GENERAL.—The second subsection (k) of
14 section 15 of the Securities Exchange Act of 1934
15 (15 U.S.C. 78o(k); (relating to standards of con-
16 duct) is amended to read as follows:

17 “(k) STANDARD OF CONDUCT FOR THE PROVISION
18 OF FINANCIAL SERVICES TO RETAIL CUSTOMERS.—

19 “(1) IN GENERAL.—The standard of conduct
20 for a broker or dealer (or registered representative)
21 when providing recommendations to a retail cus-
22 tomer, in addition to a duty of care and a duty of
23 loyalty, is as follows:

24 “(A) RECOMMENDATION TO RETAIL CUS-
25 TOMER.—When a broker or dealer (or reg-
26 istered representative) makes a recommendation

1 to a retail customer, the recommendation shall
2 be in the retail customer’s best interest at the
3 time it is made and—

4 “(i) reflect reasonable diligence; and

5 “(ii) reflect the reasonable care, skill,
6 and prudence that a broker or dealer (or
7 registered representative) would exercise
8 based on the customer’s investment profile.

9 “(B) DISCLOSURE TO RETAIL CUS-
10 TOMER.—

11 “(i) IN GENERAL.—Before a broker or
12 dealer (or registered representative) exe-
13 cutes a transaction for the first time for
14 each retail customer based on a rec-
15 ommendation to such retail customer, such
16 broker or dealer (or registered representa-
17 tive) shall disclose at point of sale to such
18 customer, in a clear and concise manner—

19 “(I) the type and scope of serv-
20 ices the broker or dealer (or registered
21 representative) provides;

22 “(II) the standard of conduct
23 that applies to the relationship;

1 “(III) the types of compensation
2 the broker or dealer (or registered
3 representative) receives; and

4 “(IV) any material conflict of in-
5 terest.

6 “(ii) CONTENT OF DISCLOSURE.—The
7 Commission may issue regulations deter-
8 mining the content of the disclosure re-
9 quired in clause (i). Such regulations may
10 provide for a disclosure of fees received by
11 the broker or dealer, whether from the re-
12 tail customer or a third party, prior to the
13 execution of the transaction.

14 “(C) MATERIAL CONFLICT OF INTER-
15 EST.—A broker or dealer (or registered rep-
16 resentative) shall avoid, disclose, or otherwise
17 reasonably manage any material conflict of in-
18 terest with a retail customer.

19 “(2) NONVIOLATION OF STANDARD OF CON-
20 DUCT.—The following is not, by itself, a violation of
21 the standard of conduct described in paragraph (1):

22 “(A) The receipt of compensation, includ-
23 ing transaction-based compensation, by a
24 broker or dealer (or registered representative)

1 or any affiliate of such broker or dealer (or reg-
2 istered representative).

3 “(B) The recommendation by a broker of
4 dealer (or registered representative) to a retail
5 customer of principal transactions (including
6 cross transactions), or the recommendation of
7 affiliated, unaffiliated, or proprietary products
8 or services, or a limited range of products or
9 services.

10 “(3) NO REQUIREMENT TO RECOMMEND LEAST
11 EXPENSIVE PRODUCT.—Nothing in this subsection
12 shall require a broker or dealer (or registered rep-
13 resentative) to recommend the least expensive secu-
14 rity or investment strategy (however quantified) or
15 to analyze all possible securities, other products, or
16 investment strategies before making a recommenda-
17 tion.

18 “(4) NON-DISCRETIONARY RETAIL CUSTOMER
19 ORDER.—The Commission may issue regulations on
20 the standard of conduct for when a broker or dealer
21 (or registered representative) handles a non-discre-
22 tionary retail customer order only if the Commission
23 or such Authority, as applicable, also issues regula-
24 tions on the standard of conduct for when a broker
25 or dealer (or registered representative) handles a

1 non-discretionary individual retirement account roll-
2 over transaction.

3 “(5) DEFINITIONS.—In this subsection:

4 “(A) COMPENSATION.—The term ‘com-
5 pensation’ includes commissions or sales
6 charges, or other fees or variable compensation,
7 for or related to the sale of securities or for the
8 servicing of customer accounts, whether paid by
9 the retail customer or received from a third
10 party.

11 “(B) CUSTOMER’S INVESTMENT PRO-
12 FILE.—The term ‘customer’s investment profile’
13 has the meaning of such term as described in
14 Rule 2111 of the Financial Industry Regulatory
15 Authority as of the date of the enactment of
16 this subsection.

17 “(C) INSTITUTIONAL ACCOUNT.—The term
18 ‘institutional account’ has the same meaning
19 given such term in Rule 4512 of the Financial
20 Industry Regulatory Authority as of the date of
21 the enactment of this subsection.

22 “(D) MATERIAL CONFLICT OF INTER-
23 EST.—The term ‘material conflict of interest’
24 means a financial interest of a broker or dealer
25 (or registered representative) that a reasonable

1 person would expect to affect the impartiality of
2 a recommendation.

3 “(E) REASONABLE DILIGENCE.—The term
4 ‘reasonable diligence’ has the meaning of such
5 term as described in Rule 2111 of the Financial
6 Industry Regulatory Authority as of the date of
7 the enactment of this subsection.

8 “(F) RECOMMENDATION.—The term ‘rec-
9 ommendation’ means either of the following rec-
10 ommendations (under the meaning ascribed to
11 such term in Rule 2111 of the Financial Indus-
12 try Regulatory Authority) for which the broker
13 or dealer (or registered representative) making
14 the recommendation receives or will receive
15 compensation:

16 “(i) A non-discretionary recommenda-
17 tion to buy, hold, or sell securities, or to
18 follow an investment strategy involving se-
19 curities, for taxable or non-taxable ac-
20 counts.

21 “(ii) A non-discretionary recommenda-
22 tion to rollover or transfer assets in an em-
23 ployer-sponsored retirement plan to an in-
24 dividual retirement account.

1 “(G) RETAIL CUSTOMER.—The term ‘re-
2 tail customer’ means a natural person or legal
3 entity, or the legal representative of such nat-
4 ural person or legal entity, in each case other
5 than an institutional account, who—

6 “(i) receives a recommendation from a
7 broker or dealer (or registered representa-
8 tive); and

9 “(ii) implements such recommenda-
10 tion with such broker or dealer primarily
11 for personal, family, retirement, or house-
12 hold purposes.

13 “(6) SUPERSESSION.—The provisions of this
14 subsection shall supersede and preempt State law,
15 other than a State law that regulates insurance
16 products, that are not securities insofar as they may
17 now or hereafter relate to a broker or dealer, or reg-
18 istered representative of a broker or dealer.

19 “(7) FIDUCIARY STATUS UNDER ERISA, THE IN-
20 TERNAL REVENUE CODE, THE INVESTMENT ADVIS-
21 ERS ACT OF 1940, OR OTHER FIDUCIARY REGIMES.—
22 The fact that a person may owe, or may in fact com-
23 ply with, the standard of conduct under this sub-
24 section shall not mean or create any presumption
25 that such person is a ‘fiduciary’ under the Employee

1 Retirement Income Security Act of 1974 (29 U.S.C.
2 1001 et seq.), section 4975 of the Internal Revenue
3 Code of 1986, the Investment Advisers Act of 1940
4 (15 U.S.C. 80b et seq.), or any other Federal, State,
5 or local statutory or regulatory fiduciary regime.”.

6 (2) APPLICATION.—The amendment made by
7 paragraph (1) shall apply to brokers and dealers (or
8 registered representative) on the date that is 18
9 months after the date of the enactment of this Act.

10 (b) RULEMAKING AUTHORITY.—Section 913 of the
11 Dodd-Frank Wall Street Reform and Consumer Protec-
12 tion Act is amended to read as follows:

13 **“SEC. 913. OBLIGATIONS OF BROKERS AND DEALERS AND**
14 **OTHER PERSONS AND ENTITIES.**

15 “(a) RULEMAKING.—

16 “(1) RULEMAKING BY THE COMMISSION.—The
17 Commission may issue regulations as the Commis-
18 sion determines is necessary to facilitate compliance
19 by brokers and dealers (including their registered
20 representative) with the obligations of such brokers
21 and dealers (and their registered representative)
22 under section 15(l) of the Securities Exchange Act
23 of 1934 only if such rulemaking does not impose any
24 obligation related to standard of care on a broker or
25 dealer (or its registered representative) that is in ad-

1 dition to, or inconsistent with, the obligations set
2 forth in such subsection.

3 “(2) RULEMAKING BY THE SECRETARY OF
4 LABOR AND THE SECRETARY OF THE TREASURY.—
5 After the date of the enactment of the [_____
6 Act of 2017], the Secretary of Labor and the Sec-
7 retary of the Treasury shall not promulgate any reg-
8 ulation under the Employee Retirement Income Se-
9 curity Act of 1974 (29 U.S.C. 1001 et seq.) or sec-
10 tion 4975 of the Internal Revenue Code of 1986, re-
11 spectively, defining the circumstances under which a
12 person is considered a fiduciary that would impose
13 any obligation on a broker or dealer (or its reg-
14 istered representative) or on a life insurance com-
15 pany (or its agents or distributors) that is in addi-
16 tion to, or inconsistent with, the obligations set forth
17 in subsection (k) of the Securities Exchange Act of
18 1934 (15 U.S.C. 78o).

19 “(b) EXEMPTION AVAILABLE TO CERTAIN PERSONS
20 WITH RESPECT TO MANUFACTURE OR SALE OF ANNU-
21 ITIES.—

22 “(1) EXEMPTION.—With respect to the manu-
23 facture or sale of annuities within paragraphs (2) or
24 (8) of section 3(a) of the Securities Act of 1933 (15
25 U.S.C. 77c) or section 989J of the Dodd-Frank Wall

1 Street Reform and Consumer Protection Act (15
2 U.S.C. 77c note), a person regulated by a State in-
3 surance regulator may rely on the exemptions in sec-
4 tion 408(b)(21) of the Employee Retirement Income
5 Security Act of 1974 (29 U.S.C. 1108(b)(24)) and
6 section 4975(d) of the Internal Revenue Code of
7 1986 (as added by the [_____ Act of 2017] only
8 if—

9 “(A) such person adopts and implements
10 practices on a nationwide basis for the sale of
11 annuity contracts that meet or exceed the min-
12 imum requirements set forth in section 15(k) of
13 the Securities Exchange Act of 1934 (15
14 U.S.C. 78o(k)) and such person is subject to
15 regulation or examination by a State insurance
16 regulator for purposes of assessing market con-
17 duct; or

18 “(B) such person complies with a standard
19 substantially similar to section 15(k) of the Se-
20 curities Exchange Act of 1934 (15 U.S.C.
21 78o(k)), and is regulated by a State insurance
22 regulator with respect to annuities within para-
23 graphs (2) or (8) of section 3(a) of the Securi-
24 ties Act of 1933 (15 U.S.C. 77c) or section
25 989J of the Dodd-Frank Wall Street Reform

1 and Consumer Protection Act (15 U.S.C. 77c
2 note).

3 “(2) COORDINATION AND COOPERATION.—

4 Upon the request of any State insurance regulator,
5 the Commission or the Financial Industry Regu-
6 latory Authority shall provide such reasonable assist-
7 ance to the requesting Authority as needed in con-
8 nection with the coordination or implementation of
9 this section.

10 “(3) DEFINITION OF STATE INSURANCE REGU-
11 LATOR.—As used in this subsection, the term ‘State
12 insurance regulator’ means the principal insurance
13 regulatory authority of a State, the District of Co-
14 lumbia, any territory of the United States, Puerto
15 Rico, Guam, American Samoa, the Trust Territory
16 of the Pacific Islands, the Virgin Islands, and the
17 Northern Mariana Islands.

18 “(c) ADDITIONAL EXEMPTIONS.—A person who com-
19 plies with a standard substantially similar to section 15(k)
20 of the Securities Exchange Act of 1934 (15 U.S.C.
21 78o(k)) may rely on the exemptions in section 408(b)(24)
22 of the Employee Retirement Income Security Act of 1974
23 (29 U.S.C. 1108(b)(24)) and section 4975(d) of the Inter-
24 nal Revenue Code of 1986 (as added by the [_____
25 Act of 2017]) only if such person is—

1 “(1) registered as an investment adviser under
2 the Investment Advisers Act of 1940 (15 U.S.C.
3 80b–1 et seq.) or under the laws of the State in
4 which the person maintains its principal office and
5 place of business; or

6 “(2) a bank or similar financial institution su-
7 pervised by the United States or a State, or a sav-
8 ings association (as defined in section 3(b)(1) of the
9 Federal Deposit Insurance Act (12 U.S.C.
10 1813(b)(1)).”.

11 (c) EXEMPTION FROM PROHIBITED TRANSACTIONS
12 FOR BROKERS AND DEALERS, AND OTHER PERSONS AND
13 ENTITIES, WHEN MAKING RECOMMENDATIONS TO RE-
14 TAIL CUSTOMERS.—

15 (1) Section 408(b) of the Employee Retirement
16 Income Security Act of 1974 (29 U.S.C. 1108(b)) is
17 amended by adding at the end the following:

18 “(21) Any transaction involving a recommenda-
19 tion made by a broker or dealer (including its reg-
20 istered representative), or other persons or entities,
21 that meets the requirements of section 15(k) of the
22 Securities Exchange Act of 1934 (15 U.S.C. 78o(k))
23 with respect to such recommendation.”.

1 (2) Section 4975(d) of the Internal Revenue
2 Code of 1986 is amended by adding at the end the
3 following:

4 “(24) any transaction involving a recommenda-
5 tion made by a broker or dealer (including its reg-
6 istered representative), or other persons or entities,
7 that meets the requirements of Section 15(k) of the
8 Securities Exchange Act of 1934 (15 U.S.C. 78o(k))
9 with respect to such recommendation.”.

10 (d) REPEAL OF CERTAIN PROVISIONS.—The fol-
11 lowing provisions are hereby repealed:

12 (1) Subsections (l) and (m) of section 15 of the
13 Securities Exchange Act of 1934 (15 U.S.C. 78o).

14 (2) Subsections (g), (h), and (i) of section 211
15 of the Investment Advisers Act of 1940 (15 U.S.C.
16 80b–11).