



NASAA

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May 23, 2013

The Honorable Scott Garrett
Chairman
House Financial Services Committee,
Subcommittee on Capital Markets and GSEs
2129 Rayburn House Office Building
Washington DC, 20515

The Honorable Carolyn Maloney
Ranking Member
House Financial Services Committee,
Subcommittee on Capital Markets and GSEs
B-301 Rayburn House Office Building
Washington DC, 20515

Re: Discussion Draft to amend Section 913 of the Dodd-Frank Act (Rep. Wagner, MO)

Dear Chairman Garrett and Ranking Member Maloney:

On behalf of the North American Securities Administrators Association (NASAA),¹ I'm writing to express our strong opposition to the "discussion draft" legislation proposed by Representative Wagner of Missouri that would amend Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). This legislation, which is the focus of a hearing today in the Capital Markets Subcommittee, would severely undermine the on-going effort by the U.S. Securities and Exchange Commission (SEC) to conduct rulemaking under Section 913 of the Dodd-Frank Act ("Section 913") to establish a uniform fiduciary standard for investment advisers² and broker-dealers.

Section 913 required the SEC to conduct a study to assess the effectiveness of the standards of care applicable to broker-dealers and investment advisers when providing investment advice to retail customers. Further, Section 913 empowered the SEC to adopt rules that would address the standards of care for broker-dealers and investment advisers when providing investment advice to retail customers and specified that any such rules should be no less stringent than the fiduciary duty standard applicable to investment advisers under federal law.

The "discussion draft" legislation proposed by Rep. Wagner ("the Draft") would establish several significant obstacles to SEC rulemaking under Section 913, through

¹ The oldest international organization devoted to investor protection, the North American Securities Administrators, Inc. was organized in 1919. Our membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass roots investor protection and efficient capital formation

² The term "investment adviser" in this letter to refers exclusively federally registered investment advisers, as defined under the Securities Exchange Act of 1934, which are subject to registration and examination by the SEC.

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prescribing redundant regulatory analytical requirements and requiring the SEC to “take all necessary and appropriate steps to coordinate retail customer standards of conduct with other Federal agencies to minimize conflicts.” Further, the Draft would prevent the SEC from conducting any rulemaking under Section 913 “unless the Commission also proposes rules...in the same rulemaking to address any harm to retail customers resulting from differences in the registration, supervision, and examination requirements applicable to brokers, dealers, and investment advisers.”

NASAA is concerned about each of these provisions,³ but we are particularly alarmed by Paragraph 6, which combines two separate, distinct, and mutually exclusive issues: (1) the standards of care applicable to broker-dealers and investment advisers, which will be addressed by SEC rulemaking pursuant to Section 913, and (2) oversight of broker-dealers and investment advisers, which Congress sought to address in Section 914 of the Dodd-Frank Act. Oversight of broker-dealers and investment advisers includes registration, supervision and examination processes. The duties of care to which these financial professionals are held in their dealings with customers are a distinct and separate issue from the mechanics of oversight, which are conducted through registration, supervision and examination.

NASAA supports robust examination regimes for both broker-dealers and investment advisers; however, we believe that Congress correctly separated this issue in the Dodd-Frank Act from the question of establishing a fiduciary standard of care. The challenge presented by the disparity between the standards of conduct applicable to financial professionals is one that can and should be remedied by rulemaking, and NASAA agrees that such rulemaking should be performed in a manner that includes a thorough assessment of the costs and benefits to retail investors. By contrast, the adequacy of supervision and examination regimes for broker-dealers and SEC-registered investment advisers is primarily one of resources, and an issue that can only be addressed by Congress.

To satisfy the requirement articulated in Paragraph 6 of the Draft, Congress will need to appropriate substantially greater funds to the SEC’s Office of Compliance, Inspection and Examination (OCIE), thereby giving the Commission the resources it needs to conduct more frequent examinations of federally registered investment advisers. Absent increased appropriations for OCIE, Congress could alternatively increase the frequency of investment adviser examinations by authorizing the SEC to assess “user fees” on federally registered investment advisers to augment OCIE examination resources.

State securities regulators have repeatedly urged Congress to appropriate the resources necessary to OCIE increase the frequency of investment adviser examinations, and we continue to support such action, however we do not perceive that this is likely this year, or for the foreseeable future. Moreover, while NASAA also strongly supports H.R. 1627, the Investment Adviser Examination Improvement Act, which would authorize the SEC to assess user fees, consistent with the first recommendation of the Section 914 Study, the House Financial Services Committee has not taken any action on this important legislation.

³ NASAA supports robust and objective cost-benefit analysis as an important aspect of federal rulemaking; however, we believe that such rigorous analysis is already assured under the SEC’s 2012 guidance regarding the conduct of cost-benefit analysis in rulemakings. The cost-benefit analysis required by the “discussion draft,” though largely consistent with the SEC’s own guidelines, is overly prescriptive, and could in fact impede the ability of the SEC to measure and evaluate the costs and benefits of any rulemaking under Section 913.

Thus, by making any rulemaking under Section 913 contingent on concurrent steps “to address” issues which were the purview of the Section 914 Study, such as registration, supervision and examination, the practical effect of Paragraph 6 of the Draft would be to delay indefinitely any action by the SEC to fulfill its mandate under Section 913 and prescribe a uniform standard of care for investment advisers and broker-dealers. Indeed, Paragraph 6 would perpetuate the practice by which some unscrupulous financial professionals are free to recommend products that are in their own interests, rather than the best interest of the customer, while receiving generous commissions. Moreover, these individuals would remain free to dispense such recommendations without providing adequate disclosures contemplated by a fiduciary duty, either about their conflicts of interest, or the limitations on any “advice” they offer.

NASAA recognizes the importance of addressing disparities in the supervision of investment advisers and broker-dealers identified in the Section 914 study, but we do not believe that the SEC’s effort to develop a uniform fiduciary standard under Section 913 should be held hostage to legislative resolution of the issues identified by the 914 Study. The extension of a uniform fiduciary standard of care to all investment professionals that provide personalized investment advice is a critical step to providing greater protection to “mom and pop” investors, who look to their financial adviser for guidance in making financial decisions about their life and their retirement. Paragraph 6 of the Draft would delay, and potentially deny, investors these important and long- awaited protections.

Thank you for attention to my concerns with the discussion draft. If I may be of any additional assistance, please do hesitate to contact me or Michael Canning, NASAA’s Director of Policy, at (202) 737-0900.

Sincerely,



A. Heath Abshure
NASAA President and Arkansas Securities Commissioner

cc:

The Honorable Jeb Hensarling
The Honorable Maxine Waters