



## **SEC Committee Wants to Put the “F” Word Into Reg BI**

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The Securities and Exchange Commission’s Investor Advisory Committee voted 16 to three Wednesday to recommend changes to the agency’s Regulation Best Interest, including that the rule be a fiduciary standard.

On a call with committee members on Wednesday, Barbara Roper, director of investor protection at the Consumer Federation of America, laid out the four recommended changes to the SEC’s proposal. She said the recommendations were not intended to send the Commission down a different path or substitute a new approach; rather, they’re meant to build on the existing proposal.

“However, we are concerned by suggestions that the Commission may not feel it has the authority it needs to adopt that clarified best interest standard under the Adviser’s Act fiduciary duty,” Roper said. “Should the Commission conclude, as it goes forward, that it cannot adopt that clarified interpretation of best interest for investment advisors, then we would urge the Commission to reconsider whether it may be necessary to engage in rulemaking under Section 913(g) in order to close that regulatory loophole.”

Section 913(g) of the Dodd-Frank Act gave the SEC authority to establish a fiduciary duty for brokers and dealers.

The committee’s first recommendation is that the commission make it explicit that Reg BI is a fiduciary standard, consistent in principle for brokers and investment advisors alike. However, SEC Chair Jay Clayton has said in the past that the agency avoided using the term on purpose. “Fiduciary is a buzzword that can mean a lot of things in a lot of contexts,” he said at FINRA’s annual conference earlier this year.

The IAC also called for increased clarification around a “best interest” definition. The committee’s definition, Roper said, recognizes the range of broker/dealer and investment advisor business models.

“So you wouldn’t see identical application to all advisory act conduct or all broker/dealer conduct,” she said. “You’d see a standard that is flexible enough to be applied to the variety of ways in which advice and recommendations are offered to retail investors.”

Brokers and investment advisors should be required to recommend the investments, strategies, accounts or services that they reasonably believe represent the best available options for the investor, she said.

“We’re seeking to narrow the pool of recommendations that would satisfy best interest beyond those that would satisfy suitability, not arrive at the one perfect recommendation for an investor, which would be, of course, an impossible standard to meet in many circumstances,” Roper added.

Compliance with the standard should be based on whether the broker or advisor had a reasonable basis for the recommendation at the time it was made, not how it ultimately performed.

“This is not intended to be a gotcha standard,” Roper said. “It is intended to enhance the analysis that goes in on the front end to the recommendations to investors and ensure that the investor’s interest, rather than the broker or advisor’s financial interest, is first and foremost at arriving at that recommendation.”

It should also be clear that the standard applies to recommendations made at the outset of a client relationship, including rollover recommendation and recommendations regarding the type of accounts that would be best for the customer, the committee argued.

Lastly, the committee believes the SEC should conduct usability testing of the Customer Relationship Summary Form, a disclosure meant to alleviate client confusion about the differences between brokers and registered investment advisors. Specifically, the group is looking for study of the usability of the sample documents that the Commission has put forth. And if the testing finds it doesn’t reduce investor confusion, the Commission should work with disclosure design experts to change the form.

Some testing has found that the CRS actually increased investor confusion over the differences between brokers and investment advisors, and some groups have called for the SEC to revise and retest it.

The RAND Corporation, along with the SEC’s Office of the Investor Advocate, conducted a research report, which was submitted as a comment to the proposal. And another RAND study—on investor testing of Form CRS—is expected to be filed in the coming days, said SEC Chairman Jay Clayton.

Three committee members voted “No” on the recommendations, including Lydia Mashburn, managing director of the Center for Monetary and Financial Alternatives at the Cato Institute; Mina Nguyen, managing director at Jane Street Capital; and Paul Mahoney, professor of law at the University of Virginia School of Law.