

# Waters, Scott, Brown and Murray Call on SEC to Increase Investor Protections

Washington DC, September 12, 2018 | [Carla manosalvas](#) (8185992767)

Today, **Congresswoman Maxine Waters (D-CA)**, Ranking Member of the House Committee on Financial Services; **Congressman Bobby Scott (D-VA)**, Ranking Member of the House Committee on Education and the Workforce; **Senator Sherrod Brown (D-OH)**, Ranking Member of the Senate Banking Committee, and **Senator Patty Murray (D-WA)**, Ranking Member of the Senate Health, Education, Labor and Pensions Committee, sent a [letter](#) to **Securities and Exchange Commission (SEC) Chairman Jay Clayton** urging the SEC to revise its proposed regulations (Regulation BI) governing the standards of care owed by broker-dealers when providing retail investors with personalized investment recommendations. This would require brokers to abide by the same high standard that currently applies to investment advisers so that all advice to retail investors is provided without regard to the financial or other interests of the adviser.

“For far too long, certain financial professionals have been able to game the system and choose a standard of care that allows them to put their interests and profit motives ahead of their retail clients,” **the Ranking Members wrote**. “As a result, hardworking Americans have lost out on millions of dollars that could have been used to save for their children’s college, buy a home, or save for retirement. While we are pleased that the SEC is finally acting to address this issue, Regulation BI falls woefully short.”

Read the full [letter](#) below.

The Honorable Jay Clayton  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Dear Chairman Clayton:

We write to urge the Securities and Exchange Commission (SEC) to put retail investors first and revise its proposed regulations governing the standards of care owed by broker-dealers when providing retail investors with personalized investment recommendations (referred to herein as “Regulation BI”).

For far too long, certain financial professionals have been able to game the system and choose a standard of care that allows them to put their interests and profit motives ahead of their retail clients. As a result, hardworking Americans have lost out on millions of dollars that could have been used to save for their children’s college, buy a home, or save for retirement. While we are pleased that the SEC is finally acting to address this issue, Regulation BI falls woefully short.

The best way for the SEC to protect investors and reduce confusion is require all brokers and advisers, regardless of their titles, to comply with the same fiduciary standard that puts their clients’ interests first. In passing Section 913(g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress provided the SEC with the authority to do this so that the standard of conduct for a broker or dealer would be the same high fiduciary standard applicable to an investment adviser. Under Section 913(g) brokers, dealers and investment advisers would be required to “act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.” That section was motivated by clear evidence that the current standards were confusing to investors, unfair to professionals, and not sufficiently protective of investors. [\[iii\]](#) [\[iii\]](#) [\[iv\]](#)

However, the SEC has proposed Regulation BI under Section 913(f), a less specific subsection that authorizes the SEC to conduct rulemaking on the standards of care for advisers considering the results of the mandatory study under Section 913(b). This decision has led to a less protective proposal for investors that applies two distinct standards: a “best interest” standard for brokers and a “fiduciary” standard for investment advisers, neither of which, as described by the Commission, matches the strong, enforceable standard set by Congress in 913(g). This is not what Congress intended and undermines the compromise that the House and Senate reached in Dodd-Frank. [\[v\]](#)

Moreover, it appears that the SEC did not adequately consider the results of its own study, as required by Section 913(f). As you know, that study specifically recommended that the SEC conduct rulemaking under Section 913(g). [\[vi\]](#) Instead, the proposal would impose some ill-defined best interest standard on brokers that requires them to act “without placing the financial or other interest . . . ahead of the interest of the retail customer.” This phrasing may seem similar to the language in Section 913(g), but its actual meaning and impact on brokers’ conduct is

unclear. The SEC explains its decision on this aspect of the draft proposal based on the concern that brokers may inappropriately interpret the requirement in Section 913(g), to act “without regard to the financial or other interest,” to require broker-dealers to eliminate all conflicts of interest. That was clearly not Congress’s intent since, as the SEC acknowledges, Section 913(g) expressly provides that neither commission-based compensation nor offering only proprietary products would alone violate any uniform fiduciary standard.

We urge the SEC to revise its proposal consistent with Section 913(g) and require brokers to abide by the same high standard that currently applies to investment advisers so that their advice to retail investors is provided without regard to their financial or other interests. That standard must require brokers and investment advisers to put their clients’ best interests first under a duty of loyalty, and disclosure, while important, should not relieve them of this duty. Regulation BI for brokers and the SEC’s interpretation of the “fiduciary” obligation owed by investment advisers fail to clearly do this, enabling investors to “consent” to harmful conduct in complex and legalistic disclosures that most will never read and would not understand if they did.

While the proposal makes clear that the “best interest” standard is not the same as the detailed standard Congress set forth in Section 913(g), it fails to adequately explain just what it would require of brokers that is different from the status quo. Instead, the proposal suggests that a broker would violate its standard “if any recommendation was predominantly motivated by the broker-dealer’s self-interest.” Nowhere does the proposal define either “best interest” or “predominantly motivated.”

If the SEC intends to adopt a “best interest” standard, that standard should clearly differ from the current “suitability” standard, which has also been interpreted to require “that a broker make only those recommendations that are consistent with the customer’s best interest [and] prohibits a broker from placing his or her interests ahead of the customer’s interest.”<sup>[vii]</sup> In any final rule, the SEC must clearly explain the standard, what it requires and prohibits, and how it differs from the status quo. Without that clarification, retail investors will not be able to understand the difference between a fiduciary standard and a weaker “best interest” standard.

We appreciate that the proposal requires all brokers to have written policies and procedures reasonably designed to identify and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with such recommendations. However, the SEC should make clear that these policies and procedures should reduce the impact of conflicts in order to ensure that conflicts of interest do not undermine compliance with the best interest standard.

We are also concerned that proposed Regulation BI relies heavily on disclosures to investors without any evidence suggesting that these disclosures would be effective. At best these disclosure forms may further confuse investors; at worst they could lead to a false sense of security that the advice is in their best interest. While the various proposed forms summarizing the adviser-client relationship will be subject to investor testing to ensure their understanding, this must be an iterative process and language changes should be retested and subject to public notice and comment. These changes must inform and be incorporated into any final rule.

Finally, we welcome the SEC’s attempt to address investor confusion by prohibiting professionals that are not registered investment advisers from calling themselves “adviser” or “advisor.” However, the proposed approach is too narrow of a fix that fails to address the numerous other titles professionals use, including wealth manager, financial consultant, financial manager, money manager, investment manager, financial planner, or investment consultant. These titles are often used interchangeably between investment advisers, broker-dealers, and dual registrants. As a result, most retail investors cannot easily distinguish between financial advisers who are mere salespeople and those that are investment advisers that must provide advice that is in the best interests of the investor. To address this, we urge the SEC to adopt a more principles-based approach to preclude brokers from holding themselves out as investment advisers or acting in an advisory capacity.

For all of the foregoing reasons, we believe the SEC needs to amend proposed Regulation BI before it is finalized to ensure that investors’ hard-earned savings are protected and their interests are put first. If the SEC believes that it would be necessary to re-propose the rulemaking to make the changes discussed above, the Commission should do so.

Sincerely,

Maxine Waters  
Ranking Member  
Committee on Financial Services  
U.S. House of Representatives

Robert C. "Bobby" Scott  
Ranking Member  
Committee on Education and the Workforce  
U.S. House of Representatives

Sherrod Brown  
Ranking Member  
Committee on Banking, Housing, and Urban Affairs  
U.S. Senate

Patty Murray  
Ranking Member  
Committee on Health, Education, Labor, and Pensions  
U.S. Senate

Sen. Elizabeth Warren  
Sen. Kirsten Gillibrand  
Sen. Jeffrey A. Merkley  
Sen. Catherine Cortez Masto  
Sen. Cory A. Booker  
Sen. Richard J. Durbin  
Sen. Jack Reed  
Sen. Robert Menendez  
Sen. Dianne Feinstein  
Sen. Tammy Duckworth  
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Rep. Elijah Cummings  
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Rep. Pramila Jayapal  
Rep. Hakeem Jeffries  
Rep. Marcy Kaptur  
Rep. Barbara Lee  
Rep. Stephen F. Lynch  
Rep. Carolyn B. Maloney  
Rep. Marcia L. Fudge  
Rep. Eleanor Holmes Norton  
Rep. Jan Schakowsky  
Rep. Nydia M. Velázquez

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