# FINRA CEO Criticizes DOL Fiduciary Proposal (Again)

Article By:

Harry Frischer

David A. Picon

Philip W. Arnold

Edward Canter

Last week, Richard Ketchum, Chairman and CEO of the ***Financial Industry Regulatory Authority*** ("FINRA"), doubled-down on his recent criticism of the ***U.S. Department of Labor'***s ("DOL") proposed regulation addressing the standard of care for broker-dealers providing retirement investment advice. Speaking at FINRA's annual conference, Chairman Ketchum said that, while he supports a "best interests of the customer" standard, the DOL's proposal – which we wrote about here – is "not the appropriate way to meet that goal."

Chairman Ketchum expressed particular concern over language in the DOL proposal that would require an advisor to make recommendations in the best interest of the customer "without regard to the financial or other interests" of the advisor. He worried that this language could lead to class action lawsuits and arbitration where the standard would be misapplied, stating, "I'm not sure, but I suspect, a judicial arbiter might draw a sharp line prohibiting most products with higher financial incentives no matter how sound the recommendation might be."

In addition, Chairman Ketchum criticized the DOL proposal for providing "insufficient workable guidance . . . on how to manage conflicts in most firms' present business models." Faced with this regulatory uncertainty, Chairman Ketchum anticipated that many firms might either stop offering various retirement services or move from a commission-based compensation structure to a more expensive fee-based compensation structure, potentially limiting access to affordable retirement investment services.

Chairman Ketchum also opined that the DOL proposal would likely result in investor confusion. Under the DOL's proposed rule, a different standard would apply to broker-dealers when they provide retirement-related investment advice than when they provide investment advice that is not retirement related. To avoid the confusion resulting from the application of different standards of care depending on the services broker-dealers were providing, Chairman Ketchum said that an effective regulatory environment would apply a "consistent best interest standard across, at least, all securities investments." He raised similar concerns in testimony before the House Financial Services committee early last month.

Finally, Chairman Ketchum expressed “disappointment” with the rhetoric surrounding the DOL’s recent proposal, explaining that it was a “disservice to a wide range of investment firms truly working to serve their clients’ interests.” He highlighted the strengths of the present securities regulatory system, which, he said, “has evolved over decades to encourage a culture of compliance, demanding proper management and disclosure of a firm’s conflicts and holding firms and registered persons accountable if they fail to meet those standards.”

Still, Chairman Ketchum reaffirmed his support for a “best interest” standard, saying that he continues to believe that, “for both investor protection and firm cultural reasons, a best interest standard for broker-dealers – under the securities laws – is the direction we must go.” Noting the challenges in designing such a standard, Chairman Ketchum outlined an alternative approach, emphasizing that, in his view, the SEC is the proper agency to implement a “best interest” standard and that future proposals should contain the following features:

1. Clear guidance “that customer interests come first and that any remaining conflicts must be knowingly consented to by the customer.”

2. A provision requiring firms to implement processes for identifying and addressing conflicts that arise in the course of their businesses.

3. Know-your-customer and suitability standards (similar to FINRA’s) that will serve as “belt and suspenders” backstops to the new standard.

4. More effective disclosure requirements, *e.g.*, annual disclosures explaining conflicts, product features and fees in plain English.

5. Concrete steps to address incentives created by differential product compensation, *e.g.*, targeted fee leveling.

Chairman Ketchum’s comments should provide the SEC with a useful framework as the agency works to draft its own proposal. As noted in previous posts, SEC Chairwoman Mary Jo White has expressed her support for imposing a “best interest” standard on the brokerage industry. However, it does not appear that the SEC is ready to issue a proposed rule any time soon. In a hearing before the House Financial Services Committee this March, Chairwoman White explained that the SEC was still in the early stages of the rulemaking process.



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