



**Testimony of Michelle Carroll Foster  
On Behalf of the Financial Services Institute  
Before the New Jersey Bureau of Securities**

**November 2, 2018**

Introduction

Good Morning Bureau Chief Gerold,

Thank you for the opportunity to comment on the New Jersey Securities Bureau's (Bureau) notice of pre-proposal regarding potential amendments to rules to require that broker-dealers, agents, investment advisers, and investment adviser representatives be subject to a fiduciary duty.<sup>1</sup>

My name is Michelle Carroll Foster, and I am the Vice President of State Affairs at the Financial Services Institute (FSI). My comments address FSI members' concerns with the possible implementation of a fiduciary duty in New Jersey.

Background on FSI and Its Members

By way of background, FSI is an advocacy association comprised of members from the independent financial services industry. FSI consists of independent financial advisor members who are self-employed independent contractors, rather than employees, of our independent broker-dealer members. This means they are small-business owners with strong ties to their communities. They hire and pay their own employees, pay all their own overhead costs, pay self-employment taxes, and embody the entrepreneurial spirit.

These independent financial advisors provide comprehensive and affordable financial services to individuals, families, small businesses, associations, organizations and retirement plans. They assist these entities with services such as financial education, financial planning, and investment monitoring. Due to their unique business model, FSI independent broker-dealer member firms and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their investment goals.

FSI has three broker-dealer firm members and 1,212 financial advisor members operating in New Jersey. According to a 2016 study by Oxford Economics, FSI members in New Jersey support approximately \$2.3 billion in economic output and account for 11.3 percent of the total economic activity of the state's financial services industry. This activity, in turn, supports 22,761 jobs including direct employees, those employed in the FSI supply chain (indirect), and those supported in the broader economy (induced). In addition, FSI members contribute nearly \$125.4 million annually to New Jersey state and local government tax collections.<sup>2</sup>

FSI Position on the Fiduciary Proposal

With that background, let me now offer FSI's perspective on the New Jersey pre-proposal that brings us together today. Firstly, FSI believes a uniform standard of care is best promulgated at the federal level by the U.S. Securities and Exchange Commission (SEC). Secondly, we contend a

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<sup>1</sup> Notice of Pre-Proposal, available at, [NJ Register](#)

<sup>2</sup> Economic Impact Study, available at, <https://financialservices.org/economicimpact/>

state-specific fiduciary standard is redundant given the already robust investor protections embodied in federal law and the regulation of the Financial Industry Regulatory Authority (FINRA). Thirdly, if New Jersey were to proceed with its proposal, Main Street investors would likely lose access to affordable professional financial services and advice. Lastly, FSI is under the opinion that New Jersey would likely be pre-empted from establishing a state-specific fiduciary standard by federal law. Let me expand upon each of these points in more detail.

#### Federal Best Interest Standard Is the Best Option

FSI has long supported a federal uniform standard of care for broker-dealers and investment advisors. Under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>3</sup> Congress granted the SEC complete rulemaking authority to establish a uniform standard of care for broker-dealers and investment advisors. That authority remains in effect and has not been withdrawn or modified.

Importantly, in May of this year, the SEC issued its proposal Regulation Best Interest to govern the conduct of broker-dealers and investment advisors. The SEC has announced its intention to finalize this proposal by September 2019. The imposition of a state-specific standard in the interim would only serve to further confuse investors by contributing to the creation of a patchwork of standards across the various states. New Jersey should refrain from the imposition of a fiduciary duty and instead await implementation of the SEC's Regulation Best Interest. An SEC uniform standard will help provide investors throughout the country with clarity.

Moreover, the U.S. Department of Labor (DOL) recently announced plans to issue a revised final fiduciary rule package to replace the one vacated this spring by the U.S. Court of Appeals for the 5<sup>th</sup> Circuit. DOL has indicated it plans to issue this revised package in tandem with the SEC's final release of Regulation Best Interest. This should result in a comprehensive and consistent federal best interest standard that protects all retail investors.

#### Investors are Protected While the SEC Works on Its Final Rule

Investors are currently protected by stringent standards of care, robust regulatory oversight, and vigorous enforcement. It is important to note that investment advisers and dual registrants are already subject to a fiduciary duty under Section 206 of the Investment Advisers Act of 1940, as interpreted by the U.S. Supreme Court in SEC v. Capital Gains Research Bureau.<sup>4</sup> Similarly, independent broker-dealer firms are subject to the suitability standard<sup>5</sup>, which FINRA has made clear requires independent broker-dealer firms and their registered representatives to act in their customer's best interests.<sup>6</sup> Therefore, we believe state-specific fiduciary standards of care will not provide any additional investor protection benefits.

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<sup>3</sup> Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, available at, <https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>

<sup>4</sup> Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., et al. Supreme Court of the United States 375 U.S. 180 (1963), available at, <https://www.sec.gov/divisions/investment/capitalgains1963.pdf>

<sup>5</sup> FINRA Rule 2111. Suitability, available at, [http://finra.complinet.com/en/display/display.html?rbid=2403&element\\_id=9859](http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=9859)

<sup>6</sup> FINRA Rule 2010. Standards of Commercial Honor and Principles, available at, [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=5504](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5504)

### The New Jersey Proposal Would Negatively Impact Main Street Investors

FSI is concerned that the imposition of a fiduciary duty would result in New Jersey investors losing access to much needed financial advice. FSI's mission is to ensure Main Street investors have access to affordable and competent financial advice and guidance.

Our dedication to this mission lead to our participation in litigation that ultimately resulted in the DOL fiduciary rule being vacated by the U.S. Court of Appeals for the 5<sup>th</sup> Circuit. FSI's main objection to the DOL rule was that it was too complex and costly. In fact, the increased costs of that pending rule led several firms, including some of our members, to adopt plans to stop offering retirement planning services in exchange for commission revenue. Since the vast majority of retirement investors choose to pay for advice via commission, the provision of affordable, competent financial advice and guidance to Main Street Americans was diminished.

The adoption of a state-specific fiduciary standard in New Jersey and other states would have the same flaws as the DOL fiduciary rule by significantly increasing costs that would eventually be passed down to investors. A state-specific standard would also likely lead some firms to stop offering commission-based financial planning services. Such a result would be unfortunate because studies indicate that investors who work with financial advisors save more, are better prepared for their retirement, and have greater confidence in their retirement planning.

### NSMIA Pre-Empts the New Jersey Proposal

Finally, Section 103 of the National Securities Markets Improvement Act of 1996 (NSMIA) expressly pre-empts states from enacting regulations that impose new or different recordkeeping requirements than those established under the Securities and Exchange Act of 1934.<sup>7</sup> Without a doubt, creating a state-specific fiduciary duty would require broker-dealers to create and maintain new records to demonstrate compliance with the mandatory disclosure standards. We believe this would result in pre-emption of any potential fiduciary proposal under NSMIA.

By way of illustration, the state of Nevada has found it extremely difficult to avoid federal pre-emption. In 2017, the Nevada State Legislature adopted legislation that extended a fiduciary duty to broker-dealers. The legislation directed the Securities Commissioner to adopt rules to implement the new law. FSI participated in a workshop held by the Nevada Secretary of State in 2017 to help inform the formulation of the rule. We also provided comments to the Secretary on potential draft regulations after the workshop. However, one year later FSI and other stakeholders are still awaiting an initial draft. This is due, at least in part, to the challenge of satisfying the requirements of state legislation while avoiding federal pre-emption.

### Conclusion

For these reasons, FSI respectfully requests the Bureau refrain from any future efforts to impose a state-specific fiduciary duty on broker-dealers, agents, investment advisers, and investment adviser representatives. Instead, we believe a uniform standard of care should be promulgated at the federal level by the SEC. Any imposition of a fiduciary duty would likely be redundant as broker-dealers and investment advisors are already subject to robust standards, oversight and enforcement. A fiduciary proposal would only serve to harm New Jersey investors – limiting their access to affordable professional financial services and advice. FSI also reasons New Jersey would likely be pre-empted by NSMIA from establishing a fiduciary standard.

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<sup>7</sup> Section 103 of the National Securities Markets Improvement Act of 1996, available at, <https://www.congress.gov/104/plaws/publ290/PLAW-104publ290.pdf>

However, if the Bureau chooses to proceed with a fiduciary proposal in spite of these considerations, FSI urges the inclusion of a provision making it clear that registered broker-dealers and their associated persons who follow the rules and standards of their primary regulator will be deemed to be in compliance with the New Jersey fiduciary standard.

We are committed to constructive engagement in the regulatory process and welcome the opportunity to work on this and other important regulatory efforts. We look forward to continued engagement and collaboration as you work to develop these rules and regulations.