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Financial Reform Conference:

~~Senate~~ Counteroffer for title IX

[Amendment instruction refers to Conference Base Text]

Section 913 is amended to read as follows:

**SEC. 913. STUDY AND RULEMAKING REGARDING
OBLIGATIONS OF BROKERS, DEALERS, AND
INVESTMENT ADVISERS.**

(a) Definition.—For purposes of this section, the term “retail customer” means a natural person, or the legal representative of such natural person, who—

(1) receives personalized investment advice about securities from a broker or dealer or investment adviser; and

(2) uses such advice primarily for personal, family, or household purposes.

(b) Study.—The Commission shall conduct a study to evaluate—

(1) the effectiveness of existing legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice and recommendations about securities to retail customers imposed by the Commission and a national securities association, and other Federal and State legal or regulatory standards; and

(2) whether there are legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers that should be addressed by rule or statute.

(c) Considerations.—In conducting the study required under subsection (b), the Commission shall consider—

(1) the effectiveness of existing legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice and recommendations about securities to retail customers imposed by the Commission and a national securities association, and other Federal and State legal or regulatory standards;

(2) whether there are legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for

1 brokers, dealers, investment advisers, persons associated with brokers or dealers, and
2 persons associated with investment advisers for providing personalized investment advice
3 about securities to retail customers that should be addressed by rule or statute;

4 (3) whether retail customers understand that there are different standards of care
5 applicable to brokers, dealers, investment advisers, persons associated with brokers or
6 dealers, and persons associated with investment advisers in the provision of personalized
7 investment advice about securities to retail customers;

8 (4) whether the existence of different standards of care applicable to brokers, dealers,
9 investment advisers, persons associated with brokers or dealers, and persons associated with
10 investment advisers is a source of confusion for retail customers regarding the quality of
11 personalized investment advice that retail customers receive;

12 (5) the regulatory, examination, and enforcement resources devoted to, and activities of,
13 the Commission, the States, and a national securities association to enforce the standards of
14 care for brokers, dealers, investment advisers, persons associated with brokers or dealers,
15 and persons associated with investment advisers when providing personalized investment
16 advice and recommendations about securities to retail customers, including—

17 (A) the effectiveness of the examinations of brokers, dealers, and investment
18 advisers in determining compliance with regulations;

19 (B) the frequency of the examinations; and

20 (C) the length of time of the examinations;

21 (6) the substantive differences in the regulation of brokers, dealers, and investment
22 advisers, when providing personalized investment advice and recommendations about
23 securities to retail customers;

24 (7) the specific instances related to the provision of personalized investment advice about
25 securities in which—

26 (A) the regulation and oversight of investment advisers provide greater protection to
27 retail customers than the regulation and oversight of brokers and dealers; and

28 (B) the regulation and oversight of brokers and dealers provide greater protection to
29 retail customers than the regulation and oversight of investment advisers;

30 (8) the existing legal or regulatory standards of State securities regulators and other
31 regulators intended to protect retail customers;

32 (9) the potential impact on retail customers, including the potential impact on access of
33 retail customers to the range of products and services offered by brokers and dealers, of
34 imposing upon brokers, dealers, and persons associated with brokers or dealers—

35 (A) the standard of care applied under the Investment Advisers Act of 1940 (15
36 U.S.C. 80b-1 et seq.) for providing personalized investment advice about securities to
37 retail customers of investment advisers, as interpreted by the Commission and the
38 courts; and

39 (B) other requirements of the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et
40 seq.);

1 (10) the potential impact of eliminating the broker and dealer exclusion from the
2 definition of “investment adviser” under section 202(a)(11)(C) of the Investment Advisers
3 Act of 1940 (15 U.S.C. 80b–2(a)(11)(C)), in terms of—

4 (A) the impact and potential benefits and harm to retail customers that could result
5 from such a change, including any potential impact on access to personalized
6 investment advice and recommendations about securities to retail customers or the
7 availability of such advice and recommendations;

8 (B) the number of additional entities and individuals that would be required to
9 register under, or become subject to, the Investment Advisers Act of 1940 (15 U.S.C.
10 80b–1 et seq.), and the additional requirements to which brokers, dealers, and persons
11 associated with brokers and dealers would become subject, including—

12 (i) any potential additional associated person licensing, registration, and
13 examination requirements; and

14 (ii) the additional costs, if any, to the additional entities and individuals; and

15 (C) the impact on Commission and State resources to—

16 (i) conduct examinations of registered investment advisers and the
17 representatives of registered investment advisers, including the impact on the
18 examination cycle; and

19 (ii) enforce the standard of care and other applicable requirements imposed
20 under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.);

21 (11) the varying level of services provided by brokers, dealers, investment advisers,
22 persons associated with brokers or dealers, and persons associated with investment advisers
23 to retail customers and the varying scope and terms of retail customer relationships of
24 brokers, dealers, investment advisers, persons associated with brokers or dealers, and
25 persons associated with investment advisers with such retail customers;

26 (12) the potential impact upon retail customers that could result from potential changes in
27 the regulatory requirements or legal standards of care affecting brokers, dealers, investment
28 advisers, persons associated with brokers or dealers, and persons associated with investment
29 advisers relating to their obligations to retail customers regarding the provision of
30 investment advice, including any potential impact on—

31 (A) protection from fraud;

32 (B) access to personalized investment advice, and recommendations about securities
33 to retail customers; or

34 (C) the availability of such advice and recommendations;

35 (13) the potential additional costs and expenses to—

36 (A) retail customers regarding and the potential impact on the profitability of their
37 investment decisions; and

38 (B) brokers, dealers, and investment advisers resulting from potential changes in the
39 regulatory requirements or legal standards affecting brokers, dealers, investment
40 advisers, persons associated with brokers or dealers, and persons associated with

1 investment advisers relating to their obligations, including duty of care, to retail
2 customers;

3 (14) any other consideration that the Commission deems necessary and appropriate to
4 effectively execute the rulemaking required under subsection (b).

5
6 (d) Report.—

7
8 (1) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, the
9 Commission shall submit a report on the study required under subsection (b) to—

10
11 (A) the Committee on Banking, Housing, and Urban Affairs of the Senate; and

12 (B) the Committee on Financial Services of the House of Representatives.

13
14 (2) CONTENT REQUIREMENTS.—The report required under paragraph (1) shall describe the
15 findings, conclusions, and recommendations of the Commission from the study required under
16 subsection (b), including—

17
18 (A) a description of the considerations, analysis, and public and industry input that the
19 Commission considered, as required under subsection (e), to make such findings,
20 conclusions, and policy recommendations; and

21
22 (B) an analysis of whether any identified legal or regulatory gaps, shortcomings, or overlap in
23 legal or regulatory standards in the protection of retail customers relating to the standards of
24 care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and
25 persons associated with investment advisers for providing personalized investment advice
26 about securities to retail customers.

27
28 (e) Public Comment.—The Commission shall seek and consider public input, comments, and data in
29 order to prepare the report required under subsection (d).

30
31 (f) Rulemaking.— The Commission may commence a rulemaking, as necessary or appropriate in the
32 public interest and for the protection of retail customers (and such other customers as the
33 Commission may by rule provide), to address the legal or regulatory standards of care for brokers,
34 dealers, investment advisers, persons associated with brokers or dealers, and persons associated with
35 investment advisers for providing personalized investment advice about securities to such retail
36 customers. The Commission shall consider the findings conclusions, and recommendations of the
37 study required under subsection (b).

38 (g) Authority to Establish a Fiduciary Duty for Brokers and Dealers.--

39 (1) In General.--

40 (A) SECURITIES EXCHANGE ACT OF 1934.—Section 15 of the Securities Exchange Act of
41 1934 (15 U.S.C. 78o) is amended by adding at the end the following:

42 “(m) Standard of Conduct --

43 (1) IN GENERAL.—Notwithstanding any other provision of this Act or the Investment
44 Advisers Act of 1940, the Commission may promulgate rules to provide that, with respect
45 to a broker or dealer, when providing personalized investment advice about securities to a

1 retail customer (and such other customers as the Commission may by rule provide), the
2 standard of conduct for such broker or dealer with respect to such customer shall be the
3 same as the standard of conduct applicable to an investment adviser under section 211 of
4 the Investment Advisers Act of 1940. The receipt of compensation based on commission or
5 other standard compensation for the sale of securities shall not, in and of itself, be
6 considered a violation of such standard applied to a broker or dealer. Nothing in this
7 section shall require a broker or dealer or registered representative to have a continuing duty
8 of care or loyalty to the customer after providing personalized investment advice about
9 securities.

10 “(2) DISCLOSURE OF RANGE OF PRODUCTS OFFERED.—Where a broker or dealer sells only
11 proprietary or other limited range of products, as determined by the Commission, the
12 Commission may by rule require that such broker or dealer provide notice to each retail
13 customer and obtain the consent or acknowledgment of the customer. The sale of only
14 proprietary or other limited range of products by a broker or dealer shall not, in and of itself,
15 be considered a violation of the standard set forth in paragraph (1).

16 “(n) Other Matters.—The Commission shall—

17 “(1) facilitate the provision of simple and clear disclosures to investors regarding the
18 terms of their relationships with brokers, dealers, and investment advisers, including any
19 material conflicts of interest; and

20 (2) examine and, where appropriate, promulgate rules prohibiting or restricting certain
21 sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and
22 investment advisers that the Commission deems contrary to the public interest and the
23 protection of investors.”.

24 (B) INVESTMENT ADVISERS ACT OF 1940.—Section 211 of the Investment Advisers Act of
25 1940, is further amended by adding at the end the following new subsections:

26 (g) Standard of Conduct.—

27 (1) IN GENERAL.—The Commission may promulgate rules to provide that the standard of
28 conduct for all brokers, dealers, and investment advisers, when providing personalized
29 investment advice about securities to retail customers (and such other customers as the
30 Commission may by rule provide), shall be to act in the best interest of the customer
31 without regard to the financial or other interest of the broker, dealer, or investment adviser
32 providing the advice. In accordance with such rules, any material conflicts of interest shall
33 be disclosed and may be consented to by the customer. Such rules shall provide that such
34 standard of conduct shall be no less stringent than the standard applicable to investment
35 advisers under section 206(1) and (2) of this Act when providing personalized investment
36 advice about securities, except the Commission shall not ascribe a meaning to the term
37 ‘customer’ that would include an investor in a private fund managed by an investment
38 adviser, where such private fund has entered into an advisory contract with such adviser.
39 The receipt of compensation based on commission or fees shall not, in and of itself, be
40 considered a violation of such standard applied to a broker, dealer, or investment adviser.

41
42 (2) Retail Customer Defined.—For purposes of this section, the term “retail customer”
43 means a natural person, or the legal representative of such natural person, who—

- 1
2 (1) receives personalized investment advice about securities from a broker, dealer, or
3 investment adviser; and
4 (2) uses such advice primarily for personal, family, or household purposes.

5 (h) Other Matters.—The Commission shall—

6 “(1) facilitate the provision of simple and clear disclosures to investors regarding the
7 terms of their relationships with brokers, dealers, and investment advisers, including any
8 material conflicts of interest; and

9 “(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain
10 sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and
11 investment advisers that the Commission deems contrary to the public interest and the
12 protection of investors.”.

13 (h) HARMONIZATION OF ENFORCEMENT.—

14 (1) SECURITIES EXCHANGE ACT OF 1934.—Section 15 of the Securities Exchange Act of 1934, as
15 amended by paragraph (1)(A), is further amended by adding at the end the following new
16 subsection:

17 “(o) Harmonization of Enforcement.—The enforcement authority of the Commission with
18 respect to violations of the standard of conduct applicable to a broker or dealer providing
19 personalized investment advice about securities to a retail customer shall include—

20 “(1) the enforcement authority of the Commission with respect to such violations
21 provided under this Act; and

22 “(2) the enforcement authority of the Commission with respect to violations of the
23 standard of conduct applicable to an investment adviser under the Investment Advisers Act
24 of 1940, including the authority to impose sanctions for such violations, and

25 the Commission shall seek to prosecute and sanction violators of the standard of conduct
26 applicable to a broker or dealer providing personalized investment advice about securities to a
27 retail customer under this Act to same extent as the Commission prosecutes and sanctions
28 violators of the standard of conduct applicable to an investment advisor under the Investment
29 Advisers Act of 1940.”.

30 (2) INVESTMENT ADVISERS ACT OF 1940.—Section 211 of the Investment Advisers Act of 1940,
31 as amended by paragraph (1)(B), is further amended by adding at the end the following new
32 subsection:

33 “(h) Harmonization of Enforcement.—The enforcement authority of the Commission with
34 respect to violations of the standard of conduct applicable to an investment adviser shall
35 include—

36 “(1) the enforcement authority of the Commission with respect to such violations
37 provided under this Act; and

38 “(2) the enforcement authority of the Commission with respect to violations of the
39 standard of conduct applicable to a broker or dealer providing personalized investment
40 advice about securities to a retail customer under the Securities Exchange Act of 1934,
41 including the authority to impose sanctions for such violations, and

1 the Commission shall seek to prosecute and sanction violators of the standard of conduct
2 applicable to an investment adviser under this Act to same extent as the Commission prosecutes
3 and sanctions violators of the standard of conduct applicable to a broker or dealer providing
4 personalized investment advice about securities to a retail customer under the Securities
5 Exchange Act of 1934.”.

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