INSTITUTE FOR
THE FIDUCIARY STANDARD

Barbara Roper, Investors' "Most Fearsome Advocate," The 2017 Frankel Fiduciary Prize Recipient

Boston, September 27, 2017 – The Institute for the Fiduciary Standard today awarded the 2017 Frankel Fiduciary Prize to Barbara Roper, Director of Investor Protection, for the Consumer Federation of America. Roper was honored at a program at the Boston University School of Law.

The Frankel Fiduciary Prize Selection Committee, Deborah A. DeMott, David F. Cavers Professor of Law, Duke Law and Chair of the Frankel Fiduciary Prize Selection Committee, stated:

"Barbara Roper exemplifies the values and commitments honored by the Frankel Fiduciary Prize. Her resourcefulness as an advocate has been significant on many issues, most recently in the long process leading to the fiduciary rule adopted by the Department of Labor. The Selection Committee applauds her."

Mercer Bullard, Professor of Law, University of Mississippi, and a member of the selection committee, "We owe a deep debt of gratitude to Barbara Roper, individual investors' most diligent, passionate and fearsome advocate, as the Department of Labor's fiduciary rule becomes effective."

The program, "Fiduciary Advice at a Crossroads" highlighted the historic developments leading to the enactment of the DOL fiduciary rule. Joining DeMott and Bullard at the program, among others: Tamar Frankel, BU law professor, Brooksley Born, former Chair of the CFTC, Phyllis Borzi, former DOL assistant secretary who led the effort for the DOL rule, and Rutgers Law School professor, Arthur Laby.

CFA Consumer Federation of America

The Consumer Federation of America appreciates the Institute for the Fiduciary Standard's recognition of Barbara Roper. Since 1986, Barb has been protecting the American consumer in the increasingly complex financial world. For decades years she has worked tirelessly to implement DOL's fiduciary rule protecting retirement accounts. To "bookend" Barb's many efforts, attached is Barb's first letter on the subject, imploring the SEC's Arthur Levitt to take action, and the introduction to her most recent testimony on the rule, as financial institutions work to get it rescinded.

CFA

Consumer Federation of America

October 26, 1999

Arthur Levitt
Chairman
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Dear Chairman Levitt:

Nobody needs to tell you that the nation's securities markets today are undergoing their most dramatic changes in decades, or that those changes have potentially enormous consequences for the growing legion of average, unsophisticated Americans who have come to rely on the markets to save for retirement, a child's college education, or a first home. You are to be congratulated for your efforts to ensure that the interests of these investors are not forgotten as the industry responds to new challenges and opportunities.

It is in that capacity that I am writing to you today -- as a guardian of investors in a rapidly changing financial marketplace. On a number of the central issues of the day -- demutualization of the major markets, the advent of after-hours trading for retail investors, and the need to protect against market fragmentation, for example -- you have already staked out strong pro-investor positions.

In particular, we share your concern that having for-profit markets serve as self-regulators creates potentially harmful conflicts of interest. If our markets are to be preserved as the premier markets of the world, these conflicts must be addressed as privatization moves forward. With Congress all but silent on the dangers of for-profit self-regulation, your leadership in raising this issue has been crucial. We stand ready to help in any way that we can to devise workable solutions that ensure that a vigorous, well-funded regulatory structure operating in the public interest is not sacrificed in the pursuit of new, more flexible market structures.

Another transformation that has received somewhat less attention is the changing role of the full-service broker. But this is also an area where, in our view, regulation should be reexamined to ensure that it adequately addresses the realities of today's marketplace.

As you know, traditional full-service brokerage firms are suddenly faced with very real competition from on-line firms for the business of self-directed investors. These changes come on top of two decades in which full-service firms have faced growing competition for advice seeking customers from the financial planning industry, whose claim to offer comprehensive, objective financial counsel has been an attractive selling point with the public. As a result, full service firms are being pulled in two very different directions. On the one hand, they must seek to satisfy self-directed investors, who want to complete their transactions quickly and conveniently at the lowest possible price. Advice-seeking investors, on the other hand, increasingly want services that aren't muddied by the conflicts of commission-based compensation.

In short, market forces seem increasingly to be driving a wedge between the two major functions traditionally offered to clients in combination by full-service brokers -- advice and product sales. Although it poses serious challenges for the industry, this division has the potential to benefit investors in the long run. The combination of advice and commission-based compensation has always been a troubling one, creating as it does a serious, largely undisclosed conflict of interest that can serve to bias the registered representative's recommendations. For investors to benefit, however, the increasingly advice-based services offered by full-service brokers must be held to the professional standards that this relationship implies -- a fiduciary duty to place clients' interests ahead of their own and an accompanying responsibility to fully disclose any and all conflicts of interest.

With this in mind, I was concerned by a report earlier this year that the Commission is considering a rule proposal that would treat fee-based wrap accounts as brokerage accounts, rather than subjecting them to the disclosure requirements of the Investment Advisers Act. I do not know whether these reports are true. If they are, I encourage you to rethink this proposal. While I certainly understand, and share, the desire to encourage the brokerage industry to move further toward less conflict-inducing compensation methods, exempting the industry from the professional standards to which others offering competing services must adhere seems to me to be too high a price to pay. It would set an unfortunate precedent, both for lowering the already modest standards that apply to advisory services generally and for providing the brokerage industry with additional special exemptions from advisory standards, even as they move increasingly into the advisory business.

With your focus on industry compensation practices, you have played a leading role in initiating the debate over appropriate professional standards for an advice-driven brokerage industry. After all, the brokerage industry will find it difficult, if not impossible, to evolve into a more professional advisory profession if it retains compensation practices, such as sales contests, that smack of the used car lot. The North American Securities Administrators Association has also entered the debate, with its up-coming round-table on the appropriateness of the current suitability standard for on-line investors. It seems to me, however, that they have asked only half of the question. The other half -- whether the suitability standard is an adequate standard for an advice-driven broker-client relationship -- is at least as important.

What is missing, it seems to me, is a broader vision of how broker-dealer regulation can help to advance the investor interest as the market for brokerage services evolves. If you share our interest, CFA would be pleased to work with you and your staff to help develop such a vision.

No one can predict with any confidence what our securities markets will look like ten, or even five, years from now. Investors are fortunate to have you at the helm of the SEC during this period of unprecedented change and turmoil. Please let me know if there is anything CFA can do to assist you. Meanwhile, if you or a member of your staff would like to discuss these issues further, please feel free to call me at 719-543-9468.

Sincerely,

Barbara L. N. Roper
Director of Investor Protection

September 14, 2017

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington DC 20549-1090

Re: Standard of Conduct for Investment Advisers and Broker-Dealers

Dear Chairman Clayton:

In October of 1999, Consumer Federation of America (CFA) wrote to then SEC Chairman Arthur Levitt urging him to reexamine the regulation of broker-dealers to address changing market conditions -- specifically the evolution underway among full-service firms toward a more advice-driven approach to their retail accounts. The letter was prompted by reports that the Commission was preparing to propose a rule that would exempt fee accounts offered by brokers from regulation under the Investment Advisers Act, which we strongly opposed. Despite sharing Chairman Levitt's goal of encouraging brokers to adopt compensation practices designed to reduce conflicts of interest, we argued that exempting brokers from "the professional standards to which others offering competing services must adhere" was "too high a price to pay. It would set an unfortunate precedent, both for lowering the already modest standards that apply to advisory services generally and for providing the brokerage industry with additional special exemptions from advisory standards, even as they move increasingly into the advisory business." We questioned "whether the suitability standard is an adequate standard for an advice-driven broker-client relationship" and argued that what was missing was "a broader vision of how broker-dealer regulation can help to advance the investor interest as the market for brokerage services evolves."

Nearly 18 years later, little has changed at the SEC. While the particular approach to expanding broker-dealers' exemption from the Advisers Act that was the topic of that letter was ultimately overturned in court -- and all fee accounts are now regulated as advisory accounts -- the Commission's practice of permitting brokers to market themselves as advisers while regulating them as salespeople continues unabated. And, although every SEC Chairman since Christopher Cox has pledged to address the issue, studies have been conducted that support rulemaking, and public input has been sought, the one significant advance in investor protection on this front has come, not from the SEC, but from the Department of Labor (DOL). The SEC's only actions in the

Intervening years have served to make the problem worse, not better. In particular, by interpreting the broker-dealer exclusion from the Advisers Act to cover any advice given "in connection with and reasonably related to" their sales activities, the Commission turned a narrow broker-dealer exclusion into a gaping loophole and all but erased the functional distinction that once existed between broker-dealers and investment advisers.

It is therefore with a certain skepticism that we contemplate this latest reopening of the issue under your leadership. While we hope for better, and will participate in good faith as we have in the past, experience has taught us that this process is at least as likely to result in a weakening of investor protections as it is to result in a rigorous pro-investor policy for the regulation of the financial professionals. After all, brokerage industry lobbyists have made no secret of their goal to win a watered down, disclosure-based standard from the SEC and then to use that standard to satisfy compliance with DOL's more rigorous rule. The letters submitted in response to this request by SIFMA, Fidelity, and the Investment Company Institute (ICI), among others, provide a roadmap for how that goal of undermining investor protections while pretending to strengthen them could be achieved. And the whole premise for this exercise -- that the SEC and DOL need to work together to fix problems in the DOL rule -- is misguided. Early evidence clearly demonstrates that the DOL rule is both workable and working as intended to deliver tangible benefits to retirement savers

If you are to succeed where your predecessors have failed in developing a pro-investor policy for regulation of financial professionals, you will have to do what they were either unwilling or unable to do:

- **Correctly diagnose the problem.** The central problem the Commission needs to address is not that investors are "confused" about the differences between broker-dealers and investment advisers. The problem is that investors are being misled into relying on biased sales recommendations as if they were objective, best interest advice and are suffering significant financial harm as a result. Investor confusion is relevant only because it limits the tools the Commission has available to address that harm.

- **Develop a solution that is tailored to the problem**. There are two possible approaches to address the problem -- either eradicate the misleading practices that allow brokers to portray themselves as advisers when they are acting as salespeople or adopt a fiduciary standard for all recommendations so that investors are appropriately protected regardless of the type of financial professional they turn to for investment advice. The former approach has a certain logical appeal but poses significant operational challenges. The latter offers a cleaner approach, but it will only work if the Commission takes rigorous steps to address the toxic web of financial incentives that pervade the broker-dealer business model.

- **Bring a healthy dose of skepticism to the brokerage industry's self-serving claims**. Any regulatory approach that provides meaningful protections to investors-- rather than the mere appearance of such protections -- will engender strong opposition from the broker-dealer community. Industry groups try to sugar-coat their opposition to a strong, pro-investor rule by claiming they are motivated by concern over the impact on small investors. As should be patently obvious, however, their real motivation is concern for their own bottom line. The current situation -- in which brokers are allowed to market themselves as advisers while recommending investments that serve their own financial interests rather than the best interests of their customer -- is hugely profitable for them. They won't give it up without a fight. And if they can get the right to claim they are acting in customers' best interests without actually having to do so, all the better from their point of view.

- **Listen instead to industry groups that embrace a fiduciary standard**. Sometimes drowned out by the better-funded lobbyists for the brokerage and insurance industries, a host of financial professionals have embraced a rigorous fiduciary standard as the appropriate standard for advice. Among them are advisers who have demonstrated that it is possible to provide fiduciary advice at an affordable cost and under a variety of business and payment models to even the smallest accountholders. It is their input that should guide the Commission as it seeks to develop a standard of conduct for investment advice that benefits not just investors but also those advisers and investment product sponsors prepared to compete based on the quality and cost of their products and services.

- **Build support within the Commission for a pro-investor regulatory approach**. Resistance from within the Commission has played as large a role as outside opposition in undermining earlier efforts at reform. Examples include a staff interpretation mischaracterizing the legislative history behind the Investment Advisers Act to justify a definition of "solely incidental to" that allows virtually any advisory services offered by brokers to escape regulation under the Act; a staff interpretation of financial planning services that provided a roadmap for brokers to evade Advisers Act regulation of such services; and a Request for Information regarding the appropriate standards for broker-dealers and investment advisers that omitted the "best interest" standard from its description of advisers' fiduciary duties. Meanwhile, various commissioners have in recent years expressed determined opposition to any rulemaking that goes beyond the disclosure-based approach the SEC's own research has shown to be ineffective.

- **Develop a rigorous economic analysis justifying regulatory action that can withstand legal scrutiny**. One thing that makes rulemaking in this area so challenging is that there is no consensus between brokerage industry lobbyists and investor advocates with regard to the appropriate regulatory approach. And, since both sides view the issue as of the highest priority, the Commission must accept the likelihood that any rule it adopts will be challenged in federal court by one side or the other. The Commission's surest defense against a claim that it acted in a manner that is arbitrary and capricious or otherwise contrary to law is, first, to develop a regulatory proposal based in logic and fact and, second, to support that proposal with an airtight economic analysis as thorough and well-reasoned as the DOL's Regulatory Impact Analysis (RIA). Indeed, it is incumbent on the Commission, in developing its own regulatory proposal, to carefully consider the findings of the RIA, particularly those with regard to the breakdown of the market for investment advice and the limitations of disclosure as a regulatory solution, many of which are directly relevant to the task at hand. We are confident that an approach based on an unbiased assessment of the market for investment advice will support a strong and effective rule, one that reins in the toxic conflicts of interest that are responsible for tens of billions of dollars a year in investor harm.

Unless you can overcome these obstacles and build support within the Commission for a strong, pro-consumer rule, investors would frankly be better off if the Commission refrained from acting. After all, thanks to the actions of the DOL, investors today are better protected when it comes to their retirement accounts, which is where most Americans, particularly middle income Americans, have the majority of their investments. And, despite what industry lobbyists would have you believe, early evidence shows the DOL rule is benefitting investors by reducing conflicts, lowering investment costs, improving investment products, and preserving access to advice under a variety of business models for even the smallest accountholders.8

A weak SEC rule that undermines protections for retirement savings without significantly enhancing protections for non-retirement accounts would leave investors considerably worse off than they are today. On the other hand, a strong and effective SEC rule that extends the core protections of the DOL rule to all securities accounts would deliver on your promise to make the SEC work for "Mr. and Mrs. 401(k)."

This was the Introduction of Ms. Roper's September 14, 2017 submission to the SEC. For a complete copy go to http://consumerfed.org/wp-content/uploads/2017/09/cfa-letter-to-sec-on-standard-of-conduct-rfi.pdf.

Consumer Federation of America

BARBARA ROPER

DIRECTOR OF INVESTOR PROTECTION
CONSUMER FEDERATION OF AMERICA

2017 FRANKEL FIDUCIARY PRIZE RECIPIENT

Since 1986 Barbara Roper has been protecting the American consumer in the increasingly complex financial world. As America's leading consumer advocate on investor protection issues, Roper has conducted groundbreaking studies on abuses in the financial planning industry, state oversight of investment advisers, state and federal financial planning regulation, broker-dealer regulation, financial planning software, the need for mutual fund reform in the wake of trading and sales abuse scandals, the information preferences of mutual fund shareholders, and securities law weaknesses as a cause of the financial crisis, among others. She has testified before Congress as well as federal and state regulatory bodies to strengthen investor protections.

Of the many investor protection issues on which Roper has had a significant impact, Roper is perhaps best known for leading a decades long fight to require all financial professionals who provide investment advice to abide by a fiduciary duty to their customers. Her research and advocacy was critical to making the Department of Labor's Conflict of Interest Rule, one of the most pro-investor reforms in a generation, a reality. And she continues the fight as DOL rule opponents try to roll back these historic reforms.

Roper is a member of the SEC's Investor Advisory Committee, FINRA's Investor Issues Group, and the CFP Board's Public Policy Council and Standards Commission. She has previously served on FINRA's dispute resolution task force, the Public Company Accounting Oversight Board's Standing Advisory Group as well as its Investor Advisory Group, the Investors Working Group, the board of Fund Democracy, and the national advisory board of AARP's Money After Fifty program. She is a recipient of the National Association of Personal Financial Advisors' Distinguished Service Award, the Distinguished Service Award from the North American Securities Administrators Association, and Consumer Action's Consumer Excellence Award. She graduated in 1977 from Princeton University with a degree in art history.

The Consumer Federation of America is a national organization of more than 250 nonprofit consumer groups that was founded in 1968 to advance the consumer interest through research, advocacy, and education.