Consumer Federation of America

October 3, 2017

The Honorable Alexander Acosta
Secretary
U.S. Department of Labor
S-2521
200 Constitution Ave., N.W.
Washington, D.C. 20210

Dear Secretary Acosta:

As you know, a number of industry groups opposed to the Department's Conflict of Interest (fiduciary) rule have suggested that the rule is causing brokerage firms to shift investors into fee accounts where they face higher costs than they would have in a commission account. There are good reasons to dismiss these arguments as nothing more than the misleading rhetoric of industry groups intent on watering down the rule's strong investor protections. After all, those making the claim exaggerate the role of the Department's fiduciary rule in prompting a migration to fee accounts that is several decades old, ignore evidence that most firms have chosen to continue offering commission accounts as an option under the rule, and provide no evidence that retirement investors who are moved to fee accounts are worse off as a result. On the contrary, they both exaggerate the supposed cost advantage of commission accounts and fail to consider the significant benefits of fee accounts for many investors.[1] Despite our skepticism, we cannot dismiss out of hand the possibility that *some* firms are using the rule as an excuse to shift customers into fee accounts, even when that is not the best option for the investor, or charging them unreasonable fees as a result. If this is occurring, however, that reflects a fundamental enforcement failure on the part of the Department and its fellow regulators at the Securities and Exchange Commission and FINRA, not a problem with the rule itself.

As you are doubtless aware, the Department's rule includes provisions specifically designed to protect against this sort of misconduct. It is explicit in requiring that firms that offer both fee and commission accounts recommend the type of account that is best for the retirement investor. And all retirement accounts are subject to the rule's requirement that compensation be reasonable in light of services offered. Thus, statements like the one from Fidelity in a recent comment letter to the SEC, suggesting that investors are being forced by the DOL rule to "pay an asset-based fee to receive exactly the same services that were previously provided to them for no

[1] Letter from Barbara Roper and Micah Hauptman, CFA, to the DOL, April 17, 2017, at 71-75, http://bit.ly/2oXIZfq.

additional fee under a transaction-based fee structure," are either gross misrepresentations or, if true, offer strong evidence that some firms at least are flouting the rule's requirements.[2]

- The record shows that most firms have chosen to continue to offer commission accounts subject to the conditions of the Best Interest Contract Exemption. If these firms are nonetheless encouraging their advisers to push retirement investors toward fee accounts when they would be better off in commission accounts, that would be a clear violation of both the DOL rule's requirement, and parallel requirements under SEC and FINRA rules, that the type of account recommended be based on the best interests of the customer.

- In the relatively rare instance where firms have chosen to offer only fee accounts to retirement investors, they are still obligated under the Department's rule to ensure that fees are reasonable in light of services offered. Where investors do not require the same level of service traditionally provided to fee accounts, the firm should lower the fees accordingly, and it is our understanding that some firms have done just that. After all, the level of fee charged to these investors is entirely within the control of the firm. They should not be allowed to act opportunistically to maximize their fee income, then point to their willingness to disadvantage customers in this way as evidence of the rule's harmful impact.

As long as the fees charged are reasonable, fee accounts offer significant benefits for many investors. That presumably explains why the SEC has, in the past, gone to considerable lengths to encourage their adoption[3] and why some of the same groups making this argument today once identified fee accounts as a "best practice" that offered broad benefits even for buy-and-hold investors.[4] It is certainly true, however, that firms may have an incentive to recommend fee accounts even for investors who would be better off in a commission account or to charge excessive fees. Moreover, when it comes to determining what type of account is best for the customer, the Department's rule has changed the equation. By imposing a best interest standard and restrictions on conflicts of interest, the rule makes commission accounts a far more attractive option than they were previously or are outside the retirement market. Firms must take that into account when weighing what option is best for the customer.

If light of brokerage firms' incentive to maximize income, industry groups' claims that investors are being inappropriately shifted to fee accounts and charged excessive fees in those accounts should be investigated. If verified, the Department must act to end the practice. It should start by sending a clear message that it takes the rule's requirements regarding both the reasonableness of fees and the appropriateness of account type recommendations seriously and that it is prepared to hold firms accountable for complying with these provision of the rule. In

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[2] Letter from Marc R. Bryant, Fidelity, to the SEC, August 11, 2017, at 3, http://bit.ly/2wLJSKh.

[3] *See, e.g.*, Letter from Barbara Roper, CFA, to the SEC, Certain Broker-Dealers Deemed Not To Be Investment Advisers, January 13, 2000, http://bit.ly/2eMqEhg (discussing an SEC proposal to exempt fee accounts offered by broker-dealers from regulation under the Investment Advisers Act in order to encourage adoption of fee-based compensation it viewed as better aligning the interests of brokers and their customers). *See, also*, Tully Commission, Report of the Committee on Compensation Practices, April 10, 1995, http://bit.ly/2nwNb0E.

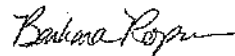
[4] *See, e.g.*, Letter from Ira D. Hammerman, General Counsel, Securities Industry Association, to the SEC regarding Release No. IA-2273, Certain Broker-Dealers Deemed Not To Be Investment Advisers, September 22, 2004, http://bit.ly/2oxtk2w.

this regard, it must make clear that its non-enforcement policy applies only to firms making good faith efforts to comply and would not be applicable in this instance. We are issuing a similar request to the SEC and FINRA to use their authority under securities laws to hold firms accountable for acting in customers' best interests when determining whether to recommend a fee or commission account.

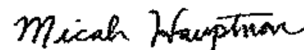
But this issue also highlights the importance of including a strong enforcement mechanism in the conflict of interest rule, so that retirement investors won't be dependent on over-burdened regulators with limited resources to ensure that their interests are protected. As the Department itself concluded in its Regulatory Impact Analysis, inclusion of a strong enforcement mechanism is essential to ensure compliance by firms and advisers who have powerful incentives to flout the rule's requirements. We therefore urge you to reject efforts by industry lobbyists to weaken these key provisions of the rule during the reconsideration.

Workers and retirees who turn to financial professionals for advice about their retirement savings should be able to trust that the advice they receive will be designed to serve their best interests. As part of its commitment to provide that assurance, the Department must act to ensure effective enforcement of the rule.

Respectfully submitted,



Barbara Roper
Director of Investor Protection



Micah Hauptman
Financial Services Counsel