Consumer Federation of America

October 10, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Re: ZRIN 1210-ZA27, Extension of Transition Period and Delay of Applicability Dates, Fiduciary Rule

Ladies and Gentlemen:

We are writing on behalf of the Consumer Federation of America (CFA)[1] to follow up on comments that we submitted to the Department responding to its proposed extension of the transition period for the conflict of interest (or "fiduciary") rule and its related exemptions.[2]

In that comment we took issue with the Department's unfounded statements that it "believes that investor losses from the proposed transition period extension could be small," because "the Department believes that firms already have made efforts to adhere to the rule and [Impartial Conduct Standards.]" We pointed out that the Department provided no verifiable evidence to support these beliefs and the Department's beliefs did not appear to comport with market realities.

We are following up to alert the Department to a recent market survey of broker-dealers, which further discredits the Department's statements.[3] While the survey appears to be similar to other industry surveys in that it is largely self-serving and its participants were likely self-selected, and the methodology that was used to form a representative sample is not transparent, when one digs below the surface of these deficiencies, there were several answers that function as critical admissions by the broker-dealer industry. These admissions provide evidence that

[1] The Consumer Federation of America is a non-profit association of nearly 300 consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.
[2] Letter from Micah Hauptman and Barbara Roper, to the DOL, September 15, 2017, https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA27/00080.pdf.
[3] John Crabb, The Fiduciary Rule Poll, International Financial Law Review, October 2017, https://media2.mofo.com/documents/171000-fiduciary-rule-poll.pdf.

contradicts the Department's belief that broker-dealer firms have made efforts to adhere to the rule and Impartial Conduct Standards.

- In response to the question (Q5), "Have you made any changes in the product mix that you will make available to retail retirement accounts?" 64% answered "No." Thus, a sizeable majority of the broker-dealers surveyed admitted they had made no changes to product mix as a result of the rule. This suggests they have not undertaken the proper due diligence to cull their offerings of inferior products.

- In response to the question (Q7), "Have you revised your internal compensation arrangements to accommodate the fiduciary rule?" again, 64% answered, "No, we have not revised our internal compensation arrangements." Thus, a sizeable majority of the broker-dealers surveyed admitted they had made no changes to their compensation arrangements. This suggests that firms have not reined in financial incentives to ensure that advice does not violate the Impartial Conduct Standards.

In a follow up discussion of the results with the Morrison & Foerster attorneys who devised the survey questions, Morrison and Foerster Senior Of Counsel Hillel Cohn was asked what was his key takeaway from the survey. He answered, "The most surprising thing to me was the relative lack of steps taken to prepare for the rule. I would have thought there would have been more pro-active activity than apparently there has been."

By the industry's own evidence, it is unreasonable for the Department to believe that a significant percentage of firms have made efforts to adhere to the rule and Impartial Conduct Standards. If the Department does not factor this into its decisionmaking, it will have failed to consider an important aspect of the problem.

The fact that a sizeable majority of firms have not taken meaningful steps to comply with the rule and Impartial Conduct Standards for the retail market does not surprise us and it should not surprise the Department. It only reinforces the Department's conclusion that, without a legal enforcement mechanism, firms will not have an incentive to comply with the Impartial Conduct Standards, implement effective anti-conflict policies and procedures, or carefully police conflicts of interest.[4]

Respectfully submitted,

Micah Hauptman

Micah Hauptman
Financial Services Counsel

Barbara Roper

Barbara Roper
Director of Investor Protection

[4] BIC at 21022.