CFA Consumer Federation of America

February 21, 2018

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 are doubtless aware, the Massachusetts Securities Division brought charges against Scottrade last week for dishonest and unethical practices related to its alleged violation of the Department of Labor's conflict of interest rule.[1] We are writing on behalf of the Consumer Federation of America to urge you to begin using your own enforcement authority against firms, such as Scottrade, that clearly fail to work "diligently and in good faith to comply" with the rule.

We supported the Department's decision to refrain from bringing enforcement actions in cases of inadvertent rule violations during an initial transition period, but only if this policy of forbearance is truly limited to instances where firms are working "diligently and in good faith to comply."[2] Since the Department announced its non-enforcement policy, we have written twice to voice concern over potential violations of this standard. First, we wrote October 3, 2017 to urge you to look into allegations that firms were inappropriately shifting retirement savers into fee accounts without first ensuring the shift was on terms that were in the best interest of the investor.[3] We wrote again later that month to draw your attention to evidence from an industry survey suggesting that many firms had failed to change either their product mix or compensation practices to comply with the rule.[4]

The conduct Scottrade is alleged to have engaged in falls squarely within the Department's jurisdiction, since it relates to rollover recommendations, which are considered investment advice under ERISA. Moreover, the alleged misconduct clearly fails to meet the good faith compliance test. It is clear, for example, that Scottrade knew its rollover recommendations

---

[1] *In re Scottrade, Inc.*, Administrative Complaint, No. E-2017-0045 (Feb. 15, 2018) http://bit.ly/2By4rMW.
[2] *See* Field Assistance Bulletin No. 2017-02 (May 22, 2017) http://bit.ly/2rwpjj8.
[3] Letter from Barbara Roper and Micah Hauptman, Consumer Federation of America, to Secretary of Labor Alexander Acosta (Oct. 3, 2017) http://bit.ly/2CyL5UK.
[4] Letter from Barbara Roper and Micah Hauptman, Consumer Federation of America, to Secretary of Labor Alexander Acosta regarding ZRIN 1210-ZA27, Extension of Transition Period and Delay of Applicability Dates, Fiduciary Rule (Oct. 10, 2017) http://bit.ly/2oe4o1i.

were covered by the rule and that its practice of conducting sales contests to encourage rollovers was inconsistent with the rule.

- Before Scottrade's merger with T.D. Ameritrade, the company maintained a page on its website devoted to the DOL fiduciary rule. It stated that, "When the Department of Labor fiduciary rule takes effect, Scottrade brokerage will serve as a fiduciary when making recommendations to clients regarding the rollover or transfer of a retirement account."[5]
- As the Massachusetts Securities Division documented in its complaint, Scottrade updated its compliance manual to indicate it was ending practices that encourage recommendations based on factors other than the client's best interests.[6] The updated compliance manual stated that, "The firm does not use or rely upon quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives that are intended or reasonably expected to cause associates to make recommendations that are not in the best interests of Retirement Account clients or prospective Retirement Account clients."
- In fact, however, the firm ramped up its use of such contests, making no effort to exclude retirement accounts, according to Massachusetts' well-documented complaint.

While the issues in the Scottrade case appear to be particularly stark, there's no reason to believe they are unique. On the contrary, we are concerned that some firms seem to have taken the Department's non-enforcement policy during this protracted transition period as a signal that they can willfully flout the requirements of the rule, and give conflicted advice that is not in customers' best interests, without fear of repercussions. We urge you to take immediate steps to counter that impression. For those who view the Department's good faith enforcement policy as a farce, doing so would send a powerful message that, despite the lengthy implementation delay, the Department remains committed to ensuring that retirement savers are protected from the harmful impact of conflicted investment advice. Retirement savers deserve no less.

Respectfully submitted,

Barbara Roper

Barbara Roper
Director of Investor Protection

Micah Hauptman

Micah Hauptman
Financial Services Counsel

---

[5] *See* Scottrade, Understanding the Department of Labor's Fiduciary Rule, http://bit.ly/2ojXXZP (last visited February 20, 2018).

[6] *In re Scottrade, Inc.*, Administrative Complaint at 3.