BETTER MARKETS

March 20, 2018

The Honorable Jay Clayton, Chairman
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar
The Honorable Robert J. Jackson Jr.
The Honorable Hester M. Peirce
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: The Need to Propose and Finalize a Strong Fiduciary Duty Rule Without Delay

Dear Chairman Clayton and Commissioners:

We are gratified to see that the SEC is currently working on a proposed fiduciary duty rule to better protect investors from the powerful conflicts of interest that influence so many advisers and take a huge toll on investors every year. We view this as a long overdue and critically important reform. As many at the SEC know, we at Better Markets[1] have been very actively engaged with the Department of Labor ("DOL") over the years regarding its 2016 fiduciary duty rule, and we have also shared our views over time with the SEC as well.[2] However, given the SEC's renewed focus on the fiduciary standard, we wanted to bring our most recent thinking to your attention as you consider proposing a rule.

---

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

[2] Better Markets, Inc., Comment Letter on Duties of Brokers, Dealers, and Investment Advisers (July 5, 2013), *available at* https://bettermarkets.com/rulemaking/better-markets-comment-letter-sec-duties-brokers-dealers-and-investment-advisers; Better Markets, Inc., Comment Letter on Definition of the Term "Fiduciary" – Proposed Delay of Applicability Date (Apr. 17, 2017), *available at* https://bettermarkets.com/rulemaking/better-markets-comment-letter-dol-definition-term-fiduciary-proposed-delay-0; Better Markets, Inc., Comment Letter on Definition of the Term "Fiduciary"; Better Markets, Inc., Comment Letter on Conflict of Interest Rule – Retirement Investment Advice (Sept. 24, 2015), *available at* https://bettermarkets.com/rulemaking/better-markets-second-comment-letter-dols-best-interest-fiduciary-duty-rule; Better Markets, Inc., Comment Letter on Definition of the Term "Fiduciary; Conflict of Interest Rule – Retirement Investment Advice (July 21, 2015), *available at* https://bettermarkets.com/rulemaking/better-markets-comment-letter-dols-proposed-fiduciary-duty-rule.

1825 K Street, NW, Suite 1080, Washington, DC 20006
TELEPHONE (1) 202.618-6464
FAX (1) 202.618.6465
WEBSITE bettermarkets.com

I. **The SEC should act quickly to promulgate a rule that ensures all advisers under its jurisdiction are subject to a strong fiduciary standard when they give investment advice about securities.**

We urge the SEC to use its authority under Section 913 of the Dodd-Frank Act[3] to propose and finalize, without delay, the strongest possible fiduciary duty rule applicable to broker-dealers, investment advisers, and others who dispense advice to investors about securities. It is in our view among the most important investor protection initiatives currently within the reach of any financial regulator. In fact, finalizing a strong rule would be one of the most significant investor protection accomplishments in the history of the SEC.

The stage is set for the SEC to move forward, and no obstacles stand in the way that cannot be overcome when the relevant facts, legal principles, and investor protection considerations are taken into account. After years of debate and analysis, including the SEC's own study issued in 2011[4] and the exhaustive rulemaking and thorough regulatory impact analysis conducted by the DOL in support of its fiduciary rule,[5] it is now beyond reasonable dispute that—

- The SEC has—and has long had—the legal authority to broaden and strengthen the fiduciary standard and to apply it specifically to broker-dealers when they provide personalized investment recommendations.

- The concept has been studied *ad infinitum* by the SEC, the DOL, and others, and the weight of authority clearly favors extending the fiduciary duty more broadly to encompass broker-dealers providing personalized investment recommendations.

- A new rule is essential for protecting investors from the billions of dollars in losses, by conservative estimates, that they suffer every year as a result of bad investment recommendations urged upon them by many advisers with conflicts of interest.
- A new rule, properly written, will also promote consistency in the standards applicable to advisers under three distinct but related statutory regimes, the Employee Retirement

---

3 Dodd–Frank Wall Street Reform and Consumer Protection Act, § 913, Pub. L. 111-203, 124 Stat. 1376 (codified in scattered sections of 15 U.S.C.).

4 *See* Sec. & Exch. Comm'n, Study on Investment Advisers and Broker-Dealers (2011) [hereinafter *Staff Report*], *available at* https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

5 Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8 2016). As you have noted, the SEC and the DOL are tasked with administering two different statutory regimes with distinct purposes. Nevertheless, the economic analysis that the DOL developed in support of its own rule provides powerful evidence of the need for strong measures across the board to limit the enormous harm that conflicts of interest are inflicting on investors of all types, whether they be retirement savers or other investors with securities accounts. Moreover, the DOL wisely fashioned its rule after significant consultation with the SEC and with the elements of Section 913 of the Dodd-Frank Act prominently in mind. Finally, we note that while the United States Court of Appeals for the Fifth Circuit recently vacated the DOL's rule, that decision should in no way deter the SEC from proceeding with its own rulemaking—if anything, it makes the matter more urgent. *See Chamber of Commerce v. U.S. Dept. of Labor*, No. 17-10238, 2018 WL 1325019 (5th Cir. Mar. 15, 2018). As noted above, the DOL and the SEC operate under two different statutory regimes, so the Fifth Circuit's interpretation of ERISA has little bearing on the SEC's authority to develop a strong fiduciary standard under the securities laws.

Income Security Act of 1974 ("ERISA"), the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940 ("Advisers Act"), alleviating investor confusion and creating a more level playing field among all advisers.

- The counterarguments advanced by broker-dealers, insurance companies, and others who seek to preserve the status quo lack merit: A broad and strong rule is workable for the industry at reasonable cost, and moreover, such a rule will expand, not restrict, access to quality investment advice at affordable prices for all investors, large and small alike. [6]

II. The SEC has an opportunity not only to end years of investor abuse arising from adviser conflicts of interest, but also to help restore the agency's reputation and credibility as a stalwart guardian of investor protection.

Under your leadership, the SEC has an extraordinary and perhaps once-in-a-lifetime opportunity finally to correct a long-standing regulatory failure: Due to the SEC's inaction for decades, broker-dealers have been permitted to render conflict-ridden investment advice to retail and institutional investors without adhering to the fiduciary standard. The result has been incalculable harm to millions of investors who can ill-afford the sometimes catastrophic but always corrosive losses arising from the sale of overpriced, under-performing investments recommended by many broker-dealer representatives who are not required to act in their client's best interest.

We have been gratified by and applaud your focus on what is good for "Mr. and Mrs. 401(k)" and other everyday investors. They need and deserve a strong fiduciary duty rule that closes this enormous and unacceptable regulatory gap.

If the SEC succeeds in correcting this state of affairs, it will help re-establish its reputation as one of the leading guardians of investor protection. If it fails to act, or perhaps worse, produces a weak fiduciary duty rule, then it will sully that reputation and continue to subject countless investors to the scourge of conflicts of interest that contaminate investment advice and undermine Americans' financial well-being.

III. The SEC must ensure that any rule incorporates a number of critical elements and establishes a genuine fiduciary duty.

To ensure that any rule proposed by the SEC can fulfill its promise and provide meaningful new protections to investors, it must contain a number of core elements and address a number of

[6] There is abundant evidence that the rule is workable for the advisor industry without imposing unreasonable compliance costs or threatening to constrict investor access to investment advice. In short, many members of the industry have already demonstrated that it is possible not only to comply with the rule, but also to do so through the development of innovative strategies, products, and technologies. *See, e.g.,* Consumer Federation of America, Comment letter on Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (August 7, 2017) (offering a detailed review of industry adaptation to the rule).

specific issues, all of which are affirmatively required or authorized under various subsections of Section 913 of the Dodd-Frank Act.[7]

A. The rule must establish a true best interest standard.

Section 913 of the Dodd-Frank Act established a clear and high standard for any new rule promulgated by the SEC that fortifies the fiduciary duty under the Advisers Act and applies it to broker-dealers providing investment advice. The SEC must adhere to this explicit authority and implement the strongest possible fiduciary standard for all advisers that provide investment advice about securities to their clients. Merely tinkering with the suitability standard developed by FINRA, relying principally on a disclosure regime, or even resting on the fiduciary standard as developed and applied by the SEC under the Advisers Act, will betray the letter and spirit of the law.

As provided in the Dodd-Frank Act, and as recommended by the SEC's own study under Section 913, that standard must at a minimum be—

> "to act in the best interest of the customer, without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice."[8]

Furthermore, pursuant to Section 913, the standard of conduct applied to brokers must be—

> "no less stringent than the standard applicable to investment advisers under [the IAA] when providing personalized investment advice about securities."[9]

Thus, consistent with Section 913 of the Dodd-Frank Act, the uniform fiduciary duty must incorporate genuine best interest standard, and its application to brokers must be no less stringent.

B. Strong disclosure requirements are essential but cannot serve as a substitute for a fiduciary duty.

The robust disclosure of conflicts of interest is a critical element of any true fiduciary duty, but disclosure alone is not sufficient and cannot substitute for a best interest standard.[10] The fiduciary duty is historically, and under many different bodies of law, an affirmative standard of loyalty and care, not simply a duty to make disclosures and then freely pursue one's own interests at the expense of a client's best interest.

---

7 The elements of any new fiduciary duty rule described in this letter are essential regardless of the specific rulemaking authority the SEC may invoke, whether it be Section 913 or other authority under the securities laws.

8 Dodd–Frank Act, § 913(g)(1).

9 *Id.* Elsewhere, Section 913 similarly makes clear that the standard applicable to a broker or dealer "shall be the same as the standard of conduct applicable to an investment adviser. . . ." *Id.*

10 Under the Advisers Act, the fiduciary duty includes, but is not limited to, "full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading [their] clients." *Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (citations and internal quotation marks omitted).

> Far from being a true fiduciary duty, a disclosure regime by itself is little more than a modified version of "buyer beware." Disclosures can easily be designed to obscure the real significance of an adviser's conflicts of interest, and consent can easily be extracted from clients who feel pressured and confused, or worse, falsely comforted. In fact, studies show that regulation by disclosure alone can actually undermine investor protection goals by emboldening advisers to ignore the client's best interest once they have "checked the disclosure box," and by rendering investors even more vulnerable to conflicted advice once they receive disclosures.[11] The new standard must therefore ensure that even after full disclosure of any conflict, the adviser must at all times act in the best interest of the client.

Section 913 of the Dodd-Frank Act reflects the role of disclosure as an important but **distinct** element of a strong fiduciary regime. After delineating the minimum attributes of the fiduciary standard, Section 913 separately addresses the "other matter" of disclosure as follows:

> "The Commission shall (1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest."

In short, any new rule must provide that at all times, even after a conflict of interest is disclosed, the broker or adviser must still observe the duties of loyalty and care and manage any conflict so that the interests of the client always come first.

C. The rule must ban certain practices that intensify conflicts of interest and require advisers to mitigate conflicts of interest.

A strong fiduciary standard must be complemented with other provisions that flatly prohibit certain practices, such as sales quotas and other compensation incentives that inevitably

---

11 There is a growing consensus among experts that mere disclosure is not an effective cure for the ills posed by conflicts of interest and that a fiduciary duty is a more effective solution. *See* Angela Hung et al., Effective Disclosures in Financial Decisionmaking (2015), *available at* https://www.rand.org/pubs/research_reports/RR1270.html; George Loewenstein et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 American Economic Review: Papers and Proceedings 423 (2011); Robert Prentice, *Moral Equalibrium: Stock Brokers and the Limits of Disclosure*, 2011 Wis. L. Rev. 1059 (2011) (concluding that disclosures do not give sufficient information to investors and may even cause brokers to give more biased advice); Omri Ben-Shahar & Carl Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647 (2011) (finding that disclosure as a regulatory tool has a history of being ineffective); Daylian Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. of Legal Studies 1 (2005). Similar findings were presented at a recent meeting of the SEC's Investor Advisory Committee's on December 7, 2017, where four panelists discussed the limitations and sometimes the counterproductive effects of disclosures as a remedy to conflicts of interests. *See* Meeting of the Securities and Exchange Commission Investor Advisory Committee (Dec. 7, 2017), https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac120717-agenda.htm; Sunita Sah et al., *The Burden of Disclosure: Increased Compliance with Distrusted Advice*, 104 J. of Personality and Social Psychology 289 (2013) (describing 6 experiments revealing that disclosure can increase pressure to comply with advice if the advisees feel obliged to satisfy their advisors' personal interests).

induce advisers to provide recommendations based on their own financial interest rather than the best interest of the client. In addition, firms must be required to institute policies and procedures that will help ensure compliance with the rule and the mitigation of conflicts of interest. In an important and pragmatic sense, such provisions help focus a firm on the need to eliminate or minimize conflicts of interest, increase the likelihood of compliance with the fiduciary standard, and provide the SEC or FINRA as regulators with more effective tools for measuring compliance and taking remedial enforcement action where appropriate.

An affirmative duty to eradicate conflicts of interest and the practices that foster them will address another problem as well. Many broker-dealer reps and other advisers would prefer to act in their clients' best interest but are subjected to intense pressures and incentives created by management to compromise the best interests of their clients. A strong rule that eliminates these influences will not only protect investors, but also improve the environment for the benefit of good advisers who seek to provide the best possible advice to their clients.

D. <u>Commission-based compensation and sales of proprietary products should be conditioned on protective measures.</u>

In a few instances, the Dodd-Frank Act establishes some specific limits or exceptions regarding the nature and scope of the duty the SEC may impose. The statute nevertheless preserves the SEC's broad authority to ensure that such exceptions are conditioned on additional protections, or even prohibited outright if they pose too great a threat to the investor's best interest. The SEC should make use of this broad authority.

Two examples are in the area of commission-based compensation and recommendations relating to proprietary products. For example, Section 913 provides that the receipt of commission-based compensation or other standard forms of compensation for the sale of securities, and the sale of proprietary products, shall not, "in and of itself," be considered a violation of the standard. The "in and of itself" wording reflects Congress's intent that the SEC should take great care to ensure that these carve-outs remain narrow. Reinforcing the point, elsewhere in Section 913, Congress specifically required the SEC to "examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and **compensation schemes** for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors."[12]

Thus, the right to receive such commission-based compensation or to sell proprietary products, if permitted at all under the fiduciary standard, must be conditioned on measures designed to ensure that customers receive full, clear, and timely disclosure; that they understand and consent to those arrangements; and that, at all times, **notwithstanding such consent**, the customers' best interests come first.

[12] Dodd-Frank Act § 913(g)(1) (emphasis added).

E. <u>The rule must address the long-standing use of misleading titles that sow widespread confusion and induce the misplaced trust of unsuspecting investors.</u>

For years, too many advisers have deployed promotional devises, including advertisements and titles, that deceive investors and lull them into believing that they are dealing with an adviser who has their best interest at heart. Prominent among them is the widespread uses of titles such as "financial adviser" or "financial consultant." Whether intentionally or not, these titles connote the very different category of "investment adviser," who is subject to at least some form of the fiduciary duty. These titles conjure the notion of a professional who is not only an expert in financial matters but also someone who will offer advice and recommendations that serve the client's best interest.[13]

In fact, these titles are misleading because those "advisers" and "consultants" are not currently subject to the standards of trust and loyalty embodied in the fiduciary duty. Accordingly, in any final rule, the SEC must prohibit the use of such titles when they are misleading and ensure that anyone using them—along with anyone else providing investment advice to a client about securities, regardless of title—is fully subject to the fiduciary duty.

F. <u>The rule must cover non-retail as well as retail investors.</u>

While retail investors are desperately in need of the protections that could be afforded by a strong new fiduciary duty rule, they are not the only ones who are vulnerable to conflicts of interest. Section 913 of the Dodd-Frank Act expressly allows the SEC to extend the protections of the fiduciary duty beyond retail customers and to "such other customers as the Commission may by rule provide."[14]

The SEC should invoke this authority to ensure that institutional investors also benefit from the fiduciary duty, especially where they lack the sophistication in financial matters that is often assumed but too often in reality absent. Consistent with the Advisers Act, they should not be treated differently than retail investors when it comes to such a fundamental protection. At a minimum, institutional investors that are especially vulnerable, that lack sufficient financial sophistication, or that represent the interests of retail investors collectively (including, for example, pension funds) would clearly benefit from, and should be protected under, the new fiduciary duty rule.[15]

---

13 The SEC's own staff report identified this investor confusion over titles as a significant problem that the proposed fiduciary rule would address. *See Staff Report supra* note 3 at v.

14 Dodd-Frank Act § 913(g)(1).

15 The Dodd-Frank Act reflects this approach in other contexts by requiring swap dealers and security-based swap dealers to adhere to a "best interest" standard when acting as an adviser to "special entities," including institutional investors such as municipalities and pension funds. Dodd-Frank Act § 764(a). Even if the SEC decides not to broadly protect all investors from conflicts of interest, retail and institutional alike, then it should at least impose the fiduciary duty whenever an adviser provides advice to such special entities.

G. The rule must narrowly circumscribe the exceptions for a "continuing duty of care."

Section 913 states that nothing in the section shall require a broker to have a "continuing duty of care or loyalty" to the customer after providing advice. This provision represents a potentially huge loophole in the fiduciary standard. Claims for breach of fiduciary duty often arise when clients find themselves neglected by an adviser who has engendered a reasonable expectation that the client's interests were under a continuing duty of care.

The SEC must therefore write its rule to ensure, for example, that brokers cannot resort to clauses in fine-print contracts that operate as a convenient "on-off switch" for the fiduciary duty. Furthermore, the rule must provide that the duties of care and loyalty, once triggered, only end where the adviser's role in "providing personalized investment advice about securities" has truly concluded; where the client has received timely and clear disclosure in writing that the adviser is no longer subject to those duties; and where the client has acknowledged the cessation of those duties in writing.

H. The rule must expansively interpret the threshold requirement that "personalized investment advice" be involved before the fiduciary duty attaches.

Section 913 defines the scope of the SEC's authority to impose a fiduciary duty on brokers in terms of instances where "personalized investment advice" is involved.[16] This too represents a potentially huge loophole in any new rule the SEC writes. Accordingly, the SEC must construe "personalized investment advice" broadly, in accordance with the underlying purposes of the securities laws and the well-established maxim that substance controls over form in matters of securities regulation.[17]

Thus, the rule should make clear that advice will be regarded as "personalized" whenever it is in substance and reality personalized and regardless of fine-print contract clauses purporting, for example, to cast any advice given as general information or "education" about investment options. While it may be appropriate to allow advisors to provide truly general, educational information about investments to their clients without triggering the fiduciary standard, any rule must carefully guard against attempts to circumvent the fiduciary standard by providing what is in reality personalized advice in the guise of educational information. A key element of the rule that will help minimize this loophole is a strong definition of what constitutes a "recommendation."[18]

---

16 Dodd-Frank Act § 913(g)(1).

17 As stated by the Supreme Court, "Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called." *Reves v.Ernst & Young*, 494 U. S. 56, 61 (1990).

18 The "recommendation" concept has already been developed under FINRA's rules, and the DOL drew from that definition when it identified the type of advice that triggers the fiduciary duty.

I. The SEC must ensure that investors have meaningful private remedies with which to enforce the new fiduciary duty rule, including the right to participate in class actions.

Private remedies will be an essential feature of any rule. The protections of a new fiduciary duty rule will be severely compromised if they are not enforceable (and actually enforced) both by the SEC **and** by investors who suffer losses from violations. This means at a minimum retaining FINRA's current approach of prohibiting brokers from forcing investors to forego the right to participate in class actions. Of course, the SEC has the opportunity to go further, as it should, and ban all pre-dispute mandatory arbitration clauses across the securities industry, whether individual or class.

As a review of the independent data shows, there are no meritorious arguments in defense of mandatory arbitration when those proceedings are so biased against investors, so ineffective in affording meaningful relief, and so opaque.[19] And the Dodd-Frank Act eliminated any question about the SEC's ability to take such a step, as it expressly granted the agency broad authority to limit or even prohibit the use of mandatory arbitration.[20]

J. The SEC should not be swayed by arguments that a genuine fiduciary duty would be unworkable or that it would limit the availability of investment advice to small investment account holders.

The SEC should not be unduly influenced by pleas to protect and preserve the broker-dealer business model and the products and services they traditionally offer. These arguments ring hollow for many reasons. For example, recent experience under the DOL rule shows that broker-dealers can readily adapt to the fiduciary duty—if they wish to do so.[21]

In addition, new products and business models are emerging, including many innovative firms that rely on a combination of technology and human advisers to make fiduciary advice available under very low fee structures. Financial planners have for years been able to thrive under the fiduciary standard while serving large and small accounts alike. And of course, industry opponents of the fiduciary standard fail to account for the enormous and demonstrated benefits that it would confer on investors, benefits that dwarf any reasonable estimates of the compliance costs facing industry.

---

19 Consumer Fin. Prot. Bureau, Arbitration Study (Mar. 2015) *available at* https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf; Stephen Hall, *The Shameless Wall Street Double Standard*, Law360 (June 12, 2017) https://www.law360.com/articles/930747/the-shameless-wall-street-double-standard.

20 *See* Dodd-Frank Act § 921(a) (granting the SEC authority to prohibit or place limits on mandatory arbitration agreements signed before any dispute arises).

21 *See* footnote 5 *supra.*

K. <u>A strong fiduciary duty rule also satisfies the limited economic analysis criteria required by the securities laws.</u>

The DOL produced an exhaustive economic analysis to support its rulemaking under ERISA, showing that conflicts of interest are costing investors tens of billions of dollars every year in lost retirement savings.[22] The DOL's estimate was extremely conservative, since it only examined the impact of conflicts of interest on one type of account (IRAs) and one type of investment (front-load mutual funds). Were the analysis expanded to encompass all types of investment accounts (retirement and non-retirement alike) and all types of securities products (from other types of mutual funds, to individual securities, to variable annuities, to non-traded REITS), the magnitude of harm would be even more staggering.[23]

While the DOL's analysis should bear on the SEC's understanding of the need for a strong rule, the SEC need not go to such lengths to justify its own rulemaking, since the SEC is not subject to the same economic analysis requirements faced by the executive branch agencies, such as the DOL. The most that the SEC is required to do is "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[24] This test is easily satisfied.

The first and most important factor is whether the rule will promote investor protection, and if written properly, there can be no reasonable dispute that a new fiduciary rule will do precisely that. The other three economic criteria would also be readily satisfied, again assuming the rule is properly written as proposed herein. For example, the rule will promote efficiency in two respects. First, it will establish more uniform standards of care for broker-dealers and investment advisers, bringing both types of advisers into better alignment under a strong, uniform standard. Second, it will promote more efficient allocation of capital, eliminating the distortions that conflicts of interest cause through the diversion of funds from a broad swath of investors to a concentrated population of financial industry advisers. The rule will promote fair competition by eliminating the obviously uneven regulatory requirements under which different sets of advisers operate.[25] And finally, it will promote capital formation by restoring and elevating investor confidence in the capital markets and by reducing fees and commissions, thus ensuring that investors have more money for investment in companies rather than the enrichment of their advisers.

---

22 *See* Dept. of Labor, Regulating Advice Markets, Definition of the Term "Fiduciary," Conflicts of Interest - Retirement Investment Advice, Regulatory Impact Analysis for Final Rule and Exemptions (Apr. 2016), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf.

23 And even that analysis would omit the damage that conflicts of interest cause with respect to other types of non-securities investments, including commodities, real estate, and other products.

24 *See* 77 U.S.C. §77b(b) (2012).

25 When it promulgated its new fiduciary duty rule, the DOL wisely used Section 913 as something of a template, drawing on many of the concepts and actual phrases set forth in that section. As a result, the SEC is well-situated to develop a rule that is at once strongly protective of investors and also in harmony with what the DOL has done to protect retirement savers from conflicts of interest.

IV. <u>Conclusion</u>

An unfortunate yet fitting way to conclude this letter is to draw your attention to the recent enforcement action filed by Massachusetts, alleging rampant abuses by Scottrade, which far from mitigating and managing conflicts of interest, allegedly used brazen sales contests to intensify and inflame those conflicts of interest, undoubtedly victimizing countless investors.[26]

The firm was charged with "dishonest and unethical activity and failure to supervise" under state law for conducting sales contests that violated the DOL rule's impartial conduct standards, as well as the firm's own compliance manual.[27] Those standards require, among other things, that advisers act in the best interest of their clients and avoid misleading statements. Scottrade allegedly violated these provisions by holding multiple sales contests, some nationwide, and promoting a culture at the firm where aggressive sales practices and incentive-based programs flourished. Internal Scottrade materials allegedly instructed advisers to target a client's "emotional vulnerabilities" and "use emotion over logic" to coerce their clients to bring more assets to the firm.[28] Inevitably, employees seeking to maximize their income and win the contests, which are often very high pressure, put their interests above their clients' best interests, in violation of the law. Or, at the very least, those employees submitted to pressure and convinced themselves that their actions in promoting certain investment products, maximizing their income, and winning contests were also conveniently in their clients' best interest.

The recklessness of these actions and the danger they pose to investors is clear and they illustrate why a strong and fully enforceable fiduciary rule is so vitally necessary, both under ERISA and under the securities laws.

We hope these comments are helpful. We acknowledge and appreciate the sincerity of your focus on the interests of Mr. and Mrs. 401(k), and we urge you to keep those investors foremost in mind as you guide the SEC through the process of developing a new fiduciary duty rule, one that fulfills the SEC's paramount obligation to protect investors and adheres to the letter and spirit of the Dodd-Frank Act and the securities laws. We look forward to meeting with you to discuss these issues as you formulate your proposal.

Sincerely,

Dennis M. Kelleher
President and CEO

[26] Administrative Complaint In the Matter of Scottrade, Inc., Docket No. E-2017-0045 (Feb. 15, 2018) *available at* http://www.sec.state.ma.us/sct/current/sctscottrade/scottradeidx.htm.

[27] *Id.* at 17.

[28] *Id.* at 5.

Stephen Hall
Legal Director and Securities Specialist

Lev Bagramian
Senior Securities Policy Advisor

Better Markets, Inc.
1825 K Street, NW
Suite 1080
Washington, DC 20006
(202) 618-6464

dkelleher@bettermarkets.com
shall@bettermarkets.com
lbagramian@bettermarkets.com
www.bettermarkets.com