PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION
2415 A Wilcox Drive | Norman, OK 73069
Toll Free (888) 621-7484 | Fax (405) 360-2063
www.piaba.org

December 14, 2018

Christopher W. Gerold
Bureau Chief
Bureau of Securities
PO Box 47029
Newark, NJ. 07101

Re: Pre-Proposed Amendment N.J.A.C. 13:47A-6.3, Fiduciary Duty

Dear Mr. Gerold:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules which govern the conduct of those who provide investment advice to investors.

On October 15, 2018, the Bureau of Securities issued a Notice of Pre-Proposal soliciting comments regarding amendments to its rules to require that broker-dealers, agents, investment advisers, and investment adviser representatives be subject to a fiduciary duty when recommending to a customer an investment strategy, or the purchase, sale or exchange of any security, or providing investment advisory services to a customer.[1] The Bureau recognized in its Notice that a uniform fiduciary standard would protect investors from the abuses that can result when financial professionals place their own financial interests ahead of their customers, and invited comment on "the legal and factual bases for applying a fiduciary standard to all financial services professionals; the scope of the duty in terms of duration and when it arises; the types of recommendations that would trigger the duty; and the scope of the duty in terms of to whom it is owed."[2]

PIABA has long advocated for a true fiduciary standard for all investment professionals (regardless of what they call themselves) who provide investment advice to their clients and fully supports the Bureau's proposed fiduciary rule. Consistent with numerous studies, including the Securities and Exchange Commission's ("SEC") findings in 2011, we believe that a uniform fiduciary duty applicable to all financial intermediaries who provide investment advice would eliminate confusion and best protect customers.[3] We therefore believe

[1] Notice of Pre-Proposal, 50 N.J.R. 2142 (Oct. 15, 2018).
[2] *Id.* at 2143.
[3] SEC, *Study on Investment Advisers and Broker-Dealers* ("SEC Study") (Jan. 2011), available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf. The SEC reviewed two studies which it sponsored (the "Seigel &

Officers and Directors
President: Christine Lazaro, NY
EVP/President-Elect: Samuel B. Edwards, TX
Secretary: David Meyer, OH
Treasurer: Michael S. Edmiston, CA
Hugh D. Berkson, OH
Benjamin P. Edwards, NV
Adam Gana, NY
Marnie C. Lambert, OH
Thomas D. Mauriello, CA
David P. Neuman, WA
Timothy J. O'Connor, NY
Darlene Pasieczny, OR
Joseph C. Peiffer, LA
Jeffrey R. Sonn, FL
Andrew J. Stoltmann, IL
Robin S. Ringo, *Executive Director*

that the fiduciary duty should apply to all forms of financial advice, and to all customers. We also believe that the fiduciary duty should arise whenever a financial or investment recommendation is made, and that it should last throughout the duration of the advisor-customer relationship. Finally, we believe the Rule should explicitly provide for a private right of action. PIABA's suggestions are discussed in further detail below.

I. A Fiduciary Standard Should Apply to all Financial Professionals Who Are Compensated for Making Financial and/or Investment Recommendations

Under federal law, Investment Advisers who charge a fee for their services are fiduciaries to their clients. However, under current federal and New Jersey law, Brokers who provide investment advice and financial recommendations to New Jersey citizens are not considered to be fiduciaries. Instead, brokers are subject to a lower suitability standard. The suitability standard allows brokers to recommend products that benefit the broker or their firm financially, even if such recommendations are not in the best interests of their customers. The suitability standard is clearly riddled with conflicts of interest. Indeed, PIABA members have long represented many investors in New Jersey who have been harmed by conflicted advice which would not have been allowable if a fiduciary standard existed.

For example, one New Jersey couple from Middlesex County, in their late forties, opened an account with a broker to prepare for retirement. The broker placed their funds in a combination of private placements, Real Estate Investment Trusts, and other high risk alternative investments. The broker told the couple the investments were safe, and met their goals of preservation of capital and growth. The couple did not know that the recommended investments were highly risky. The customers also did not know that the recommended investments paid substantially higher commissions to the broker and the firm than other, safer investments. Had the broker recommended investments that were in the best interests of his clients, he and his firm would have earned much less. Unfortunately, the couple lost a significant amount of their investment and retirement savings as a result of this conflicted advice.

As another example, a New Jersey couple from Ocean Township opened several brokerage accounts. The couple has been married for over 50 years, and, after retiring, decided it was important to entrust their retirement savings – amassed after a lifetime of hard work – to a broker whom they could trust to take care of them. Unfortunately, once the broker had control of the couple's accounts, he purchased promissory notes and other illiquid private placement investments. The couple believed their broker had chosen investments which were safe, and would provide them with a steady stream of income to support them in their retirement. In fact, the investments were very risky. The broker never conveyed how much risk the couple had actually assumed. The broker and his firm benefited from the purchases, because they made substantial commissions on each of those investments. The couple was not so fortunate. They lost much of the retirement savings they had spent their lifetime acquiring.

By enacting a fiduciary rule, New Jersey is in a position to protect its residents from suffering the same or similar fate as the New Jersey residents in the cases described above. The enactment of such a standard is particularly important because customers usually do not understand the differences between investment

---

Gale Study" and the "RAND Report"), and a study conducted by Consumer Federation of America. The SEC Study found that, based on the comments, studies and surveys it had reviewed, investors did not understand the differences between investment advisers and broker-dealers. The SEC determined that this misunderstanding is compounded by the fact that many retail investors may not have the "sophistication, information, or access needed to represent themselves effectively in today's market and to pursue their financial goals." *Id.* at 101.

advisers, who are subject to a fiduciary standard under federal law, and broker-dealers, who are not. As the SEC has concluded: "it is important that retail investors be protected uniformly when receiving personalized investment advice or recommendations about securities regardless of whether they choose to work with an investment adviser or broker-dealer. It is also important that the personalized securities advice to retail investors be given in their best interests, without regard to the financial or other interest of the financial professional, in accordance with a fiduciary standard."[4]

The importance of a fiduciary standard is borne out by the fact that most retail customers think their financial advisor – regardless of whether that advisor is a broker or an investment adviser – is a fiduciary.[5] The industry is well aware of this confusion. In a survey open to all brokers, investment advisers, and insurance consultants and producers, 97 percent of them said: "investors don't understand the differences between brokers and investment advisers."[6]

Many firms and their personnel are also "dually-registered," meaning that they operate simultaneously as broker-dealers and as registered investment advisers. Customers of such firms often open "brokerage" accounts and "investment advisory" accounts with the same person at the same time. The customers are typically given a sheaf of paperwork, much of it in small print, in which the firm attempts to disclaim its duties for brokerage accounts. Customers rarely read these materials. They do not understand that their financial advisor may claim to have one duty with respect to their brokerage account, and a separate and different duty with respect to their advisory account.

Customers are also frequently confused by firm advertising. In a study conducted by PIABA in 2015, PIABA examined the websites of nine different brokerage firms (the "PIABA Report"), many of which conduct business in New Jersey.[7] PIABA examined Allstate, UBS, Morgan Stanley, Berthel Fisher, Ameriprise, Merrill Lynch, Fidelity, Wells Fargo, and Charles Schwab and found that the firms' advertising presents the image that firms are acting in a fiduciary capacity.[8] Those firms have continued to aggressively promote themselves as offering all-encompassing financial advice with no differentiation between the firms' investment adviser services and brokerage services.

PIABA believes that the only reasonable way to address the investor confusion – which has been created by the financial service industry's misleading advertising and description of their services – is to hold both brokers and investment advisers to a fiduciary duty that encompasses both a *duty of care* and *duty of loyalty*.

---

[4] *Id*.

[5] *See* Spectrum Group, *Fiduciary – Do Investors Know What it Means* (2015), available at http://spectrum.com/Content_Whitepaper/fiduciary.aspx.

[6] *See* fi360-ThinkAdvisor, *Trustworthy Advice and Individual Investors: Will Regulators Act in Investors' Best Interest?* (Aug. 2013), available at http://www.fi360.com/uploads/media/fiduciarysurvey_resultsreport_2013.pdf; *see also* fi360-ThinkAdvisor, *Seeking Trustworth Advice for Institutional Investors – Financial Intermediaries Indicate Strong Support for Fiduciary Standard* (Feb. 2015), available at http://www.fi360.com/uploads/media/2015fiduciarysurvey.pdf.

[7] *See* PIABA, *Major Investor Losses due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty; Misleading Ads Fuel Confusion, Underscore Need for Fiduciary Standard* (Mar. 25, 2015) (the "PIABA Study"), available at https://piaba.org/system/files/pdfs/PIABA%20Conflicted%20Advice%20Report.pdf.

[8] *Id.* at 1.

***Duty of Care*:** The duty of care should require brokers to act with the care, skill, prudence and diligence, under the circumstances then prevailing, that a reasonably prudent person acting in a like capacity would use in connection with providing investment advice, based on the investment objectives, risk tolerance, financial circumstances, and needs of the investor, without regard to the financial or other interests of the broker. This duty would require the investment advice to not only be suitable, but to also be the best possible advice given the circumstances. Investment costs must be a factor in determining what investment is best for a client, as well as investment objectives, risk and liquidity. This standard is similar to the fiduciary standard which was enacted by the Department of Labor in 2016 with respect to retirement accounts, after several years of study.

***Duty of Loyalty*:** The duty of loyalty should require the mitigation or elimination of conflicts of interest. Incentives which encourage brokers to engage in conduct that they would not otherwise engage in should be prohibited. Brokers should not be paid differential compensation that is dependent on the product recommended. Commissions should be leveled so that the incentive to recommend one product over another is eliminated. This will ensure that a broker considers the needs of his or her clients, rather than in his or her own pecuniary interest. In addition, sales contests should be eliminated because they encourage brokers to put their own interests ahead of their clients'.

II. The Fiduciary Duty Should Apply to All Customers/Investors

PIABA believes that brokers who provide investment advice to investors should be held to a fiduciary standard regardless of the wealth, sophistication or legal personhood of the investor. Institutions such as pension funds, municipalities and institutional investors that manage pools of capital on behalf of retail investor beneficiaries hold the retirement savings for millions of individual investors. Those individuals are often unsophisticated people of modest means who have minimal outside assets. As such, a broker who misleads an institutional investor representing thousands of individuals can do substantial damage, without the impacted individuals ever knowing or having control over what was done.[9]

Moreover, there are many investors in New Jersey who would qualify as an "accredited investor" under the federal securities laws because they hold assets with high value, such as their retirement account, or they have an income that is large on a national level, but not for someone living in New Jersey.[10] However, an individual's wealth does not mean that he or she has a high level of understanding of investments, or is in a financial position to put his or her money at risk.

Simply put, all investors benefit from and should be entitled to a heightened standard of conduct when receiving financial advice.

[9] Tamar Frankel, *The Regulation of Brokers, Dealers, Advisers and Financial Planners*, 30 Rev. Banking & Fin. L. 123, 129-30 (2011). Professor Frankel also observes that institutional investors are "not much better off than individuals with respect to understanding some complex investments." *Id.* at 130.

[10] Rule 501 under Regulation D defines accredited investor as "[a]ny natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000" (exluding primary residence), or whose income exceeds $200,000 per year, or joint income with that person's spouse exceeds $300,000 per year. 17 C.F.R. §230.501 (a)(5) and (a)(6).

III. The Fiduciary Duty Should Apply to All Forms of Financial or Investment Advice

PIABA urges New Jersey to adopt a fiduciary duty that applies to all financial and investment advice offered to a customer, regardless of the type of advice, type of account, or manner in which the broker is compensated. Additionally, the fiduciary standard should always arise when a financial professional recommends a securities transaction *or* an investment strategy involving securities. This would simply require brokers and brokerage firms to live up to the promises which they routinely make to customers in their advertising and in one-on-one communications.

Specifically, brokerage firms give their "registered representatives" titles that sound trustworthy and suggest they are "Investment Advisers", like "Financial Advisor," "Retirement Consultant," and "Wealth Manager."[11] Brokers pay millions of dollars every year to tell investors that they put the interests of customers ahead of their own. Brokers encourage investors to *trust* them, saying they will provide *advice* and *guidance.* One leading broker, whose US headquarters is located in New Jersey, emphasizes the advice and guidance it offers:

> Advice that's all about you and what you need is what UBS does best. It starts with a plan that we develop together—as part of a strategy for managing your wealth and pursuing your personal goals for every part of your life, at every stage of your life. It's what we call: Advice. Beyond investing.[12]

Other brokerage firms make similar promises. For example, Charles Schwab tells investors, "Let us help plan your financial future."[13] Wells Fargo advertises that "Our Financial Advisors are committed to providing you with top-notch service and attention that you expect and deserve."[14] Merrill Lynch says, "Your advisor will help guide you, making adjustments as your needs change."[15] Brokers use the language of fiduciaries to gain the trust and confidence of customers.[16] As a result, when customers meet with a broker, they reasonably expect that they are being given advice that is for their benefit.

Consistent with the foregoing, PIABA believes that a fiduciary standard should apply, regardless of how a brokerage firm charges a customer. There is no valid reason why a broker's duty should be any less to a customer who pays a broker by commissions than it is to a customer who pays a management fee. In either scenario, the customer is reasonably trusting and relying upon the broker's advice. Consequently, the broker should always be required to act in the best interests of its customers, regardless of how the broker is paid.

Similarly, the imposition of a fiduciary standard should not depend on the type of account the customer holds. Brokers and brokerage firms often argue that no account is a fiduciary account unless the customer has given

---

[11] *See* Consumer Federation of America and Americans for Financial Reform, *Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways* (January 18, 2017), available at https://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf.

[12] UBS, *Wealth Planning*, available at https://www.ubs.com/us/en/wealth/planning.html (last visited Nov. 23, 2018).

[13] Charles Schwab, *Investing Based on Your Goals*, available at https://www.schwab.com/public/schwab/investing/invest.html (last visited Nov. 11, 2018).

[14] Wells Fargo Advisors, *Why Choose Wells Fargo Advisors*, available at https://info.wellsfargoadvisors.com/form.aspx?type=wellsfargoadvisorspacket&cid=WFA140043903&in tcid=WFA140043903 (last visited Nov. 11, 2018).

[15] Merrill Lynch, *Working with Us*, available at https://www.ml.com/working-with-merrill-lynchfinancial-advisor.html (last visited Nov. 11, 2018).

[16] *See supra* n. 7.

the broker discretion to trade the customer's account without the prior approval of the customer. That argument fails to acknowledge the reality of broker-customer relationships. Our experience is that customers usually trust, rely upon and follow the broker's advice. Indeed, the reason why customers typically retain financial professionals such as brokers is for their advice.

Additionally, PIABA also believes that the Rule should recognize that other types of financial recommendations may trigger a fiduciary duty. Specifically, brokers sometimes recommend other financial courses of action preceding the recommendation of a particular security or investment strategy in order to earn the client's trust and cause the client to entrust their assets to the broker for management. A prime example of such a scenario is when a broker recommends to a prospective client that they retire early and/or elect a lump sum payment in lieu of a defined benefit pension which is then turned over to the broker for investment. Obviously, the broker has a financial incentive to recommend such a course of action. Another example of a situation where financial recommendations unrelated to a specific securities recommendation may properly give rise to imposing a fiduciary standard of conduct is when a brokerage firm's personnel provides generalized financial advice to prospective clients for an extended period of time before the customer has met with a broker, in order to induce the customers to open brokerage accounts with the firm.

In short, it is important to recognize that certain financial recommendations, including recommendations to elect a lump sum in lieu of a pension, although not securities recommendations per se, are a necessary precursor to a broker obtaining control of assets which can then be invested through the broker. As such, those recommendations should trigger the same duties as the specific securities recommendations which must inevitably follow.

It is equally essential to recognize that brokers do not merely pick investments or devise investment strategies. As set forth in the examples of firm advertising cited above, brokers and brokerage firms often purport to offer retirement planning advice and/or a wide spectrum of financial advice and services. The firms' advertising presents the image that the firms are doing far more than simply recommending a specific investment or investment strategy.[17]

Given the foregoing realities, PIABA believes that the Fiduciary Rule should: a) always apply to recommendations of any securities transaction or investment strategy involving securities; and b) also apply in any situation where the broker offers generalized retirement planning, financial or investment recommendations to a prospective customer which are designed to encourage the customer to open an account with the firm and/or to bring additional assets to the firm for investment. Such situations include, but are not limited to, recommendations to take early retirement, recommendations to elect a lump sum in lieu of a defined benefit pension, recommendations to refinance a property to use the equity in order to make an investment, and/or recommendations to meet with a broker from the firm.

IV. The Fiduciary Duty Should Continue Throughout the Duration of the Broker-Customer Relationship

PIABA believes that the fiduciary duty owed by a broker to a customer should last for the duration of the customer relationship, just as it does with Investment Advisers. There are several reasons why this is an appropriate standard.

[17] *See supra* n. 7.

First, as discussed above, brokers and broker-dealers hold themselves out as providing continuous advice, and being available to assist customers in planning and managing their wealth and investment goals. As UBS puts it, its advice is "part of a strategy for managing your wealth and pursuing your personal goals for every part of your life, at every stage of your life."[18] Charles Schwab says: "Let us help plan your financial future."[19] Merrill Lynch says it will provide guidance, "making adjustments as your needs change."[20] These firms, and many others, emphasize the continuing relationship they will have with customers. Requiring brokers to undertake an ongoing fiduciary duty is simply requiring them to live up to what they promise.

Further, brokers often continue to be compensated for investment transactions and investment advice after the sale has occurred. For example, certain types of investments, such as variable annuities and mutual funds, continue to pay commissions to brokers for years after the investments are sold. This is because variable annuities and mutual funds are long term investments which require ongoing management, including the repositioning of assets. In other words, the management of a variable annuity or mutual fund, and the payment to a broker for such management, does not end when the customer purchases the product. Accordingly, it logically follows that the broker's fiduciary duties to a customer should continue for as long as the broker is continuing to be compensated for that recommendation.

An ongoing duty is also essential in order to ensure that recommended investment strategies remain in the customer's best interest. Customers often maintain their accounts with a broker for years or even decades. During that time, a customer's investment profile will change, sometimes dramatically. Likewise, the investment strategy that will be in the customer's best interests can also change. For example, a customer who initially invested while employed but has since retired will most likely need a more conservative investment strategy than what was originally recommended. Similarly, a customer who was single when he or she opened an account but has since gotten married and had children is likely to have different objectives and risk tolerances. For these reasons, an investment strategy cannot satisfy a fiduciary standard unless such a standard requires an ongoing assessment and update of the customers' situation to ensure that the strategy is still in the customer's best interests.

V. The Rule Should Specifically Include a Private Right of Action

PIABA strongly believes that the Bureau should clearly provide for a private right of action in its rule, so that investors can take action on their own behalf against financial professionals and their firms who violate the Rule. There are several reasons why PIABA believes the inclusion of a private right of action is important.

First, allowing for a private right of action is consistent with the overarching goal of state and federal securities laws and regulations – which is to protect the investing public. A private right of action would provide firms with a strong incentive to adopt and implement policies and procedures to ensure that financial professionals are adhering to a fiduciary duty and to carefully police conflicts of interest.

---

[18] *Supra* n. 12.
[19] *Supra* n. 13.
[20] *Supra* n. 15.

Further, a private right of action can, and regularly does, supplement the state and federal agencies' public enforcement efforts, including in States which hold brokers to a fiduciary standard.[21] For example, customers may bring an action under Sections 11[22] and 12[23] of the Securities Act of 1933; and under Sections 21D,[24] 21F,[25] and 29[26] of the Securities Exchange Act of 1934. Investors can also arbitrate a broad range of state, federal and regulatory securities violations under the rules promulgated by the Financial Industry Regulatory Authority, if the underlying contract so provides or the customer demands it.[27] The New Jersey rule should recognize these well-established means of protection for private investors. Indeed, limiting remedial measures to actions brought by the State would be inefficient and burdensome upon the State.

Finally, a fiduciary relationship is that of the highest trust and confidence. Whenever that trust is broken, customers should have their own ability to pursue a private right of action in order to prevent the fiduciary standard from becoming meaningless. This is especially important because customers often lack the information and bargaining power necessary to protect their rights. Without a private right of action, customers would be deprived of their primary means to remedy abuses.[28]

VI. The Industry's Arguments Against the Imposition of a Uniform Fiduciary Standard Lack Merit

A. The Fiduciary Duty Rule will help, not harm, small investors.

The securities industry has frequently protested, and continues to promote the argument, that the adoption of any fiduciary standard will harm small investors by preventing them from obtaining personalized financial advice. This begs the question of why any investor would be better off receiving conflicted financial advice, or advice that is not in their best interest, than in receiving no advice at all? We simply do not understand how or why continuing to allow brokers to recommend costly products which primarily benefit the brokers rather than the customers serves the needs of any investor, regardless of the size of their accounts.

Small investors have just as much of a right to be protected from financial abuse as larger investors. Indeed, many smaller investors have a greater need to preserve the money that is invested and cannot afford to lose their money. These investors are also at a disadvantage if they do lose money, because they are often not able to afford counsel, or to obtain any meaningful recovery against the advisor or the firm. Most importantly, the industry's argument that adoption of a fiduciary standard will drive brokers out of business, or result in the cessation of financial services for smaller investors, is not borne out by reality.

California, Florida, Georgia, Missouri, Puerto Rico, South Carolina, and South Dakota have all long considered brokers to be fiduciaries under state common law. Investors in those states have full access to

---

[21] *See* Richard B. Stewart and Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1214 (1982).
[22] 15 U.S.C. § 77k (civil liabilities on account of false registration statement).
[23] 15 U.S.C. § 77l (civil liabilities arising in connection with prospectuses and communications).
[24] 15 U.S.C. § 78u-4 (private securities litigation).
[25] 15 U.S.C. § 78u-6 (securities whistleblower incentives and protection).
[26] 15 U.S.C. § 78j (manipulative and deceptive devices).
[27] FINRA Rules 12200 *et seq*.
[28] *See* Stacy-Ann Evy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond* 44 Hofstra L. Rev. 839, 893–94 (2016) (on information asymmetry); *see generally*, Albert Choi and George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 Va. L. Rev. 1665 (2012) (on how bargaining power asymmetry impacts contract design of nonprice terms).

investment advice and services. This was confirmed by a 2012 study which examined whether there were differences in the services available to investors in states that have fiduciary standards and those that do not. The study found no statistical difference between the two types of states when it came to servicing lower wealth clients, including the ability to provide a broad range of products such as those that provide commission based compensation.[29]

The costs of compliance associated with a fiduciary duty standard are also not meaningfully different from those associated with a mere suitability rule. The same 2012 study discussed above found that there is no statistically significant increase in compliance costs in states in which there is a clear fiduciary standard and ones in which there is no fiduciary standard.[30]

Indeed, when the industry was moving towards the implementation of the Department of Labor's Fiduciary rule, the benefits to investors large and small were readily apparent. In examining those efforts, a report by the Consumer Federation of America determined that:

(i) The DOL rule had begun to eliminate the most harmful conflicts associated with commission-based advice without eliminating access to commission-based advice;
(ii) Despite dire predictions to the contrary, most firms continued to offer commission-based retirement investment advice; and
(iii) Far from driving up investors' costs, the DOL rule was responsible for significant cost reductions.[31]

The anticipation of the DOL Rule did not result in any meaningful reduction of commission-based products. It did not cause any decline in the products or services that are available for small investors. In fact, it did exactly the opposite. As a result of the anticipation of the DOL Rule, brokerage firms offered more services and investment products to small investors than they did prior to the enactment of the DOL Rule. If New Jersey adopts a similar rule, the firms will again innovate and small investors will benefit.

In short, there is substantial evidence that small investors have not suffered any disadvantages when fiduciary rules have been enacted by the states or when the fiduciary rule was enacted by the Department of Labor. There is also no evidence that a fiduciary rule will hurt small investors or prevent them from obtaining financial services. Simply put, a fiduciary rule benefits all investors. The only "harm" it does is to those in the securities industry who wish to continue to be able to take advantage of their customers to their own benefit.

B. Disclosure of conflicts is not enough.

Several in the industry have argued that greater disclosures of conflicts would be sufficient to protect investors. However, these arguments ignore the fundamental nature of a client's relationship with his or her broker: one of trust. Clients do not believe they have to negotiate with their brokers to receive solid advice,

---

[29] *See*, Michael Finke and Thomas P. Langdon, "The Impact of the Broker-Dealer Fiduciary Standard on FinancialAdvice" (Mar. 9, 2012), available at https://www.onefpa.org/journal/Pages/The%20Impact%20of%20the%20Broker-Dealer%20Fiduciary%20Standard%20on%20Financial%20Advice.aspx.
[30] *See id*.
[31] *See*, Consumer Federation of America, *The Department of Labor Conflict of Interest Rule is Already Delivering Benefits to Workers and Retirees: Delay Puts Those Benefits at Risk* (Jan. 31, 2017), available at https://consumerfed.org/in_the_media/department-labor-conflict-interest-rule-already-delivering-benefits-workers-retirees/.

nor do they think their brokers are trying to squeeze every last bit of compensation from their accounts. Simply put, clients do not think their brokers are lying to them and that it is their job to find the lies.

The foregoing is borne out by recent studies which show that disclosures do not lead to greater understanding, even when read. For example, a Rand Corporation study commissioned by the SEC revealed that, after reviewing disclosures regarding the differing duties of investment advisers and brokers, many individuals still remained confused about when firms owed them fiduciary duties and when they did not.[32] This finding was confirmed by another study of the effect of such disclosures which was conducted by the American Association of Retired Persons, the Consumer Federation of America, and the Financial Planning Coalition.[33] In short, disclosure of differing duties does not adequately put investors on notice that they should not trust their broker, or that a "buyer beware" standard applies.

Providing greater disclosure also does not appropriately mitigate the conflicts of interest inherent in the relationship between financial advisors and customers. Instead, it places the burden on the customers to fully understand the impact of those conflicts on the future of their retirement savings. However, the financial advisors have held themselves out to be professionals who are there to offer guidance to investors on important, life decisions. They should accept the responsibility that comes with the profession and with the trust they have sought to earn by managing the life savings of an individual.

C. *New Jersey retirement savers and investors cannot afford to wait for the SEC to promulgate rules.*

New Jersey retirement savers and investors are losing $610 million every year due to conflicted advice from financial advisors.[34] Despite that sobering statistic, many in the industry continue to argue that New Jersey should delay the implementation of its own rule until such time as the SEC releases its final rule. However, the SEC has had almost eight years since it issued a report recommending the consideration of rulemaking that would apply to brokers providing personalized investment advice.

The White House Council of Economic Advisors concluded that this conflicted advice costs Americans $17 billion each year.[35] Likewise, the Department of Labor concluded that the cost to investors of investing based on conflicted advice is about $1.4 billion a month.[36] In the past eight years since the SEC study, New Jersey retirement investors have lost over $4.8 billion ($610 million x 8 years). New Jersey investors cannot wait any more. It is imperative that New Jersey retirement investors receive these protections as soon as possible.

---

[32] SEC, *Investor Testing of Form CRS Relationship Summary*, 46 (Nov. 2018), available at https://www.sec.gov/about/offices/investorad/investor-testing-form-crs-relationshipsummary.pdf.

[33] AARP, Consumer Federation of America, and Financial Planning Coalition, *Final Report on Testing of Proposed Customer Relationship Summary Disclosures*, 12 (Sept. 10, 2018), available at https://consumerfed.org/reports/report-on-testing-of-proposed-customer-relationship-summary-disclosures/.

[34] *See*, Economic Policy Institute, *Here is what's at stake with the conflict of interest ('fiduciary') rule* (May 20, 2017), available at https://www.epi.org/publication/here-is-whats-at-stake-with-the-conflict-of-interest-fiduciary-rule/

[35] *See*, White House Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings* (Feb. 2015); available at https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

[36] *See*, "Regulating Advice Markets; Definition Of The Term "Fiduciary"; Conflicts Of Interest - Retirement Investment Advice; Regulatory Impact Analysis for Final Rule and Exemptions" (April 2016) ("RIA"), 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.

VII. Conclusion

PIABA supports the Bureau's efforts to heighten the duty of brokers who provide investment advice to their customers. PIABA urges the Bureau to adopt a broad, uniform fiduciary standard applicable to all financial professionals who provide investment advice to investors. PIABA thanks the Bureau for the opportunity to comment on this important issue.

Very truly yours,

Christine Lazaro
PIABA President