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April 17, 2017

By E-Mail to EBSA.FiduciaryRuleExamination@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of the term Fiduciary – General Comments
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: General Comments regarding the examination described in the
President's Memorandum -- **RIN 1210-AB79**

Dear Sir or Madam:

We submit this letter in response to the request of the U.S. Department of Labor (the "DOL") for comments on regulations published in the Federal Register on April 8, 2016 (the "Regulation"). The Regulation implements a new definition of the term "investment advice" under Section 3(21) of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The DOL has been directed to reexamine the effect of the Regulation on the ability of Americans to gain access to retirement information and financial advice. As part of this examination, the DOL was, among other things, directed to consider:

- whether the anticipated applicability of the Fiduciary Rule and PTEs has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
- Whether the anticipated applicability of the Fiduciary Rule and PTEs has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees.

Seward & Kissel LLP has a substantial number of clients who will be affected by the Regulation. We respectfully submit the following comments and request that the DOL consider them in accordance with the President's memorandum. Our comments fall into two categories:

- (1) the Regulation will prevent most IRAs and small plans from investing in private investment funds; and
- (2) applying ERISA's fiduciary obligations to advice between and among financial institutions will result in dislocations and disruptions within the retirement services industry that may adversely affect investors and retirees.

The views we express in this letter are our own and do not necessarily reflect those of our clients.

IRAs and Small Plans Will Be Prevented From Investing In Private Investment Funds

The Regulation's definition is so broad and the cost of compliance with the BIC Exemption is so high that the vast majority, if not all, private fund clients of Seward & Kissel have elected to exclude investments by IRAs and small plans after the applicability date, unless the IRA Owner or plan fiduciary represents that he or she has retained an independent fiduciary regarding the investment. It is not clear that a group of advisers capable and willing to provide fiduciary advice on investments in private funds will emerge, and if they do whether the additional cost of that advice will be of a benefit to the IRAs or small plans. It is clear that the Regulation as drafted will reduce Americans' access to these investments, which the DOL itself noted that access to these investments "allow realization of economies of scale, [and] they are especially suited for the purposes of smaller plans".¹

This restriction could be easily eliminated, if the Regulation made clear that the offering of interests in private investment funds and ongoing communications between the fund's manager and the investors is not "investment advice". This clarification would not undermine the general goal of the DOL in issuing the Regulation to protect unsophisticated plan participants and IRA Owners as existing securities laws limit the offering of these interests to retail investors.

For example, under the Securities Act of 1933, as amended (the "1933 Act"), a company that offers or sells its securities must register the securities with the SEC or find an exemption from the registration requirements. The 1933 Act provides companies with a number of exemptions. Certain exemptions permit a company to sell its securities to what are known as "accredited investors." The term "accredited investor" is defined in Rule 501 of Regulation D and includes a "plan" within the meaning of ERISA if the investment decision is made by a plan fiduciary

¹ See, the preamble to the DOL's "Plan Assets Regulation" 29 C.F.R. 2510.3-101.

which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of \$5,000,000, or, if a self-directed plan, has investment decisions made solely by persons that are accredited investors. The term also includes a natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year, or has a net worth over \$1 million, either alone or together with a spouse (excluding the value of the person's primary residence).

Advice Between and Among Financial Institutions

Registered investment advisers currently receive information, research and market data from a plethora of sources, including sources within its organization. The scope of this information is as varied as the investment strategies investment advisers employ and can include proprietary research on companies that the investment adviser is considering acquiring, due diligence on a prospective acquisition or a valuation of a portfolio an investment manager is considering purchasing or selling. If the investment adviser is acting as a fiduciary to a pension plan, under the Regulation, this type of market research is considered a recommendation as to the advisability of acquiring, holding, disposing or exchanging securities specifically directed to the investment adviser for its consideration in making investment decisions, and because the provider of the information is not independent of the investment adviser, or the investment adviser pays for the market research with plan assets, the Regulation imposes ERISA fiduciary status on the provider of the research.

The effect of ERISA fiduciary status and liability will be to increase the cost of such market research and/or limit the availability of such research provided to professional investment managers serving ERISA clients and cause dislocations and disruptions within the retirement services industry that may adversely affect investors and retirees. By amending the Regulation to provide that any advice given to an "Independent" plan fiduciary is not "investment advice" under the regulation, the DOL would eliminate the disruption of information within the retirement services industry. By defining an "Independent" plan fiduciary as (i) a fiduciary that is not related to the plan, the plan sponsor, participant or IRA Owner and (ii) that is appointed as an "investment manager" or a "QPAM", this amendment would not undermine the goal of the Regulation to protect unsophisticated plan fiduciaries and IRA Owners.

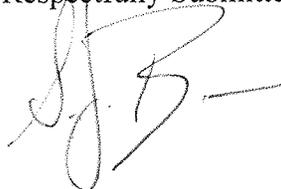
Office of Regulations and Interpretations

April 17, 2017

Page 4

We thank the DOL for the opportunity to comment on the Regulation, and hope that these comments are helpful in the DOL's efforts to meet the directions set forth in the President's memorandum.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be "S. B.", with a horizontal line extending to the right.