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Submitted Electronically
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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Fiduciary Rule Examination
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: RIN 1210-AB82; Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions; Delay of January 1, 2018 Applicability Date

Ladies and Gentlemen:

Thank you for the opportunity to submit these comments on the question of whether the Department of Labor (the "Department") should delay the January 1, 2018 applicability date for the remaining conditions of the Best Interest Contract ("BIC") Exemption, Principal Trading Exemption, and PTE 84-24, all of which were issued in connection with the regulation that redefines the term "fiduciary" under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 ("ERISA") and section 4975(e)(3)(B) of the Internal Revenue Code (the regulation and accompanying prohibited transaction exemptions referred to together as the "Rule"). We appreciate the Department's consideration of a delay in the applicability date based on changes in the marketplace and the burdens imposed on financial institutions by requiring compliance within the time frame currently contemplated.

For the reasons set forth in this comment letter, we believe that the Department should delay the applicability date of the Rule for no less than 24 months from the current January 1, 2018 planned applicability date. As explained below, this time period will give the Department the time it needs to review and assess the considerable volume of evidence that it has regarding this complex and important rule; it will avoid adverse effects on consumers that many believe will result from the Rule, and which the President's Memorandum regarding the rule seeks to avert; and this 24-month delay will spare the industry the potential double-costs of coming into compliance with the current Rule, only to have to change systems again in order to comply with a new and revised rule.

In requesting an extension of the January 2018 applicability date, we agree strongly with the comments submitted by the Securities Industry and Financial Markets Association ("SIFMA"), the Investment Company Institute ("ICI"), and the U.S. Chamber of Commerce.

Background

UBS AG, a subsidiary of UBS Group AG, operates three main lines of businesses in the United States—its Wealth Management Americas business primarily operated through UBS Financial Services Inc. ("UBSFS"), its investment banking business primarily operated through UBS Securities LLC ("UBS Sec LLC"), and its global asset management business primarily operated through UBS Asset Management (Americas) Inc. ("UBS" is used throughout in reference to the UBS business in the United States). UBSFS is dually registered as a broker-dealer and an investment adviser and is one of the largest securities firms in the United States. As of December 31, 2016, Wealth Management Americas (which, as noted, primarily operates through UBSFS) had invested assets totaling over $1 trillion and close to 15,000 employees—including a network of approximately 7,000 financial advisors.

UBS Sec LLC is a registered broker-dealer and a member of the Financial Industry Regulatory Authority ("FINRA"), the New York Stock Exchange, Inc., NASDAQ, and other principal exchanges. In addition, UBS Sec LLC provides a full range of investment banking services and is a registered futures commission merchant, a member of certain major United States and foreign commodity exchanges, and a primary dealer in United States Government securities.

Retirement assets constitute a significant portion of client assets (over one million retirement accounts) in the UBS Wealth Management Americas business. Additionally, UBS provides services to ERISA plans and individual retirement accounts ("IRAs") directly or through plan asset investment vehicles.

The broker-dealer industry is as comprehensively regulated as any industry in the United States. Indeed, the SEC Study on Investment Advisers and Broker-Dealers required more than 40 pages just to describe the myriad of statutes, rules, judicial decisions, and interpretations that regulate almost every aspect of a broker-dealer's conduct, the multitude of remedies available whenever there is a violation, and the parallel regulatory regimes under state law.[1]

Comments

As has been widely reported, different financial institutions have taken different approaches toward compliance with the Rule. For UBS alone, study of the various approaches, scoping their implementation, and preparing to build them into our systems and practices has already cost approximately $23 million. Unfortunately, we believe that these costs have been incurred without convincing evidence that investors will be better served under the Rule as written.

In preparing for the June 9, 2017 applicability date, UBS took a different approach toward the Rule than many other large financial institutions. While UBS studied and scoped the full panoply of options, we were not prepared to disrupt and confuse our clients with new requirements, account structures, and fees until the ultimate terms and requirements of the Rule were clear and in effect.

[1] SEC, *Study on Investment Advisers and Broker-Dealers*, at 46–80, 80–83, 88–91 (Jan. 2011), *available at* https://www.sec.gov/news/ studies/2011/913studyfinal.pdf.

As a result, UBS developed an interim approach that did not disrupt clients or their relationships with their financial advisors. The costs to UBS, which were great, did not reflect a model that would be sustainable permanently once the Rule was fully in effect. Rather, we decided that it was not fair to our clients to make decisions about how to best serve them in compliance with the Rule until the Department had the opportunity to fully review the Rule in light of the President's Memorandum to the Secretary of Labor, and until the Department issued guidance or amended regulations or rescinded the Rule. We are encouraged by Secretary Acosta's desire to coordinate with the Securities and Exchange Commission to develop a Rule that does not create undue additional regulation on an industry that is already heavily regulated.

Once the Department makes a final determination regarding the current Rule, issues a new regulation, or rescinds the Rule, financial institutions will again need to review their business models and systems, determine whether changes are required or desirable, and build the policies, procedures, technology, and training to implement those changes.[2] Based on our recent experience with the efforts and costs incurred in connection with compliance for the June 9, 2017 applicability date, we believe that an extension of 24 months is necessary to ensure that financial institutions have sufficient time to develop and implement new solutions. It would be wasteful to require financial institutions to immediately incur the costs of preparing for a Rule that will be subject to a full review and may well not be implemented in its current form.

As the Department considers the appropriateness of extending the January 1, 2018 applicability date, UBS offers the following suggestions and principles to guide the consideration of an extension. First, the Department should take enough time to thoroughly consider the costs and benefits of the Rule. The Department has not yet fully considered the extent of compliance costs, the costs to individual investors of losing access to financial advice, and the likelihood of increased litigation costs resulting from the BIC Exemption. The Department should therefore allow itself sufficient time to fully take account of the data regarding the Rule's costs and benefits. Second, the Department should avoid imposing unnecessary burdens on consumers—in the form of reduced services and higher prices—during the Department's review period. Third, the Department should not require the industry to expend massive resources to comply with the conditions of a Rule that may never go into effect. Finally, the Department should announce its delay as soon as possible, because by September, the industry will need to begin expending resources to comply with the January 1, 2018 applicability date and to notify clients of upcoming changes.

1. The Department should allow itself sufficient time to conduct an analysis that takes account of new information and permits re-evaluation of important information in the existing rulemaking record.

A delay of the January 1, 2018 applicability date is necessary to allow the Department sufficient time to perform a thorough analysis of the Rule and its consequences.

In particular, there are at least three matters that did not receive full consideration in the original rulemaking that, we respectfully submit, could substantially alter the Department's analysis of the

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[2] UBS believes that the most appropriate course is for the Department to permit the SEC to take the lead in this area and to rescind the current Rule. We appreciate, however, that the Department will consider a range of options as it responds to the Presidential Memorandum.

Rule's costs and benefits. First, compliance costs have proved to be far higher than the Department originally predicted; second, the Department originally had underestimated the costs that retirement savers have borne by having diminished access to financial advice; and third, the Department should conduct further analysis of the impact that litigation under the BIC Exemption would have on the industry and ultimately consumers. All three matters are addressed below.

A. Compliance costs are proving to be greater than the Department predicted. The Department's "primary estimate" of the cost to comply with the Rule and exemptions was $16.1 billion over ten years, with $1.5 billion in annual costs after the first year.[3] While those figures are substantial, a new study by the American Action Forum estimates that the Rule will actually impose $31.5 billion in total costs with $2 billion in annual impact.[4] An Oxford Economics study also reports that start-up costs to the industry have been far higher than the Department's estimates.[5] The American Action Forum study also found that four companies reported up-front combined compliance costs of over $100 million in 2016 alone, or an average of over $25 million each.[6] (The firms' compliance costs in 2017 would, of course, be additional.) These figures are consistent with UBS's own experience in developing its interim compliance model. These costs will fall not only on large firms, but also on smaller broker-dealers, who may be less able to absorb the burden and, thus, could face the greatest risk under the Rule.[7]

It is essential for the Department to have sufficient time to reconsider these cost estimates in light of the new data and to reevaluate the cost-benefit analysis undergirding the Rule.

B. UBS also believes that the Department will need to spend additional time grappling with the costs to investors that result from reduced access to financial advice. The President's Memorandum instructs the Department to consider whether the current Rule, "may adversely affect the ability of Americans to gain access to retirement information and financial advice."[8]

Simply having access to a financial representative motivates individuals to save more than they otherwise would.[9] Research shows that losing access to this type of advice is associated with a significant loss of asset value.[10] Yet, the Rule will result in thousands of investors losing access to financial representatives and the services they can provide. The Rule will result (and is already resulting) in financial institutions no longer offering their customers the access to financial advice that was available before the Rule was issued. The Rule's consequences will be borne

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3 *Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 20,946, 20,951 (Apr. 8, 2016).

4 American Action Forum, *Fiduciary Rule Has Already Taken Its Toll: $100 Million in Costs, Fewer Options* (Feb. 22, 2017), *available at* https://www.americanactionforum.org/insight/fiduciary-rule-already-taken-toll-100-million-costs-fewer-options/.

5 Oxford Economics, *The Fiduciary Rule Increases Costs and Decreases Choice* (Apr. 15, 2017), *available at* http://www.financialservices.org/uploadedFiles/FSI/Advocacy_Action_Center/The_Fiduciary_Rule_Increases_Costs_And_Decreases_Choice.pdf.

6 American Action Forum, *supra* note 4.

7 ThinkAdvisor, *DOL Rule Will Force the Consolidation of Broker-Dealers, Cerulli Report Says* (Dec. 12, 2016), *available at* http://www.lifehealthpro.com/2016/12/20/dol-rule-will-force-consolidation-of-broker-dealer.

8 Presidential Memorandum on Fiduciary Duty Rule, 82 Fed. Reg. 9675, 9675 (Feb. 7, 2017).

9 Charles Schwab & Co., *Communicating Retirement Plan Benefits in a World of Skeptics*, *available at* http://www.schwab.com/pubhclf1le/P-8557214.

10 Claude Montmarquette et al., *Econometric Models on the Value of Advice of a Financial Advisor*, *available at* http://econpapers.repec.org/paper/circirpro/2012rp-17.htm.

disproportionately by people of lower incomes with fewer assets, as firms will be forced to raise the minimum thresholds for accounts.[11]

The Department should delay the applicability date to give itself ample time to fully consider the impact on retirement savers of reducing access to financial advice, particularly for those who need that advice most of all.

C. We respectfully submit that one of the industry's principal concerns with the Rule did not receive full consideration during the original rulemaking: the direct and indirect consequences of litigation under the BIC Exemption. The Department should give particularly careful attention to the effects of litigation in light of the President's explicit directive to assess whether the Final Rule "is likely to cause an increase in litigation."[12]

According to a report by Morningstar Research Services, the investment industry should expect to pay between $70 million and $150 million in class-action settlements annually because of the Rule.[13] As a result, and among other consequences, insurance coverage costs are expected to rise dramatically. And, according to a survey of financial firms conducted by SIFMA, more than 60% of firms anticipate that some or all of the costs of litigation and liability insurance may be passed on to clients.[14]

Some of the principal costs of litigation are not direct, but occur in the form of foregone opportunities that could have brought more products and opportunities to the market. That is the case with this Rule, whose uncertainties and potentially significant litigation costs have deterred firms from products and services they might otherwise have offered. The Department should examine this effect as it conducts its current review.

Recently the Department decided that in the ongoing litigation over the Rule, it would no longer defend the Rule's prohibition on including class action waivers in arbitration agreements. We consider this to be a positive development, but believe that litigation costs remain a significant concern with the Rule. Among other things, so long as the Rule has a private right of action, class actions will remain a concern for the hundreds of thousands of broker-dealers registered with FINRA and covered by its arbitration rules, since FINRA does not permit class action waivers.

As the Department is aware, addressing these considerations—and others—will require time. The Department must review new evidence that is submitted; scrutinize prior evidence and assessments that may warrant reconsideration; provide notice and opportunity for comment on any proposed changes to the Rule; and then review and respond to the comments that are received in preparation of a final rule. Given the above noted flaws in the cost-benefit analysis undergirding the Rule, underestimating the costs to investors of reduced access to advice, costs of compliance, and costs of litigation, the Administrative Procedure Act ("APA") does not preclude the Department from engaging in such additional analysis but, instead, obligates it to do so. To ensure

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[11] Comment Letter Submitted by SIFMA at 8–9 (Apr. 17, 2017), *available at* http://www.sifma.org/uploadedfiles/correspondence/comment_letters/2017/sifma%20letter%20-%20rin1210-ab79%20wo%20appendix.pdf?n=24493.

[12] 82 Fed. Reg. at 9675.

[13] Morningstar, Inc., *Weighing the Strategic Tradeoffs of the U.S. Department of Labor's Fiduciary Rule* (Feb. 8, 2017).

[14] Comment Letter Submitted by SIFMA at 12 (Apr. 17, 2017), *available at* http://www.sifma.org/uploadedfiles/correspondence/comment_letters/2017/sifma%20letter%20-%20rin1210-ab79%20wo%20appendix.pdf?n=24493.

sufficient time to discharge these functions responsibly—and to allow the industry time to then come into compliance—the Department should provide a 24 month delay to the January 1, 2018 applicability date.

2. The Department should avoid imposing needless burdens on retirement savers.

The President's directive to the Department to reconsider the Rule is premised on the possibility that the current Rule "may adversely affect the ability of Americans to gain access to retirement information and financial advice," may reduce "Americans' access to" financial products, and may increase "the prices that investors and retirees must pay to gain access to retirement services."[15] Given that the Department could conclude the Rule may indeed have such adverse effects and should be amended or rescinded and the genuine possibility the Rule will not go into effect as currently written, consumers should not be forced to experience those adverse effects while the Department's review is underway. Accordingly, the January 1, 2018 applicability date should be delayed to avoid harming the very people the Department seeks to benefit as the Department conducts its further review.

We agree with the studies that have reported that financial firms will substantially change the services they offer as a result of the Rule. Some firms will move to fee-based accounts, raise investment minimums for commission-based IRAs, eliminate variable annuity products, and exclude other products (such as annuities and mutual funds) from commission-based IRAs.[16] According to a comment letter filed by Americans for Prosperity, a study by the National Economic Research Association predicts that more than 57% of current retirement savings account holders will be forced out of their current plan by the final rule, and an Oliver Wyman report concluded that the rule could raise the price of financial advice by nearly 200 percent.[17]

3. The Department should not force compliance with requirements that might be changed.

The President has directed the Department "to examine" the Rule and "prepare an updated economic and legal analysis concerning the" Rule's "likely impact," noting that the Rule "may not be consistent with the policies of my Administration."[18] If the Department finds that the Rule has harmed or may harm investors through a reduction of access to retirement savings products, information, or advice, through "dislocations or disruptions within the retirement services industry," or through increased prices due to "an increase in litigation," or if the Department concludes that the Rule is at all "inconsistent with" the Administration's policies, then the Department "shall" publish a proposed rescission.[19] Thus, depending on the results of the

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15 82 Fed. Reg. at 9675.

16 Michael Wursthorn, *New Retirement Rule Is Delayed, but Not Its Impact*, Wall St. J. (Apr. 8, 2017), *available at* https://www.wsj.com/articles/new-retirement-rule-is-delayed-but-not-its-impact-1491652800.

17 Comment Letter of Americans for Prosperity (Apr. 6, 2017), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01202.pdf.

18 Presidential Memorandum on Fiduciary Duty Rule, 82 Fed. Reg. at 9675, 9675 (Feb. 7, 2017).

19 *Id.*

Department's review, there is a genuine possibility the Rule will not go into effect as currently written.

Given this possibility of a rule change or rescission, the Department should avoid imposing compliance costs on the financial services industry that may ultimately prove unnecessary. If the Department does not delay the January 1, 2018 implementation date, then financial services firms will have to bear the costs of coming into compliance with requirements that may be in effect for only a limited period. Moreover, if the Department then issues a revised rule (rather than rescinding the Rule in full), the industry will incur further compliance costs to satisfy the Department's new, revised requirements. Thus, absent a delay, the financial services industry faces the prospect of double compliance costs, first to come into compliance with the current regulations, and second to prepare for whatever requirements a revised rule might impose.

The Department should avoid imposing such unnecessary costs on the financial services industry. We note that such costs will ultimately be borne in part by shareholders (which include many retirement plans) as well as by consumers, in the form of increased service charges and account fees for clients. Financial firms and advisors may also feel compelled to offer clients a reduced range of investment products, services, and assistance.

4. The Department should delay the January 1, 2018 applicability date as soon as possible.

It is crucial to the financial services industry that the Department announce the delay of the January 1, 2018 applicability date as soon as possible, because affected firms will need at least four months to come into compliance with the BIC Exemption, the Principal Trading Exemption, and the amendments to PTE 84-24. Specifically, if the Department does not announce the delay of the applicability date by September 1, then time, efforts, and resources will be invested that will never be recovered. In September, for instance, UBS would need to begin notifying clients, building new technology, and implementing required changes to comply with the January 1, 2018 applicability date. Once again, many of these costs are likely to be passed on to consumers.

For these reasons, the Department should delay (for at least 24 months) the January 1, 2018 applicability date as soon as practicable, so that affected firms may avoid expending time and money to comply with regulatory requirements that may be withdrawn or never go into effect. Clients should not lose access to essential services and face higher prices during an interim period of uncertainty. The Department should give itself sufficient time to perform a thorough review of the record and a complete analysis of the Rule's costs and benefits. As noted above, such a thorough reconsideration of the cost-benefit analysis conducted previously is not precluded by the APA, but is instead required by it. Finally, the industry should not be forced to undertake costly and disruptive changes until it is certain that the requirements in issue are final and permanent.

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We appreciate the Department's attention to this important matter, and thank you for this opportunity to comment.

Very truly yours,

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