

VIA ELECTRONIC MAIL (EBSA.FiduciaryRuleExamination@dol.gov)

August 3, 2017

To: Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue, NW
Suite 400
Washington, DC 20210

RE: RIN 1210-AB82: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

On July 6, 2017, the Department of Labor (“Department”) published a request for information (“RFI”) in connection with its examination of the final rule defining who is a “fiduciary” as a result of giving investment advice for a fee or other compensation with respect to assets of a plan or IRA (“Fiduciary Rule”). The RFI seeks public input regarding the advisability of extending the January 1, 2018 applicability date of certain provisions in the Fiduciary Rule and its accompanying exemptions, including the Best Interest Contract Exemption and Prohibited Transaction Exemption 84-24.

KMS Financial Services, Inc. (“KMS”) appreciates the opportunity to respond to the Department’s RFI. KMS supports a carefully-crafted, universal fiduciary standard of care that will be applicable to all professionals providing personalized investment advice to retail clients. However, we do not support the Fiduciary Rule and accompanying exemptions as currently written.

KMS supports a delay in the January 1, 2018 applicability date in order to allow the Department to conduct a detailed review of the Fiduciary Rule, its negative impact on investors’ access to retirement planning services and new innovations and approaches that may alleviate many of these concerns. We believe these negative impacts can be mitigated by making the following changes discussed further below:

- Streamline the documentation and disclosure requirements of the Best Interest Contract Exemption (BICE) while eliminating its private right of action;
- Create a single best interest standard applicable to all investors;
- Revise and broaden the level compensation rules; and
- Revise rules for IRA rollovers

About KMS

KMS Financial Services, Inc. (KMS) is an SEC registered securities broker-dealer and SEC registered investment advisor with over 325 representatives. Based in Seattle, KMS is a wholly owned subsidiary of Ladenburg Thalmann Financial Services, Inc., a publicly-traded diversified financial services company based in Miami, Florida. KMS' affiliates include industry-leading independent broker-dealer firms Securities America, Inc., Triad Advisors, Inc., Securities Service Network, Inc., and Investacorp, Inc. as well as Premier Trust, Inc., Ladenburg Thalmann Asset Management Inc., Highland Capital Brokerage, Inc., a leading independent life insurance brokerage company, and Ladenburg Thalmann & Co. Inc., an investment bank which has been a member of the New York Stock Exchange for over 135 years.

Discussion

1. Streamline the documentation and disclosure requirements of the Best Interest Contract Exemption (BICE) and eliminate the private right of action.

A. Negative Impact on Small Investors

We are concerned that the cost and other impacts of full implementation of the Fiduciary Rule will have significant negative consequences for investors who benefit from and value personal retirement planning services. This increase in cost will in turn will increase the prices that investors and retirees must pay, and ultimately reduce access to retirement planning services. Due to the Fiduciary Rule's impact, the economics of managing small accounts is changing; the fixed cost of servicing these accounts will exceed revenue that will be earned. Due to these changing economics, many firms have indicated their intentions to limit smaller investors to robo-investing type account services or be asked to move their accounts. These small (often entry level, novice investors) will lose access to the personalized retirement planning services vital to their planning for a dignified retirement. We believe that without significant changes the Fiduciary Rule will have a devastating impact on investor access to retirement planning services and small investors will bear the brunt of that impact.

B. Private Right of Action

The BIC Exemption's provision prohibiting Financial Institutions from including contractual provisions waiving a Retirement Investor's right to pursue a class action has created uncertainty regarding the true costs of the Fiduciary Rule and has been a fundamental element of the opposition to the Fiduciary Rule. This is because the private right of action creates unquantifiable financial risk for advisors and financial institutions and will not produce benefits to investors that are commensurate with its costs. This private right of action will no doubt lead to an increase in litigation, which will lead to

increased costs for Financial Institutions, which will, in turn, lead to increased prices that investors and retirees must pay to gain access to retirement services.

- *The brokerage industry should expect to absorb between \$70 million and \$150 million annually in class-action litigation costs. The price-tag range, calculated by Morningstar senior equity analyst Michael Wong, is on top of the \$1.5 billion annual cost to the industry, as estimated by the DOL's regulatory impact analysis.*¹
- *Marcia Wagner, founder and principal of The Wagner Law Group, agrees that the simple reality of allowing class-action lawsuits will lead to class-action lawsuits. "If the law stands, as written, the likelihood of class actions, especially with respect to IRAs will increase exponentially," she said.*²
- *In the long term, industry can expect to pay between \$70 million and \$150 million in annual class-action settlements. In the near term, the numbers are likely to be higher, said Wong.*²
- *"As night follows the day, there will be more litigation," Skadden Arps Slate Meagher & Flom LLP partner Seth Schwartz said of the new rules.*³
- *Chris Thorsen, a partner in the Nashville office of Bradley Arant Boult Cummings and who heads the firm's Business and Securities Litigation Practice Team, said the DOL's final rule, while well-intentioned, will more than likely end up hurting investors and attracting plaintiffs attorneys looking for new business. It means it'll be open season, for a period of years... [Plaintiffs attorneys] know it'll be expensive for defendants, and they'll take advantage of that."*⁴

The BICE's private right of action is an inappropriate and ineffective mechanism for enforcement that should be replaced by a means more likely to promote compliance without imposing an unmanageable burden on financial advisors and financial institutions.

C. BICE Disclosures

The BICE's disclosure obligations further increase firms' compliance costs, but their volume and complexity make them unlikely to benefit investors as intended. The disclosures proscribed by BICE are overly complicated which makes it highly unlikely that they will be effective in achieving the DOL's goal of transparency and usability for investors. Investors do not need or want these voluminous and duplicative disclosures, and will not read, refer to, or rely on them. Further, the cost of complying vastly outweighs any marginal usefulness of the disclosures. These additional compliance costs will, again, lead to increased prices that investors and retirees must pay to gain access to retirement services. Further, the complexity of the disclosure requirements significantly increases the likelihood that firms operating in good faith to comply will

¹ "DOL Fiduciary Rule Class-Actions Costs Could Top \$150M a Year." By Jeff Benjamin, Investment News

² "For Fiduciary Rule, Morningstar Sees Up to \$150M in Annual Class Action Settlements. By Nick Thornton, ThinkAdvisor.com

³ "Why Plaintiffs Firms Will Love DOL's New Fiduciary Rules." By Carmen Germaine, Law360

⁴ "Class Actions Will Test DOL's New Fiduciary Rule, Attorney Says." By Jessica Karmasek, Legal Newsline

make unintentional errors in their disclosures which could further confuse clients as well as have significant financial consequences for firms.

A streamlined, easy-to-read, global disclosure containing information the most pertinent to investors would be much more appropriate documentation for the BICE. Experience has demonstrated that more disclosure is not necessarily better disclosure. Consumer testing has shown that consumers are more likely to read notices that were simple, provided key context up front, and had pleasing design elements, such as large amounts of white space. This testing indicated that notice in the form of a table was more effective than a long, verbose notice.

We suggest that firms should instead be required to deliver a “global” disclosure document about their services, general disclosure of forms of compensation, and material conflicts of interest at the time an account is established. The relevant disclosures should be available on a website maintained by the firm, and access to it should be deemed equivalent to delivery of the disclosures for existing clients. Draft legislation circulated by Representative Ann Wagner (R-MO) includes a disclosure requirement at the outset of the account relationship and provides a workable format: a description of the type and scope of services to be provided, the standard of conduct applicable to the relationship, the types of compensation that may be charged, and any material conflicts of interest.

2. Create a single best interest standard applicable to all investors

Under the Fiduciary Rule, retail investors must understand multiple standards of care which will vary, not only by service, but by the account type as well. As such, this will likely create confusion and adversely affect investors. In the example below, a client has five different accounts, each subject to different, sometimes multiple, standards of care. Additionally, the fact that certain accounts are subject to the Fiduciary Rule, and even differing Prohibited Transaction Exemptions under the Fiduciary Rule, whereas other accounts are not, will create confusion for the client as to why a best interest standard is applicable to certain accounts and not applicable to others. A uniform fiduciary standard of care applicable to all accounts will not create this level of complexity and confusion.

1. Commission based IRA account - subject to the Fiduciary Rule, BIC Exemption, and FINRA suitability standards.
2. A commission based individual account - subject to FINRA suitability standards.
3. A discretionary advisory IRA account - subject to the Fiduciary Rule, and well-established RIA fiduciary standards. While both use the term “fiduciary,” they each would have a different regulatory and legal history.
4. Non-discretionary advisory IRA – subject to the Fiduciary Rule, BIC Exemption, and RIA fiduciary standards.
5. Discretionary advisory individual account – subject to well established RIA fiduciary standards.

We believe efforts to coordinate the SEC and DOL's regulatory efforts have the potential to reduce cost, preserve investor access to advice, and develop a more comprehensive Best Interest standard that will apply to financial advice rendered in connection with all of investment assets of retirement savers, not just those that are tax-qualified. Secretary Acosta recently told members of Congress that he has asked the new SEC chair whether the SEC will work with the DOL on reviewing the Fiduciary Rule and that Chairman Clayton has indicated a willingness to do so. We believe a delay of the Fiduciary Rule's full implementation would create an opportunity for meaningful discussions among the DOL, SEC, industry and investors about new approaches to achieve the DOL's goals without reducing investor access to retirement planning services.

3. Revise and broaden the level compensation rules

KMS supports the concept of reasonable compensation, but the standard as written is too vague which creates significant compliance challenges. In addition, application of the reasonable compensation standard and related requirements often harms investors by limiting their choices and/or increasing their costs. Because of concerns regarding the vagueness of the reasonable compensation requirement of the BICE, some Financial Institutions have announced the discontinuation of commissionable retirement products and services. For many investors who prefer a buy-and-hold investment strategy, a commission relationship is in their best interest due to long-term performance and reduced costs. For those buy-and-hold investors working with a trusted advisor at one of these Financial Institutions, this means that the investor will be required to either:

1. Move to an advisory relationship with their current trusted advisor; a relationship that increases long-term costs to the investor, or
2. Move their account to another advisor who can provide commission retirement products and services, but does not have a long-term relationship with the client.

Both scenarios harm the investor either by increasing costs, reducing access to a trusted financial advisor, or both. This example highlights the need for useful guidance on reasonable compensation in order to ensure that investors maintain access to products and services. We support a principles-based approach to the definition of reasonable compensation while providing the necessary guidance for financial institutions to have confidence in the quality of their compliance efforts.

Additionally, as firms have worked in the months since the Fiduciary Rule was promulgated to try to comply with the vague standard, it has become apparent that industry-wide changes must be considered, reviewed, structured, and implemented. Although the industry has worked diligently to consider how to implement these changes, more time is

required for all parties in the product manufacturing and distribution chain to implement all of the necessary adjustments.

The Fiduciary Rule offers streamlined compliance requirements to Level Fee Fiduciaries due to the fact that this structure reduces conflicts of interest which reduces the need for heightened surveillance around advisor conflicts of interest. As a result, many firms have transitioned their brokerage accounts to these fee-based advisory accounts to avoid having to rely on the BICE. As discussed above, this requirement to move client accounts to a fee-based arrangement may lead to client harm. By broadening the availability of the streamlined Level Fee Fiduciary requirements, firms will be able to offer institutional share class mutual funds (also known as “clean shares”), T-shares and other product innovations to create level fee arrangements.

Innovations in products and services are underway that create opportunities to simplify and streamline the regulatory requirements associated with the Fiduciary Rule and better accomplish its stated goals. As the Department noted, *“this final rule’s delay in the applicability of the Fiduciary Rule and PTEs might make it possible to avoid some of the cost of continuing to develop and implement T-shares, in favor of moving more directly to what might be the preferred long-term solution, namely, clean shares.”* We agree with the Department that a delay to allow for further innovation will be beneficial; however, further delay beyond January 1, 2018 is needed to give these innovations sufficient time to be operationalized. For example, American Funds, Janus and Columbia Threadneedle are reported to be the only companies to issue “clean” shares of their mutual funds thus far. Due to the sequential nature of the various intermediaries’ development of the necessary trading, surveillance, commission and other systems to support their use, it is doubtful that clean shares, or other new share classes, can be fully operationalized for at least 18 – 24 months.

4. Revise rules for IRA rollovers

The rollover provisions of the Fiduciary Rule firms and advisors to obtain specific information about the fees and expenses of clients’ retirement plans prior to recommending an IRA rollover. This information is, at best, very difficult for the client, much less the advisor or financial institution to obtain in order to adequately compare the costs of products across the marketplace. Retirement plan recordkeepers’ privacy concerns, combined with the lack of a consistent data format across clearing firms, is an obstacle to sharing and using that data. Further, the DOL framework does not give the client the information that they really need to make a rollover decision.

The Fiduciary Rule should be revised to instead require a disclosure to clients about rollovers with a more general disclosure of the cost differences. The disclosure should focus on the major qualitative differences between IRAs and employer-sponsored plans, a broader definition of education as distinct from advice, and a carve-out for “hire me” discussions. The DOL appears to have focused almost exclusively on the fact that the cost to

investors in most IRAs is higher than that charged by employer-sponsored retirement programs such as 401(k) plans. This ignores the vast qualitative difference between IRAs and employer-sponsored plans. IRAs offer a wide array of financial products, including individual equities, fixed income investments, mutual funds, UITs, fixed and variable insurance products, and numerous types of alternative investments which may help investment portfolios achieve higher overall returns with lower levels of risk by employing strategies involving non-correlated and illiquid assets. IRAs also offer a much greater level of personalized advice, which is generally not available in employer-sponsored retirement programs. This is not to say that the IRA rollover is always in the client's best interest; however, the focus on fees and expenses creates significant barriers and may lead to retirement investors approaching retirement to lose out on critical investment advice when they are most in need.

Support for a Carefully-Crafted, Universal Fiduciary Standard of Care

KMS supports a carefully-crafted, universal fiduciary standard of care that will be applicable to all professionals providing personalized investment advice to retail clients. However, we do not support the Department's Fiduciary Rule as currently written. The study of the Rule's impact required by the February 3, 2017, Presidential Memorandum, along with innovative product developments and renewed opportunity for the DOL and SEC to collaborate, provides an important opportunity to preserve investor access to these services. Therefore, we urge the DOL to delay the January 1, 2018 effective date to provide the time necessary to consider other options to achieve the DOL's goals while preserving investor access to retirement planning services.

Thank you for considering KMS' comments. Should you have any questions, please contact me at (206) 441-2885 ext. 290.

Respectfully,

Eric S. Westberg
Chairman & CEO