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*Submitted Electronically- [EBSA.FiduciaryRuleExamination@dol.gov]*

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.**

Ladies and Gentlemen:

Thank you for the opportunity to submit these comments regarding potential changes to the Department of Labor ("Department") 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, as well as accompanying prohibited transaction exemptions (collectively, these are referred to as the "Rule").

For the reasons set forth in this comment letter, we respectfully submit that the Department should rescind the Rule or substantially revise it. As explained below, in re-evaluating the Rule, the Department should work closely with the Securities and Exchange Commission ("SEC") and should recognize the SEC's particular expertise and mandate with regard to the activities of broker-dealers and investment advisers. The Department should also reevaluate many of the factual and legal conclusions that underlie the Rule. As an initial matter, the Department is allowed and indeed obligated to reconsider any elements of the current Rule that evidence or analysis show to have been based on faulty reasoning or facts. In addition, the Department should consider evidence of the harm the Rule is causing investors and will continue to cause them in the future, as well as the unnecessary financial and regulatory burden the Rule will place on the financial services industry.

We strongly agree with the comments submitted by the Securities Industry and Financial Markets Association ("SIFMA") and the Investment Company Institute ("ICI").

## 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 June 30, 2017, Wealth Management Americas (which, as noted, primarily operates through UBSFS) had invested assets of nearly \$1.2 trillion and close to 15,000 employees—including a network of approximately 7,000 financial advisers.

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 regime under state law.<sup>1</sup>

## Comments

The Rule has resulted in great costs for the financial services industry. For UBS alone, study of various approaches toward compliance, 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 conferring a benefit to the investors we serve.

As the Department considers whether to rescind or revise the Rule, UBS offers the following suggestions and principles to inform the Department’s approach. First, the Department should carefully consider the views of the SEC, the chief regulator of investment advisers and broker-dealers, which has unparalleled expertise in regulating the securities industry and the capital markets. The Department should ensure that the approaches of the two agencies are harmonized to avoid confusion for consumers, allow the marketplace to provide the best possible financial solutions for investors, and

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<sup>1</sup> 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>.

avoid overly burdensome and unnecessary regulation on the industry.<sup>2</sup> We recommend that if the Department chooses not to rescind the Rule, it replace the current Best Interest Contract exemption with a streamlined exemption as described in Section 2 below.

Second, the Department should bear in mind that under the Administrative Procedure Act (“APA”), it is permitted to reevaluate its prior positions, and is affirmatively obligated to reconsider positions taken in the past to the extent they are contradicted by new evidence, not factually supported, or rest on reasoning that the Department finds to be erroneous.

Finally, investors are being harmed by the Rule’s implementation rather than helped as the Department predicted, and costs to the industry have been and will continue to be far higher than expected. We respectfully request that the Department reconsider and reevaluate all of these aspects of the Rule.

**1. As it evaluates its Rule, the Department should give significant weight to the expertise and views of the SEC.**

In its Request for Information, the Department asked whether the Rule could be “streamlined” if the SEC “adopt[ed] updated standards of conduct.”<sup>3</sup> UBS believes that it would be a good approach for the Department to base any revised rule on the standards that the SEC ultimately promulgates. The views and positions of the SEC in this area are of vital importance, and—if the Department retains its Rule—it should substantially tailor it to take account of SEC regulation, both current and any future revised SEC rules. Indeed, the SEC is the agency designated by Congress to regulate broker-dealers and investment advisers and is the agency most familiar with the financial markets. As the agency with the deepest expertise in this area, the SEC has the capability of ensuring a harmonized approach across all customer accounts (retirement and non-retirement related) that will not harm investors. We believe, as articulated in our comment letter to the SEC and in our prior letter to the Department,<sup>4</sup> that the Department and the SEC should base any rule it might adopt on the interim Impartial Conduct Standards that the Department outlined in its May 2017 FAQs,<sup>5</sup> and that the standard be applied to retirement and non-retirement brokerage accounts alike.

In the Dodd-Frank Act, Congress required the SEC to study whether the existing “standards of care for brokers, dealers, [and] investment advisers” are adequate,<sup>6</sup> and “authorize[d], but [did] not require, the SEC to issue rules addressing [those] standards of care,” including potentially by requiring broker-dealers to adhere to fiduciary standards.<sup>7</sup> The SEC is currently considering whether to adopt new rules pursuant to this provision. On June 1, 2017, SEC Chairman Jay Clayton asked for public comments regarding what the standards of conduct for investment representatives and broker-dealers should be.<sup>8</sup> Recognizing that “clarity and consistency—and, in areas overseen by more than one regulatory body, coordination—are key elements of effective oversight and regulation,” Chairman Clayton stated that the SEC would “engage constructively” with the Department “as the Commission moves forward with its examination of the standards of conduct applicable to investment advisers and broker-dealers.”<sup>9</sup> Likewise, Secretary of Labor Alexander Acosta has expressed his desire for the Department and the SEC to work together

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See UBS Comment Letter to the Department of Labor (July 21, 2017); UBS Comment Letter to the SEC (Jul 21, 2017).

regarding regulation in this area, noting that “the SEC has critical expertise in this area,” and expressing his “hope” that “the SEC will be a full participant” in the rule-revision process.<sup>10</sup>

This coordination between the SEC and the Department with regard to the activities of broker-dealers is crucial, as demonstrated by the SEC’s no-action letter regarding clean shares. The Capital Group had sought the SEC’s guidance on clean shares as a solution to the problems that the Rule had created for the marketplace and because of uncertainty regarding their consistency with the Department’s Rule.<sup>11</sup> The Capital Group sought the SEC’s approval of clean shares. The SEC responded that clean shares would not violate the securities laws, but did not state whether compliance with its rules would necessarily ensure compliance with the Department’s Rule.<sup>12</sup> This reflects the important role the SEC has here, and how coordination with the SEC is necessary to ensure consistency in regulating broker-dealers’ practices.<sup>13</sup>

There are many other difficulties resulting from the Rule’s inconsistency with securities regulation. For instance, FINRA already has its own “suitability” requirement, which requires broker-dealers to “have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer,”<sup>14</sup> and, under the supervision and oversight of the SEC, FINRA also regulates conflicts-of-interest, requiring broker-dealers to make clients’ interests paramount, including when recommending a rollover or transfer of assets to an IRA or marketing an IRA, by “ensur[ing] that conflicts of interest do not impair the judgment of a registered representative or another associated person about what is in the customer’s interest and that they neither confuse investors nor interfere with important educational efforts.”<sup>15</sup> Moreover, broker-dealers and advisers typically assist their clients with both IRAs and other types of accounts, which may hold assets very similar to those in the IRA. Unnecessary complexity—and ultimately, unnecessary cost—is introduced when different legal standards and procedural requirements are applicable to the same two people sitting together in the same room or speaking on the phone, depending on what specific account they

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<sup>3</sup> Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31,278, 31,280 (July 6, 2017).

<sup>4</sup> See *supra* n.2.

<sup>5</sup> Department of Labor, *Conflicts of Interest FAQs (Transition Period)*, FAQ 1 (May 2017), available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period.pdf>.

<sup>6</sup> Dodd-Frank Act, § 913(b), 124 Stat. 1824 (2010).

<sup>7</sup> *Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 20,946, 20,990 (Apr. 8, 2016) (citing 15 U.S.C. § 80b-11(g)(1)).

<sup>8</sup> Statement of SEC Chairman Jay Clayton, *Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers* (June 1, 2017), available at <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31>.

<sup>9</sup> *Id.*

<sup>10</sup> Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too*, Wall St. J. (May 23, 2017), available at <https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029>.

<sup>11</sup> Letter from Capital Group to SEC (Jan. 6, 2017), available at <https://www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d-incoming.pdf>.

<sup>12</sup> SEC, *Response of the Office of Chief Counsel Division of Investment Management* (Jan. 11, 2017), available at <https://www.sec.gov/divisions/investment/noaction/2017/capital-group-011117-22d.htm>.

<sup>13</sup> Clean shares, moreover, are no panacea. Although they may work in some contexts, there is confusion regarding how administrative costs such as record-keeping fees will be paid, which may make it difficult for smaller firms to compete, and may raise prices relative to other products. As one industry insider recently put it regarding clean shares, “[t]here are clearly significant operational challenges depending on how a broker dealer is set up.” See Nick Thornton, *Morningstar: Industry’s Idea of Clean Shares May Not Be Clean Enough*, BenefitsPro (July 19, 2017), available at <http://www.benefitspro.com/2017/07/19/morningstar-industrys-idea-of-clean-shares-may-not>.

<sup>14</sup> FINRA, Rule 2111, available at [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=9859](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9859).

<sup>15</sup> FINRA Notice 13-45 (Dec. 2013), available at <http://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf>.

happen to be speaking about at any given moment. These differing legal standards make it particularly difficult for broker-dealers to put together for investors an effective and consistent asset allocation strategy across both retirement and non-retirement accounts. The Department should work with the SEC to ensure that there are consistent and appropriate standards, and that the SEC's expertise and statutory mandate are given particular weight. This would include a "streamlined" Fiduciary Rule and prohibited transaction exemption that makes compliance with a new SEC standard sufficient to satisfy the applicable Department requirements.

In particular, we suggest that the SEC and the Department collaborate on developing a disclosure-based prohibited-transaction exemption that would apply to transactions that result in variable compensation to an adviser. As discussed below, this disclosure form could be similar to the existing Form ADV that the SEC currently requires under the Investment Advisers Act of 1940 ("Advisers Act") and would include the range of compensation that the adviser might receive from clients or from third parties, would list the material conflicts of interest, and would enumerate the types of compensation for the products and services on offer.

Further, as set forth in our recent comment letter to the SEC,<sup>16</sup> we also suggest that the SEC and the Department together adopt a best-interest standard similar to the interim Impartial Conduct Standards that the Department already provided in May 2017.<sup>17</sup> This standard would require investment recommendations to be "prudent, loyal, and free from material misrepresentations," and would prohibit "receiv[ing] more than reasonable compensation" for the services rendered.<sup>18</sup> This standard would not prohibit "commissions or other payments that vary with the investment recommended," but would require advisers to "ensur[e] that the recommendations are prudent; based upon the customer's financial interests, rather than the adviser's competing financial interests in the transaction; the communications are free from material misrepresentations; and the associated fees and charges are reasonable."<sup>19</sup> Finally, when advisers recommend only "proprietary products," or when they "receive[ ] compensation that varies with the product recommended," then they "should be candid about the compensation and the limits on investments."<sup>20</sup> This standard would not include the current language from the Best Interest Contract Exemption ("BIC Exemption"): "without regard to the financial or other interest to the advisor, financial institution or any affiliate, related entity or other party." As discussed below, this amorphous language is difficult to understand in a precise way, let alone comply with. And we believe that this extra language is unnecessary if the Department and the SEC adopt our proposed standard to ensure that investment advice is provided "prudent[ly]," "loyal[ly]," and in the client's best interest.

If the Department and the SEC adopt these two suggestions, then there would no longer be any need for the onerous BIC Exemption or the Principal Trading Exemption, since clients would be receiving transparent, prudent advice in their best interest, paying reasonable fees, and receiving information that is free from material misrepresentations. There would also be no need for the private right of

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<sup>16</sup> See *supra* n.2.

<sup>17</sup> See *supra* n.5.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

action, because firms and advisers would be regulated by the SEC and FINRA's existing examination and enforcement regime.

## **2. Certain important elements of the Fiduciary Rule can and should be substantially re-evaluated during the Department's on-going review.**

Based in part on the observations above, UBS believes that the best approach for the Department is to rescind the Rule, or to stay it pending action by the SEC. This would enable the agency that Congress has tasked with regulating broker-dealers to establish a uniform standard that it can apply across the entire financial services industry.

If, on the other hand, the Department concludes that it should retain the new Rule in some form, there are several factual and legal conclusions that the Department reached during the first rulemaking that require reconsideration.

As an initial matter, it is important for the Department to recognize that it is not bound by the factual findings and analyses that underlay the Rule's adoption. In fact, the Department is affirmatively obligated to depart from its earlier conclusions when new evidence or further evaluation demonstrates that those conclusions were wrong.

As the Supreme Court has put it, "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis."<sup>21</sup> Thus, an agency, "faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice."<sup>22</sup> Changes in presidential administrations and policy positions are appropriate reasons for an agency to reconsider and then alter or rescind a rule.<sup>23</sup>

When an agency changes its position, it "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one."<sup>24</sup> It need only "adequately explain[ ] the reasons for a reversal of policy."<sup>25</sup> And when commenters present an agency with evidence pointing out errors in its prior analysis, the agency *must* reconsider its earlier conclusions. An agency may not "fail to respond to substantial problems raised by commenters,"<sup>26</sup> nor "offer[ ] an explanation for its decision that runs counter to the evidence before the agency."<sup>27</sup>

Here, there are several key bases underlying the Rule's analysis that we believe can and should be reconsidered.

**A.** A cornerstone of the Rule was skepticism about the efficacy of disclosure, even though, as SEC Chairman Clayton recently put it, "[d]isclosure and materiality have been at the heart of the SEC's

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<sup>21</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citations omitted).

<sup>22</sup> *Am. Trucking Associations v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397, 416 (1967).

<sup>23</sup> *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012).

<sup>24</sup> *FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 514–15 (2009).

<sup>25</sup> *Brand X*, 545 U.S. at 981.

<sup>26</sup> *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1149 (D.C. Cir. 2011).

<sup>27</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

regulatory approach for over eighty years.”<sup>28</sup> Commissioner Michael Piwowar also recently praised disclosure regimes, stating that, when “investors” are “arm[ed]” “with information,” “they can evaluate and make investment decisions that support more accurate valuations of securities and a more efficient allocation of capital.”<sup>29</sup> Similarly, former Commissioner Daniel Gallagher stated that “[t]he SEC is, first and foremost, a disclosure agency.”<sup>30</sup>

In adopting the Rule, however, the Department relied substantially on mere policy judgments—without proper evidence and while ignoring the judgment of the securities regulators—to conclude, for example, that “even if disclosure about conflicts could be made simple and clear, it could be ineffective—or even *harmful*.”<sup>31</sup> Because the Department’s conclusions about disclosure were based principally on policy judgments, rather than on extensive studies or record evidence, the Department may reconsider its conclusions regarding disclosure without engaging in extensive fact-finding.

Moreover, to the extent the Rule’s treatment of disclosure did rest on material in the record rather than policy judgments, that support was insubstantial. For example, the suggestion that disclosure is harmful was based on a five-page article that did not concern the subject of retirement investing; the article simply summarized general aspects of behavioral psychology, and the authors’ research actually found that individuals may put *less* value on advice when the adviser discloses a conflict.<sup>32</sup>

It also is noteworthy that the Department’s suggestion that disclosure is affirmatively “harmful” is in tension with other elements of the Rule. For instance, the Department required disclosures in the BIC Exemption because, it said, disclosure “is critical.”<sup>33</sup> This inconsistency regarding disclosure’s effectiveness is an additional, proper basis for revisiting and revising the Rule’s treatment of disclosure.

Finally, when it adopted the Rule, the Department emphasized at several points that “disclosing conflicts *alone* would fail to adequately mitigate the conflicts or remedy the harm.”<sup>34</sup> There is no reason for the Department to consider the effects of disclosure “alone,” however. There are already in place a range of restrictions on broker-dealers and investment advisers which assure that consumer protection is not dependent on “disclosure alone.” FINRA’s suitability rules require broker-dealers’ recommendations to be “consistent with the best interests of [their] customer[s].”<sup>35</sup> FINRA’s best execution rule requires broker-dealers to exercise reasonable diligence to ensure that the securities prices for their customers are as favorable as possible.<sup>36</sup> And the SEC imposes limits on principal trading with advisory accounts

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<sup>28</sup> See *supra* n.8.

<sup>29</sup> Acting Chairman Michael S. Piwowar, *Remarks at the “SEC Speaks” Conference 2017: Remembering the Forgotten Investor* (Feb. 24, 2017), available at <https://www.sec.gov/news/speech/piwowar-remembering-the-forgotten-investor.html>.

<sup>30</sup> Commissioner Daniel M. Gallagher, *Remarks to the Forum for Corporate Directors, Orange County, California* (Jan. 24, 2014), available at <https://www.sec.gov/news/speech/2014-spch012413dmg>.

<sup>31</sup> 81 Fed. Reg. at 20,951 (emphasis added).

<sup>32</sup> *Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice*, 80 Fed. Reg. 21,928, 21,942 (Apr. 20, 2015) (citing George Loewenstein, et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 Am. Econ. Rev.: Papers and Proceedings 423, 426 (2011), available at <http://www.cmu.edu/dietrich/sds/docs/loewenstein/PitfallsdisclosingCOI.pdf>).

<sup>33</sup> *Best Interest Contract Exemption*, 81 Fed. Reg. 21,002, 21,049 (Apr. 8, 2016).

<sup>34</sup> *Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 20,946, 20,950 (Apr. 8, 2016) (emphasis added).

<sup>35</sup> FINRA Regulatory Notice 11-02, at 7 n.11 (Jan. 2011), available at <http://www.finra.org/sites/default/files/NoticeDocument/p122778.pdf>.

<sup>36</sup> FINRA Rule 5310, available at [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=10455](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10455).

without the clients' informed consent. Thus, disclosure requirements do not exist in a vacuum; instead, disclosure is one of many preexisting regulatory mandates that ensure transparency and the clients' best interests. It was therefore arbitrary and capricious for the Department to examine the effects of disclosure "alone."

As it undertakes this reconsideration, the Department should give significant weight to the SEC regarding the effectiveness and best use of disclosure.

**B.** A specific disclosure alternative the Department should consider would be akin to the Form ADV disclosure requirement of the SEC, which registered investment advisers use today. Under this annual disclosure process, registered investment advisers make available to clients and publicize on the SEC's website essential information about their advisory business, including the services provided and fees charged, the compensation the firm receives from third parties and in connection with principal transactions, material conflicts of interest the firm may have regarding the provision of advice or services, and how those conflicts are addressed, among much other information.<sup>37</sup> The SEC has been successfully regulating investment advisers under this disclosure regime for over seven decades. This type of disclosure has already been deemed sufficient for a fiduciary, so it would be an appropriate regime for retirement plans as well. By leveraging the SEC's preexisting fiduciary process, the Department could still achieve its goals without overburdening investment firms, dramatically increasing prices, or decreasing available services and investment products for investors.

**C.** The Rule's disclosure requirements are of concern in at least one other respect. The BIC Exemption requires that financial representatives be prepared to give customers extensive information about their costs, fees, compensation, and third-party payments—described in dollar amounts, percentages, or formulas—before the transaction occurs, if so requested by the client.<sup>38</sup> As a practical matter, this means that brokers and others must always collect this information before every transaction, in order to have it ready should the client request it. There is no way to collect this amount of information before each transaction without substantially delaying the sale—even sales in which the customer is not interested in receiving the information. This is too complex for a fast-paced, transaction-oriented marketplace, and the result of this provision will be to bog down the pace of sales, in many instances eliminating the benefit of a swift transaction. We therefore recommend that the Department remove this requirement from the BIC Exemption.

**D.** We also agree with SIFMA that the Rule prevents investors from easily obtaining financial advice, and thus that there should be a "sophisticated investor" exception from the Rule. The Rule assumes that no investor can tell the difference between a sales pitch and fiduciary advice. But at the same time the existing regulatory regime assumes that individual investors all are sophisticated enough to recognize that very difference when they are investing their taxable personal assets. The Department's paternalistic assumption that the opposite is true for those same investors' retirement assets creates yet more disruptive regulatory inconsistency. When salespeople clearly disclose that they are selling and are not providing fiduciary advice, the Department should respect investors' ability to understand

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See SEC Form ADV Part 2, available at <https://www.sec.gov/about/forms/formadv-part2.pdf>.

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Best Interest Contract Exemption; Correction, 81 Fed. Reg. 44,773, 44,777, 44,779 (Jul 11, 2016).



that difference. Otherwise, the Rule will result in investors having only one way to get personalized financial advice. Many investors would prefer to speak to a salesperson with eyes wide open than to be forced into a potentially more costly fee-based advisory program.

UBS suggests that the Department look to the “accredited investor” standard, which Congress and the SEC have long used to define financial sophistication.<sup>39</sup> These sophisticated investors have the necessary experience and resources to evaluate complex investments and strategies.<sup>40</sup> The “accredited investor” definition has stood the test of time and is well understood, closely monitored by investment firms, and updated periodically by the SEC to meet current market conditions. We believe that this standard would protect less-experienced investors without unduly disrupting the financial system and limiting the choices available to more sophisticated investors. This is particularly true for “sophisticated investors.”

E. The Rule’s current “Impartial Conduct Standards” in the BIC Exemption also merit a second look. The Department wanted to import the prudence standard from ERISA, and therefore the Rule requires broker-dealers to

reflect[ ] the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor . . . .<sup>41</sup>

Although this language, which is modeled on ERISA’s “prudent man” standard,<sup>42</sup> will present challenges for broker-dealers, the Department went much further by adding that broker-dealers must provide advice “without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.”<sup>43</sup> As the Department is aware, this aspect of the Rule has caused extensive concern. The standard could be read to require that advisers be indifferent to the amount of compensation they receive, or even to whether they are performing their job and conducting their business in a manner that is likely to be successful and profitable over the long term. As SIFMA has noted, this standard may even impose the absurd requirement that advisers not know their own financial interests with regard to a product or service. This standard is unworkable and nearly impossible to meet without offering solely fee-based accounts to investors. The Rule would convert ERISA’s prudence standard into a near prohibition on any transaction for which an adviser would earn a particular amount that is different than what they might earn on another type of transaction even if it involves a completely different investment product. Moreover, the private right of action discussed below heightens financial representatives’ concern that they could be subject to class-action liability simply because they take account of their own financial circumstances and business interests in offering

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<sup>39</sup> 15 U.S.C. § 77b(a)(15).

<sup>40</sup> See, e.g., Net Worth Standard for Accredited Investors, Securities Act Release No. 9287, 76 Fed. Reg. 81793, 81794 (Dec. 29, 2011).

<sup>41</sup> 81 Fed. Reg. at 44,777.

<sup>42</sup> See 29 U.S.C. § 1104(a)(1)(B).

<sup>43</sup> 81 Fed. Reg. at 44,777.

their services to clients. In fact, advisers may face liability whenever they do not recommend the investment that pays advisers the least. We strongly recommend that the Department and the SEC not include this “without regard to” language, and instead jointly adopt the Department’s interim Impartial Conduct Standards from May 2017, as discussed above. This will permit broker-dealers to make suitable recommendations based on the client’s particular circumstances and needs, without injecting widespread confusion into the financial services industry and exposing broker-dealers to potentially massive liability.

**F.** Unlike the Department’s prior Interpretive Bulletin 96-1, the current Rule’s “investment education” exception does not allow any discussion of specific investment alternatives when providing general education without turning the broker-dealer into a fiduciary.<sup>44</sup> Under this exception, an adviser providing general education to plan participants cannot describe which investments fall into the various asset classes without becoming a fiduciary, potentially with respect to the individual participants.

We urge the Department to return to the standard outlined in its 1996 Bulletin, under which advisers were allowed to identify available investment alternatives. In the plan context it may be possible for an adviser to simply list all of the options that fall into a specific asset class. But in the IRA context, where a wide array of investments is available, advisers should be able to provide examples of investments that could fulfill an asset class as long as they specify that other investment alternatives with similar risk and return characteristics are also available, as described in the Department’s Interpretive Bulletin 96-1.<sup>45</sup> It cannot be that simply providing general education—such as when information is presented in a large-group setting—automatically turns broker-dealers into fiduciaries.

**G.** Further, we recommend that the Department alter its “materiality” definition applicable particularly to disclosure in order to remove its uncertain features and more closely align it with the SEC’s standard from the Advisers Act. The Rule states that “A ‘Material Conflict of Interest’ exists when an Adviser or Financial Institution has a financial interest that a reasonable person would conclude *could* affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor.”<sup>46</sup> This definition requires advisers to specifically identify every conflict that could conceivably have any effect on their judgment, an extremely burdensome requirement that will overwhelm investors with extraneous information and obscure the more essential information that the adviser needs to convey. This standard is unworkable.

Instead, the Department should adopt the standard of materiality from the Advisers Act. Courts have defined that standard by looking to whether there is a substantial likelihood that a reasonable investor would have considered the information *important*.<sup>47</sup> In addition to the benefit of this definition’s proven workability in practice, this objective standard also looks not to possibilities but to probabilities, and it takes account of how consequential the conflict is. This standard will ensure that the disclosure requirement applies only to those conflicts that truly are “material.” And this standard will add certainty to the market by defining as “material” only those conflicts that a reasonable person would objectively

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<sup>44</sup> 81 Fed. Reg. at 20,998

<sup>45</sup> *Department of Labor Interpretive Bulletin 96-1*, 61 Fed. Reg. 29,586, 29,589–90 (June 11, 1996).

<sup>46</sup> 81 Fed. Reg. at 21,084 (Rule VIII(h)(i)) (emphasis added).

<sup>47</sup> See *SEC v. Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992).

consider “important.” Advisers will not lose the benefit of a transaction simply because they failed to disclose a single unimportant conflict (thereby giving a client the option of voiding the contract) that could only theoretically affect that adviser’s judgment; only objectively important conflicts should require disclosure.

**H.** The Rule’s exemptions should also be extended to cover new issues of equity and debt securities where one’s own financial institution is part of the underwriting syndicate. Allocations of new issues are made available to clients of the underwriting syndicate and are not available “on the open market.” Without an exemption to cover new issues, retirement investors will never be able to purchase them even where the purchase meets the Impartial Conduct Standards. Once the standards are met, there is no reason for the Department to determine that some types of securities should be permitted but not others. The Department should not be concerned about these types of transactions because investors are already protected by other regulatory requirements, such as FINRA’s “suitability” requirement, which requires broker-dealers to “have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer and the disclosure requirements under the Securities Act of 1933. Investors should be able to participate in new issues if they so desire.

**I.** We agree with SIFMA that the Department should correct the error that causes the Principal Transaction Exemption to deny relief for many types of securities, including all equity securities and all municipal bonds. Currently, the Principal Transaction Exemption’s definition of “asset” lists a series of assets, but omits many other types of assets, such as equity securities and municipal bonds, among many others.<sup>48</sup> The proposed BIC Exemption had a similar error, with its original definition of “asset” limited in the same way.<sup>49</sup> After commenters pointed out the error, the Department omitted a definition of “asset” altogether from the BIC Exemption.<sup>50</sup> The Department should do the same for the Principal Transaction Exemption.

**J.** Finally, the Department should clarify that the Rule’s categorization of advice regarding rollovers and transfers as “investment advice” does not apply to transfers from one IRA account to another. For instance, when UBS acquires a new client, it will often transfer all of that client’s assets over to UBS accounts, including by transferring that client’s IRA account over from another financial services firm. But that asset transfer should not be considered “fiduciary advice.” This is simply marketing activity which does not present the same concerns that a rollover from a plan account raises. And it would inhibit the provision of comprehensive investment advice for a firm to have to single out one account of the many being transferred—the IRA account—to provide a full analysis of the competing costs and services between the firm and its competitor. Regulating IRA-to-IRA asset transfers in this way would be a needless intrusion into normal business practices. Firms should not be forced to perform an analysis on the relative merits of its services and its competitors’ services.

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<sup>48</sup> *Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefits Plans and IRAs*, 81 Fed. Reg. 21,089, 21,138 (Apr. 8, 2016).

<sup>49</sup> *Proposed Best Interest Contract Exemption*, 80 Fed. Reg. 21,960, 21,987 (Apr. 20, 2015).

<sup>50</sup> 81 Fed. Reg. at 21,015.

### 3. As it reconsiders its Rule, the Department should be attentive to the general adverse consequences that the Rule has had on the financial services industry and the economy.

The Rule has resulted in—and will continue to result in—wide-ranging negative effects, including harming investors, enormous costs to firms, and litigation costs.

A. The Department should take account of the evidence indicating that the Rule will harm consumers by decreasing access to investment information and advice. On February 7, 2017, the President issued a Memorandum (the “President’s Memorandum”) to the Secretary of Labor on the Fiduciary Duty Rule, instructing the Department to consider whether 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.”<sup>51</sup>

We believe the result of the Rule has been and will continue to be to reduce access that investors with smaller accounts have to financial advice and to lead to lower levels of saving and investing.<sup>52</sup> For instance, FINRA has noted that commission-based accounts are often the best choice for investors who desire to purchase and hold a particular asset for a long period of time,<sup>53</sup> but the Rule will cause the availability of these products to decrease and their prices to rise. As CoreData Research UK found, 71% of financial representatives will “disengage with” some investors with smaller accounts as a result of the Rule, and “the cost of advice is expected to increase and be passed on to investors,” but “will become too expensive for most investors.”<sup>54</sup> A study by the management consultant A.T. Kearney found that because of the Rule “many low-balance accounts will no longer be served, shifting many assets to formats such as robo-advice and self-directed.”<sup>55</sup> Furthermore, data before the Department demonstrates that the Rule would reduce advice for those with lower incomes, who tend to save and invest less when they are not advised. Research studies, for instance, have tended to show that when clients do not receive financial representation, they end up holding fewer equities than investors who do receive financial recommendations.<sup>56</sup> Meanwhile, studies indicate that asset allocation, not mutual fund performance, explains, on average, 100% of performance.<sup>57</sup> Individuals are motivated to save more when they have access to a financial representative,<sup>58</sup> and when those individuals lose access to

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<sup>51</sup> Presidential Memorandum on Fiduciary Duty Rule, 82 Fed. Reg. 9675, 9675 (Feb. 7, 2017).

<sup>52</sup> See Michael Wursthorn, *A Complete List of Brokers and Their Approach to “The Fiduciary Rule,”* Wall St. J. (Feb. 6, 2017), available at <https://www.wsj.com/articles/a-complete-list-of-brokers-and-their-approach-to-the-fiduciary-rule-1486413491>.

<sup>53</sup> FINRA, *Report on Conflicts of Interest* 29 (Oct. 2013), available at <https://www.finra.org/sites/default/files/Industry/p359971.pdf>.

<sup>54</sup> CoreData, *Sailing Through the Fiduciary Fog* 3, 15 (Nov. 2016), available at [https://www.sifma.org/uploadedfiles/correspondence/comment\\_letters/2017/sifma%20letter%20-%20in1210-ab79%20-%20appendix%20ii.pdf](https://www.sifma.org/uploadedfiles/correspondence/comment_letters/2017/sifma%20letter%20-%20in1210-ab79%20-%20appendix%20ii.pdf); see CoreData, *Fiduciary Rule to Leave US Mass-Market Investors Stranded, Study Shows*, available at <http://www.valuewalk.com/wp-content/uploads/2016/11/Fiduciary-rule-Press-Release-%E2%80%93-CoreData-Research.pdf>;

<sup>55</sup> A.T. Kearney, *The \$20 Billion Impact of the New Fiduciary Rule on the U.S. Wealth Management Industry* 8 (Oct. 2016), available at <https://www.atkearney.com/documents/10192/7041991/DOL+Perspective+-+August+2016.pdf/b2a2176b-c821-41d9-b12e-d3d2b0807d69>.

<sup>56</sup> See, e.g., S.R. Foerster, et al., *Retail Financial Advice: Does One Size Fit All?*, J. of Fin. (2017).

<sup>57</sup> Roger Ibbotson, et al., *Does Asset Allocation Policy Explain 40, 90, 100 Percent of Performance?* 56 Fin. Analysts J. (2000), available at <https://ssrn.com/abstract=279096>.

<sup>58</sup> See Charles Schwab & Co., *Communicating Retirement Plan Benefits in a World of Skeptics*, available at <http://www.schwab.com/pubhclf1le/P-8557214>; Claude Montmarquette, et al., *The Gamma Factor and the Value of Financial Advice* (Aug. 2016), available at <https://cirano.qc.ca/files/publications/2016s-35.pdf>; Francis M. Kinniry, Jr., *Putting a Value on Your Advice: Quantifying*

advice of this kind, on average they lose asset value.<sup>59</sup> Because of the Rule, thousands of investors will lose access to financial representatives and the services they can provide. The Rule will also decrease the range of available products; for instance, the Rule has already “played a big role” in drastically decreasing the sales of variable annuities,<sup>60</sup> although for many investors they are the only guarantee against outliving their income.

The Rule’s consequences will be borne disproportionately by people with fewer investable assets, as firms will be forced to raise the minimum thresholds for accounts.<sup>61</sup> The Rule will result in retirement investors having access to a narrower range of investment products, and in certain investors losing the ability to speak to a real, live person about investment strategy, relying instead on no-advice call centers or generic information found on the internet. Other investors will be shifted to fee-based advisory accounts that may cost them more than their previous commission-based brokerage accounts.<sup>62</sup> There is no need to disrupt investors in this way. As discussed above, investors will be sufficiently protected if the adviser provides prudent, loyal advice in the best interest of the client, combined with appropriate disclosure as described above.

**B.** Another significant area of concern with the Rule is its costs, which have proved much higher than the Department estimated. While 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,<sup>63</sup> the true figures now appear to be \$31.5 billion in total costs with \$2 billion in annual impact.<sup>64</sup> According to an Oxford Economics study, start-up costs have far exceeded the Department’s estimates.<sup>65</sup> As noted, UBS has already spent approximately \$23 million to come into compliance with the Rule, and significant new costs and burdens lie ahead. For instance, as it now stands, by January 2018 UBS and other firms must create a website containing a required level of data and detail that will be very difficult to maintain. And these costs do not even take into account the many millions of dollars in human capital that the Rule has already cost UBS and other financial firms in the form of delays in other ongoing initiatives and traditional business development. Costs such as these (and these are just a

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*Vanguard’s Advisor Alpha*, Vanguard Research (Sept. 2015), available at <https://static.vgcontent.info/crp/intl/auw/docs/literature/research/quantifying-advisers-alpha.pdf>.

<sup>59</sup> See 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>.

<sup>60</sup> Greg Iacurci, *Department of Labor’s Fiduciary Rule Blamed for Insurers’ Massive Hit on Variable Annuity Sales*, Investment News (Mar. 28, 2017), available at <http://www.investmentnews.com/article/20170328/FREE/170329922/departement-of-labors-fiduciary-rule-blamed-for-insurers-massive-hit>.

<sup>61</sup> See 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](http://www.sifma.org/uploadedfiles/correspondence/comment_letters/2017/sifma%20letter%20-%20rin1210-ab79%20wo%20appendix.pdf?n=24493).

<sup>62</sup> AdvisorHUB, *Merrill to End Commission-Based Retirement Business on Retail Accounts* (Oct. 6, 2016), available at <https://advisorhub.com/exclusive-merrill-end-commission-based-retirement-business-retail-accounts> (reporting that, because of the Rule, Merrill Lynch will have to shift clients to fee-based advisory accounts).

<sup>63</sup> 81 Fed. Reg. at 20,951.

<sup>64</sup> 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/>.

<sup>65</sup> 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](http://www.financialservices.org/uploadedFiles/FSI/Advocacy_Action_Center/The_Fiduciary_Rule_Increases_Costs_And_Decreases_Choice.pdf).

few examples) will have to be absorbed even by smaller broker-dealers, who may not be able to sustain the burden and thus could be the most at risk under the Rule.<sup>66</sup>

We agree with the studies reporting that financial firms will substantially change the services they offer as a result of the Rule. As stated above, some firms will move investors to fee-based accounts or to execution-only call centers where they will receive no financial advice whatsoever, 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.<sup>67</sup> 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%.<sup>68</sup>

C. Litigation costs in particular are expected to be far higher than the Department predicted as a result of the BIC Exemption. It is estimated that the investment industry should expect to pay between \$70 million and \$150 million in class-action settlements annually because of the Rule.<sup>69</sup> We agree with SIFMA that insurance costs will rise accordingly, much of which, together with other litigation costs, will likely be passed on to clients in the form of increased commissions, service charges, account fees, and retirement account costs.<sup>70</sup> Moreover, the constant threat of litigation will make advisers more risk averse, which may result in limiting recommendations to a narrower, “safer” range of products and declining to service as many clients. As Secretary Acosta noted, this administration does not “envisio[n]” regulating financial assistance in a way that “limits choice and benefits lawyers.”<sup>71</sup> As it conducts its review of the Rule, it is appropriate for the Department to pay particular attention to litigation costs, especially in light of the President’s instruction to determine whether the Rule “is likely to cause an increase in litigation.”<sup>72</sup>

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.<sup>73</sup> 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 in arbitration provisions.

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<sup>66</sup> See 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>.

<sup>67</sup> See 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>.

<sup>68</sup> 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>.

<sup>69</sup> Morningstar, Inc., *Weighing the Strategic Tradeoffs of the U.S. Department of Labor’s Fiduciary Rule* (Feb. 8, 2017).

<sup>70</sup> See 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](http://www.sifma.org/uploadedfiles/correspondence/comment_letters/2017/sifma%20letter%20-%20rin1210-ab79%20wo%20appendix.pdf).

<sup>71</sup> Acosta, *supra* note 10.

<sup>72</sup> 82 Fed. Reg. at 9675.

<sup>73</sup> See Brief of United States Department of Labor at 45, 63, *Chamber of Commerce of the United States of America v. United States Department of Labor*, No. 17-10238 (5th Cir. July 17, 2017) (“[T]he government is no longer defending this specific condition”).

Finally, in addition to radically decreasing costs, relying on the SEC's and FINRA's regulatory leadership and objective enforcement mechanism would also be more effective than the private cause of action. The SEC's and FINRA's enforcement of compliance requirements would better achieve regulatory aims than litigation, which is an ad hoc remedy brought by plaintiffs' attorneys against only a subset of firms—those with the deepest pockets. That is not an effective means of regulating an entire industry. Moreover, the pressure to settle in the face of staggering potential liability would prevent the creation of more effective standards for the entire industry going forward. Litigation cannot rid the industry of particular practices or bad actors; only an agency's authority to prescribe clear rules backed by sanctions can provide this sort of uniformity. The private right of action simply will not ensure that bad actors who do not act in their clients' best interests are disciplined or removed from the industry. The existing SEC and FINRA examination-and-enforcement regime, on the other hand, can help ensure investors are protected from such bad actors.

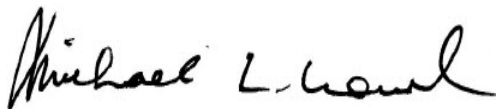
In re-evaluating the Fiduciary Rule in accordance with the President's Memorandum, the Department is engaged in an important task that we believe could result in substantial benefits for investors, while reducing unnecessary, costly burdens on the financial services industry. Most importantly, in reconsidering its Rule, the Department has the opportunity to remove the burden that the regulation imposes on clients in the form of increased fees, charges, and costs, reduction of access to a range of financial services, and denial of tailored financial advice. We appreciate the Department's attention to this matter, and thank you for this opportunity to comment.

Very truly yours,



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Jason Chandler  
Group Managing Director  
Head of Investment Platforms and Solutions  
Wealth Management Americas



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Group Managing Director  
General Counsel – UBS Group Americas and Wealth Management Americas