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August 5, 2020

Assistant Secretary Jeanne Wilson  
Office of Exemption Determinations  
Employee Benefits Security Administration  
Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

**Re: Application No. D-12011, Proposed Exemption, entitled "Improving Investment Advice for Workers & Retirees"  
ZRIN 1210-ZA29, RIN 1210 AB 96**

Dear Secretary Wilson:

Thank you for the opportunity to provide comments on the proposed Prohibited Transaction Exemption (the "Proposal") issued by the US Department of Labor (the "Department").

UBS supports the Department's efforts to harmonize the regulatory requirements applicable to individual "retail" investors and retirement accounts covered by the Employee Retirement Security Act of 1974, as amended ("ERISA"), IRAs and other accounts that are covered by Section 4975 of the Internal Revenue Code of 1986, as amended ("Code") (together "Retirement Accounts"). Aligning these requirements is an important goal and one that we believe protects investors, preserves investor choice and results in greater efficiency. Aligning these requirements will greatly benefit retirement investors (i) by reducing investor confusion about applicable service levels and standards of care among their taxable, ERISA plan and IRA accounts, (ii) by enabling financial professionals to provide tailored recommendations regarding investment strategies that reflect a holistic view of clients' assets and objectives regarding retirement and other financial goals, and (iii) by preserving investor choice to allow different business models, products, and services in Retirement Accounts.

In furtherance of these goals, UBS agrees with and supports the comments submitted by the Securities Industry and Financial Markets Association ("SIFMA") and Davis & Harmon on behalf of a group of financial institutions. As a firm providing wealth management

services to our clients, UBS is dually registered as a broker-dealer and investment adviser.

We provide below further background on UBS as well as comments on several issues of particular importance. We think these recommended changes to the Proposal would ensure both greater regulatory alignment and enhanced availability of quality investment advice.

## **UBS Background**

UBS AG, a subsidiary of UBS Group AG, operates three main lines of businesses in the United States - its Wealth Management 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. (collectively "UBS"). UBSFS is dually registered as a broker-dealer and investment adviser and is one of the largest securities firms in the United States. As of December 31, 2019, UBSFS and its related US entities had more than 2.8 million client accounts with assets totaling \$1.36 trillion. Of these, UBSFS had nearly 1.1 million Retirement Accounts with assets totaling over \$352 billion of assets.

## **Comments**

### **1. The preamble suggests an unsupported modification of the five-part test that would result in inappropriately applying an ERISA fiduciary standard to brokerage Retirement Accounts**

Like many other financial services firms, UBS is concerned with the Department's reinterpretation of the five-part test in the Proposal's preamble. Specifically, we are concerned with the suggestion that a firm or financial advisor's compliance with Regulation Best Interest ("Reg BI") would presumptively meet the five-part test despite an express agreement to the contrary. This flawed reinterpretation is a material modification of the five-part test and is a sharp departure from how the test has been historically interpreted and applied. Indeed, it is in direct conflict with the Department's amendment of the Code of Federal Regulations to restore the original five-part test, Interpretive Bulletin 96-1, and various class exemptions to their state before the Department's now vacated 2016 fiduciary rule.

Under standard industry practice today, advice provided as incidental to a brokerage relationship is not generally viewed as fiduciary advice to Retirement Accounts under ERISA or the Code. This view is not only consistent with the text and regulatory history of the five-part test, it also benefits retirement investors by facilitating their ability to choose between brokerage and advisory arrangements and ensuring their access to a full range of investments including those traded on a principal basis and IPOs.

As SIFMA notes in its comment letter, much of the troubling language in the preamble seems to have been taken from the Department's now vacated 2016 fiduciary rule even though it has little or no support in the Department's longstanding regulatory guidance or

in case law. The dicta in question raises many of the same practical and operational issues introduced as part of the 2016 fiduciary proposal which negatively affected the availability and use of the brokerage model for Retirement Accounts. Specifically, if the Proposal is finalized without removing the troubling statements regarding “mutual understanding,” “regular basis,” “primary basis,” and “for a fee,” the Department will again throw the industry and retirement investors into a muddled regulatory landscape that the SEC had worked hard to avoid with the promulgation and implementation of Reg BI.

We similarly draw your attention to the Davis & Harmon letter’s concerns that the preamble discussion would violate the Administrative Procedures Act since it amounts to a repeal of the mutual understanding and primary basis components of the five-part test.

For these reasons and the others described in the SIFMA and Davis & Harmon letters, we ask the Department to clarify that the five-part test is restored as it was before the 2016 fiduciary rule and without this new and expansive “interpretation.”

## **2. Rollover recommendations are not fiduciary investment advice**

UBS believes that the Department’s position that rollover recommendations generally constitute fiduciary investment advice is wholly inconsistent with the five-part test. We think that that the Department’s Deseret Opinion<sup>1</sup> which concluded that “merely advising a plan participant to take an otherwise permissible plan distribution, even when that advice is combined with a recommendation as to how the distribution should be invested, does not constitute [fiduciary ‘investment advice’] provides a more well-balanced approach to navigating the various regulatory regimes (i.e., ERISA, Code Section 4975, and securities, banking, and insurance laws) involved in the transfer of ERISA benefits to an individual retirement account.

A rollover from an employer sponsored plan is a consequential financial decision for retirement investors. Reflecting that, there have been a variety of regulatory actions over the last several years that have placed additional safeguards on the rollover process. These include FINRA Notice to Members 13-45, Reg BI, and the SEC’s interpretation of investment advisers’ duties with respect to rollover recommendations. These measures have significantly strengthened the obligations and standard of care applicable to rollover recommendations, the disclosures that must be made and the documentation that may be required. We believe that these new safeguards address the concerns raised by the Department and the imposition of a fiduciary obligation on those recommendations is simply unnecessary.

Under current SEC rules, when a broker-dealer or investment adviser makes a rollover recommendation, the retirement investor receives a summary of material facts about the firm’s services, fees, material conflicts of interest, and the applicable standard of care. More detailed information, including information regarding the financial adviser’s and firm’s economic incentives to recommend a rollover, is also provided in the firm’s Reg BI

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<sup>1</sup> DOL Advisory Opinion 2005-23A (Dec. 7, 2005)

disclosures and Form ADV brochure. Most, if not all firms, also provide clear educational material on the options available and the advantages and disadvantages of each. Most importantly, the recommendation must be in the investor's best interest, and the financial advisor cannot put his or her interest above the retirement investor's. Adding an ERISA fiduciary obligation and the need to comply with the terms of the Proposal adds significant regulatory burdens without offsetting incremental protection to investors.

The Department has also suggested that a rollover recommendation must be supported by a detailed analysis of different risks, returns, and costs of investments and services available through the plan with those associated with an IRA. The Department indicates that estimates can only be used where the retirement investor refuses to provide sufficient information and goes further to require consideration of costs if the investor selected different investment options. Given the complexity of plan and IRA investments and services, these requirements are unworkable. By requiring detailed consideration of the ideal allocation in the plan, these requirements ignore the fact that the retirement investor would not have access to professional investment advice in the plan and equally seem to discount the value of these services in an IRA.

As SIFMA notes, rather than analyzing specific cost data that is difficult to obtain and often outdated, many financial professionals inform participants that investments in an IRA will cost more than retaining the assets in the plan. Many retirement investors choose to rollover to an IRA anyway based on other factors that they deem more important, including access to distribution options that are not available in a plan, asset consolidation, access to professional investment advice and access to discretionary asset management.

Reg BI has been effective for just over one month. We urge the Department to refrain from modifying rollover guidance unless there is evidence of the need for more expansive regulatory requirements following a post Reg BI review. Alternatively, we request that any exemption applicable to a fiduciary rollover recommendation align with the requirements of Reg BI to ensure that a firm that satisfies Reg BI requirements automatically qualifies for coverage under the exemption.

### **3. The Proposal should not limit the types of investments that can be sold in principal transactions**

If the Department decides to not remove inferences that suggest that recommendations made pursuant to Reg BI in a brokerage account would meet the five-part test, it will be critical to at least eliminate the Proposal's limitations on permissible "at risk" principal trades that can be sold to a Retirement Account. In line with many of the comments received by the Department in connection with the 2016 rulemaking, we do not believe the Department and its staff should be dictating which types of securities are appropriate for Retirement Accounts. These limitations are inconsistent with the Department's stated goal of aligning its requirements with those of the securities laws. They also materially reduce the ability of retirement investors to select their own investments and undercut the value of the brokerage model for retirement investors.

Given that recommendations in these transactions would be subject to, at minimum, the

best interest standards under Reg BI, there is no benefit to retirement investors of imposing additional restrictions on the types of principal trades permitted.

## **Conclusion**

In summary, in addition to the requests made by SIFMA and Davis & Harmon, we specifically urge the Department: (1) retract the language in the preamble that would change the interpretation of the five-part test, including with respect to recommendations made in compliance with Reg BI, (2) reinstate the Department's previous guidance in the Deseret Opinion, or, alternatively, amend the Proposal to explicitly provide that compliance with Reg BI in recommending a rollover constitutes full compliance with the exemption, and (3) eliminate the conditions of the Proposal related to assets that can be sold to Retirement Accounts in principal transactions.

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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Jason Chandler  
Group Managing Director and Head Wealth Management USA



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Doug Hollowell  
Managing Director and General Counsel, Global Wealth Management US