



April 17, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Attn: Fiduciary Rule Examination

VIA EMAIL: EBSA.FiduciaryRuleExamination@dol.gov

Re: RIN 1210-AB79: Comments on Existing Fiduciary Rule

Dear Sir or Madam:

I write on behalf of Madison Avenue Securities, LLC (“Madison”), a San Diego, California based independent broker-dealer and an SEC Registered Investment Advisor. We appreciate this opportunity to comment on the United States Department of Labor’s (“DOL” or the “Department”) proposed Conflicts of Interest Rule (the “Rule”). More specifically, we submit these comments in support of a revision or repeal of the Rule as currently promulgated pursuant to the March 2, 2017 request (the “Request”) by the Department regarding the Presidential Memorandum on the Fiduciary Duty Rule dated February 3, 2017 (the “Memorandum”).

As we have emphasized in previous comments, Madison fully supports the intent of the Rule. We accept and endorse the idea that all retirement advice should be in the best interest of the client. Indeed, all investment advice should be given in order to serve the best interest of clients. We hold that position unequivocally and wish to emphasize it at as a preface to our comments.

The Rule as currently drafted, however, does not and will not accomplish its intended purposes. Rather, it will harm consumers and cause significant industry disruption, undermining the ability of Madison and firms like it to operate efficiently and effectively in the marketplace. Moreover, substantially increased litigation risk will end up costing consumers far more than any potential and unsubstantiated benefit. The letter will provide the reasoning behind our position that the Rule must be revised or revoked.

The Rule Creates Harm to Consumers

Financial advisors play an integral role in retirement planning for lower to middle income retirement investors that would potentially be lost if the Rule remains in its current form. In its 2015 report, the global consulting firm of Oliver Wyman states that “58% of households with under \$100,000 in investable assets, and 75% of those with over \$100,000 in investable assets solicit professional financial advice.” Oliver Wyman, *The Role of Financial Advisors in the US Retirement Market* 5 (2015). Therefore, if financial advisors serve fewer lower to middle income

investors due to the Rule, that action can only inhibit access to financial advice for those consumers by limiting their pool of options for financial advice.

Inhibiting access to retirement advice results in serious losses to consumers. In the same Oliver Wyman report showed that among individuals who earn \$100,000 or less, those who receive professional financial advice save 38% more than those who do not. *Id.* at 16.¹ According to another study, “Conservative estimates of the combined reduction in retirement assets attributable to the unintended consequences of [the Rule] could result in losses of retirement savings of \$68-\$80 billion each year.” Quantria Strategies, LLC, *Unintended Consequences: potential of the DOL Regulations to Reduce Financial Advice and Erode Retirement Readiness* (July 20, 2015), at 29.² This same study goes on to note that the Rule will jeopardize retirement readiness for 11.9 million IRA and retirement participants. Furthermore, in testimony before the Senate Subcommittee on Employment and Workplace Safety, Peter Schneider, President of Primerica testified that up to 7 million small investors could lose their current advisor due to the Rule being put in place. *Restricting Advice and Education: DOL’s Unworkable Investment Proposal for American Families and Retirees*, Hearing Before the Subcomm. on Emp’t & Workplace Safety of the S. Comm. on Health, Educ., Labor & Pensions, 114th Cong. (2015) (statement of Peter Schneider, President, Primerica, Inc.).

The financial services industry, with virtual unanimity, has predicted that the Rule will result in far less service being provided to lower and middle income consumers. It is crucial to note that these dire predictions are supported by good evidence rooted in recent history. In 2006, the United Kingdom enacted regulation similar to that contemplated by the Rule, which regulation was implemented in 2013. It too was accompanied by predictions of an increased advice gap. *See Tomlinson, The DOL’s Fiduciary Rule: What We Can Learn from the U.K., Advisor Perspectives* (September 28, 2015), <https://www.advisorperspectives.com/articles/2015/09/28/the-dol-s-fiduciary-rule-what-we-can-learn-from-the-u-k>. These predictions turned out to be accurate in that the adoption of the fiduciary regulation in England has led to an increased advice gap. Hughes, *FCA admits RDR contributed to Advice Gap*, *Financial Times Adviser* (July 19, 2016), www.ftadviser.com. More particularly, the number of financial advisors offering professional advice in England has decreased from approximately 26,000 in 2011 to 24,000 in 2014 and the percentage of retail investment products (pensions, retirement income, and retirement investments) sold without advice increased from around 40 percent in 2011-12 to around 66 percent in 2014-15. *Id.* Given the experience of investors in Britain with a similar regulatory objective and framework, there is

¹ The United States Senate Committee on Homeland Security and Governmental Affairs relies on this 2015 Oliver Wyman study as part of its analysis of the Rule. *See* Committee on Homeland Security and Governmental Affairs & Senator Ron Johnson, *The Labor Department’s Fiduciary Rule: How a Flawed Process Could Hurt Retirement Savers* (2d Sess. 2016). This Committee report concludes by stating: “[T]he labor Department’s flawed process in issuing its proposed ‘Conflict of Interest’ rule could ultimately hurt American retirement savers. Whether intentionally or not, the proposed rule threatens to restrict access to retirement advice for those Americans who need it the most.” *Id.* at 39.

² The Committee report also relies on the Quantria Strategies report in reaching its conclusion that the Fiduciary Rule will cause harm to consumers. *Id.* at 3

every reason to expect a similar result here if the Rule remains as is. Implementation of the Rule as currently drafted will bring substantial harm to retirement investors.

In the absence of financial advisors providing retirement advice to retirement investors, which the Department seems to concede will be a consequence of the Rule, it appears the Department believes a move to various automated (“robo”) solutions may fill the void. However, the use of robos as an alternative means of financial “advice” under the Rule (even though such robos typically disclaim that they are providing advice at all) completely ignores the fact that retirement investors seek personalized financial advice.

In an April 1, 2016, Policy Statement, the Massachusetts Securities Division found that retirement investors hire investment professionals to gain access to professionally personalized investment advice which cannot be provided by automated means. The Policy Statement went on to highlight issues with robo-advisors: “Specifically, robo-advisors’ failure to conduct due diligence, as well as robo-advisors’ depersonalized structure, may render them unable to provide adequately personalized investment advice and make appropriate investment decisions.” *Policy Statement of the Massachusetts Securities Division*, April 1, 2016. Significantly, robos generally do not act as fiduciaries. Reducing access to personalized financial advice and driving Americans toward automated financial services will not serve the best interests of American consumers. Quite simply, the Rule as currently written is fatally flawed.

The Rule has Already Caused and Will Continue to Cause Disruption to the Industry

The Rule has already caused substantial disruption to the financial services industry, and this disruption is causing significant increases in costs, which will ultimately be passed along to retirement investors. To date, Madison has spent hundreds of thousands of dollars and immense opportunity cost preparing to comply with the Rule. Across the financial industry, compliance cost estimates vary widely, but they are all large. For example, an estimate by the Securities Industry and Financial Markets Association indicates start-up costs for large and medium broker-dealers of \$4.7 billion with on-going costs of \$1.1 billion. Bentsen, *Securities Industry and Financial Markets Association Conflict of Interest Rule Comment Letter* (July 20, 2015), <http://www.sifma.org/issues/item.aspx?id=8589955445>. Such estimates far exceed the Department’s own estimates in this regard. Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,951 (April 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550). That compliance cost estimates vary so significantly demands further study to ascertain the actual costs and evaluate whether those costs outweigh the alleged benefit to consumers considering such costs will ultimately be passed on to those same consumers.

The Rule will Cause an Increase in Litigation

The Rule is expected to lead to an increase in litigation across the entire financial services industry—from insurance to broker-dealers to investment advisers to product manufacturers. The expected increase in litigation costs will ultimately be passed along to retirement investors. Although the DOL and Internal Revenue Service maintain enforcement authority under the Rule,

the DOL, for all practical purposes, has delegated enforcement to class action attorneys who have a financial incentive to bring lawsuits under the Rule. “It is very likely that the plaintiffs’ bar will play a primary role in enforcing the new rules in the IRA space. And it is possible if not likely, that the Fiduciary Rule will result in a spate of class action litigation in the not-too-distant future.” Kreps & Sepsakos, *The Impact of the Department of Labor’s Fiduciary Rule*, Business Law Today (November 2016), http://www.americanbar.org/publications/blt/2016/11/keeping_current.html.

Regardless of the merits of potential class action claims, financial institutions will be required to spend considerable amounts of money to purchase insurance (which may not even be available), to defend against class action lawsuits, or both. These costs will be passed on to the consumers in the form of higher priced products and services. Additionally, depending upon the potential increase in litigation, which the Department has not or cannot quantify, product sponsors may be forced to water down products or leave the space altogether to mitigate litigation risks, thus narrowing the retirement product options available for consumers.

Conclusion

Although we appreciate the Department taking another look at the Rule in accordance with the Memorandum, the Department should take this one step further in order to minimize harm to consumers, to minimize disruption to the industry and marketplace, and to minimize the likelihood of class action litigation. The Rule should be delayed until a reasonable time *after* the Department has concluded its analysis and review as directed by the Memorandum. Implementing the Rule as is on June 9, with the possibility of rescission or revision following the Department’s review, will only create additional confusion in the marketplace and will harm the very retirement investors that the Department is seeking to protect. Finally, we urge the Department to seek the input and advice of the subject matter experts in this area—the SEC, FINRA, state securities departments, and state departments of insurance—and to defer to the regulatory schemes they already oversee as a means of accomplishing the purpose that we all seek—retirement advice in the best interest of the client.

Thank you again for the opportunity to comment.

Sincerely,

MADISON AVENUE SECURITIES, LLC

A handwritten signature in dark ink, appearing to read "Wayne Talleur", followed by a long, horizontal, slightly wavy line that extends across the width of the signature.

Wayne Talleur
President & CEO