

VIA ELECTRONIC MAIL (e-ORI@dol.gov)

April 14, 2017

To: Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AB79: Examination of Fiduciary Rule and Exemptions

On February 3, 2017, President Trump issued a memorandum regarding the Department of Labor's ("Department") Fiduciary Rule ("Fiduciary Rule"), instructing the Department to examine whether the Fiduciary Rule is inconsistent with the Administration's priority to empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build individual wealth. On March 2, 2017, in response to the President's memorandum, the Department published a proposed rule to extend the applicability date of the Fiduciary Rule by 60 days, and invited comments regarding the Department's examination of the Fiduciary Rule and related exemptions.

Securities America, Inc. and Securities America Advisors, Inc. ("Securities America") appreciate the opportunity to comment on the Department's examination of the Fiduciary Rule. Securities America 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 as currently written. The Fiduciary Rule is likely to reduce investors' access to certain retirement product structures and related financial advice, result in disruptions within the retirement services industry that may adversely affect investors, and cause an increase in litigation which will result in an increase in the prices that investors and retirees must pay to gain access to retirement services.

About Securities America

Securities America, Inc. a FINRA registered broker dealer, and Securities America Advisors, Inc. an SEC Registered Investment Advisor firm, are subsidiaries of Securities America Financial Corporation. In business since 1984, Securities America is one of the largest independent broker dealer firms with over 2,000 independent financial representatives. Providing services in all fifty states, our representatives provide

services to over half a million investment customers nationwide. Securities America Financial Corporation is a subsidiary of Ladenburg Thalmann Financial Services Inc. (NYSE MKT: LTS, LTS PrA) a publicly-traded diversified financial services company based in Miami, Florida. In addition to Securities America, Ladenburg's subsidiaries include industry-leading independent broker-dealer firms Triad Advisors, Inc., Securities Service Network, Inc., Investacorp, Inc. and KMS Financial Services, 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.

General Concerns

The Fiduciary Rule is likely to reduce investors' access to certain retirement product structures and related financial advice.

- Due to the Fiduciary Rule's requirements that compensation be level within a product category, investors' access to certain retirement products will be significantly reduced. In the preamble to the Best Interest Contract Exemption ("BIC Exemption"), the Department states, *"it would not be permissible to draw categories based on the differential compensation the Financial Institution receives from different mutual fund complexes, or differences in the amounts paid to the firm for different annuities or riders."* Due to this requirement, Securities America will be forced to preclude some lower cost investment options that may be appropriate for some clients and reduce available product offerings to only those that pay the same level compensation (even if that compensation is higher) to the Financial Institution. This will likely cause a broad reduction across multiple product categories and, in some categories, may reduce available products from over 100 to less than 10.
- To comply with the Fiduciary Rule, many fund families have deployed T-share fund classes¹ which can have the effect of increasing costs and limiting choices for the retirement investor. T-shares usually have no rights of accumulation which increase costs for an investor who would be approaching a break point or who, under a subscription plan or letter of intent, has committed to future purchases. Additionally, T-shares charge the same commission even when the investor is switching between funds within the same fund family. Fund families have historically waived this cost specifically because there is less administrative cost when trading within the same fund family. The administrative cost has not

¹ <http://www.federatedinvestors.com/FII/daf/pdf/literature/17-69288.pdf?doclink=elc>

changed; but now, the investor will face higher costs to switch funds within fund families. This leads to less efficient financial markets and higher costs absorbed by the investing public.

The Fiduciary Rule has resulted in disruptions within the retirement services industry that may adversely affect investors.

- As discussed above, the Fiduciary Rule will lead Securities America to reduce investor access to certain retirement product structures. In many cases, this will adversely affect investors. For example, in the Variable Annuity product category retirement investors may no longer have access to the products that provide the lifetime income guarantees that would have been in their best interest had the products continued to be available.

Other Financial Institutions have announced the discontinuation of commissionable retirement products and services, out of a fear of BIC Exemption related litigation. A special report released by J.D. Power indicates that a majority of clients working with advisors under a commission arrangement are resistant to moving to a fee-based arrangement.² According to the report, *“more than half (59%) of investors who pay commissions say they either “probably will not” (40%) or “definitely will not” (19%) be willing to stay with their current firm if it meant being forced to move to a fee-based retirement account. [Further] high net worth investors (\$1 million+ investable assets) are more resistant to the change than others and are also more sensitive to the specific level of the proposed fee. At a proposed 1% fee, 25% of HNWs say they “definitely would not” be switching from commissions, compared with 52% at a 2% fee who say the same.*

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, in many cases, reduced costs. For those buy-and-hold investors working with a trusted advisor at one of these Financial Institutions choosing to discontinue offering commissionable retirement products and services, this means that the investor will be required to either:

1. Move to an advisory relationship with their current trusted advisor; a relationship the majority of commission investors are resistant to move to, and a relationship that typically increases long-term costs to the investor, or

² <http://www.jdpower.com/resource/wealth-management-fiduciary-roulette>

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.

- The Fiduciary Rule limits choice and increases cost to the investing public in other ways. Many Financial Institutions cannot support the qualified mutual fund investment conducted direct at the mutual fund (i.e. non-brokerage) due to the requirements to develop level compensation and completely eliminate conflicts. As a result, these firms are forcing all qualified mutual fund investments to be made within brokerage accounts which increases the costs to the investor due to the other features associated with the broker account.
- Under our current regulatory structure, retail investors must understand two different standards of care; (1) the suitability standard under FINRA rules governing Broker Dealers, and (2) the fiduciary standard under rules governing Registered Investment Advisers (“RIA”). 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.

The rule is likely to cause an increase in litigation, and increase in the prices that investors and retirees must pay to gain access to retirement services.

- The BIC Exemption’s provision prohibiting Financial Institutions from including contractual provisions waiving a Retirement Investor’s right to pursue a class action will cause an increase in litigation. This increase in litigation 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.*³
 - *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.*⁴
 - *“As night follows the day, there will be more litigation,” Skadden Arps Slate Meagher & Flom LLP partner Seth Schwartz said of the new rules.*⁵
 - *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.”*⁶
- Compliance with the Fiduciary Rule will cause Financial Institutions to bear considerable initial and ongoing expense to comply with the disclosure and supervision requirements of the BIC Exemption. This increased cost will ultimately be passed on to advisors through reduced payouts and/or increased costs, which will in turn result in advisors reducing or eliminating services to clients with small account balances. Additionally, advisors may be forced to

³ “DOL Fiduciary Rule Class-Actions Costs Could Top \$150M a Year.” By Jeff Benjamin, Investment News

⁴ “For Fiduciary Rule, Morningstar Sees Up to \$150M in Annual Class Action Settlements. By Nick Thornton, ThinkAdvisor.com

⁵ “Why Plaintiffs Firms Will Love DOL’s New Fiduciary Rules.” By Carmen Germaine, Law360

⁶ “Class Actions Will Test DOL’s New Fiduciary Rule, Attorney Says.” By Jessica Karmasek, Legal Newsline

increase asset management fees for clients with larger account balances; thereby, increasing clients overall cost of receiving high-quality advice.

Support for Further Delay

Securities America appreciates the fact that the Department has delayed the applicability date of the Fiduciary Rule for 60 days and amended the transition period requirements of certain PTEs through January 1, 2018. However, we do remain concerned that the Department is not affording adequate time to review the Fiduciary Rule in response to the Presidential Memorandum.

In the March 2, 2017 proposal to delay the Fiduciary Rule, the Department acknowledged the fact that should it revise or rescind the Rule after the current applicability date, two major changes in the regulatory environment will cause disruption to retirement investors and produce additional and unnecessary frictional costs. Further, in the preamble to the final rule delaying the applicability date, the Department states it has concluded that *“any such review [pursuant to the Presidential memorandum,] is likely to take more time to complete than a 60-day extension would afford.”* We respectfully request that the Department further delay the applicability date of the Fiduciary Rule to afford enough time to conduct a thorough review, and avoid causing unnecessary disruption to retirement investors.

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

Securities America 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. We believe a carefully-crafted universal fiduciary standard of care should make it easier for investors to receive high-quality, individualized investment advice from a trusted advisor, while maintaining the ability for “Americans to make their own financial decisions.”

Such regulation should provide retail investors with a clear and easy to understand standard of care that is applicable to the entirety of the client’s relationship with an advisor. Professionals should be required to do the following:

- Act in the best interest of the client as defined by well-established law regarding fiduciaries;
- Provide advice with skill, care, and diligence based upon the individual needs of the client; and
- Disclose material conflicts of interest, avoid them when possible, and obtain informed client consent to act when conflicts cannot be reasonably avoided.

Thank you for considering Securities America's comments. Should you have any questions, please contact me at 402-399-9111 ext. 1007.

Respectfully,

A handwritten signature in blue ink, appearing to read 'K. Miller', with a long horizontal flourish extending to the right.

Kevin J. Miller

Executive Vice President & General Counsel