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Wayne Saker
Brookline, Massachusetts

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Employee Benefits Security Administration
U.S. Department of Labor

Re: Definition of "Fiduciary" and related rules
Response to Request for Information, July 6, 2017
Docket No. EBSA-2017-0004-0001

To the Employee Benefits Security Administration:

To begin, I wish to thank you for requesting additional public comment on the fiduciary duty rules, including the Definition of "Fiduciary" ("Fiduciary Rule") and the Principal Transaction Exemption ("PTE").

Summary

I wish to respond to questions three and twelve of your Request for Information.

> 3. Do the Rule and PTEs balance the interests of consumers in receiving broad-based investment advice while protecting them from conflicts of interest? Do they effectively allow Advisers to provide a wide range of products that can meet each investor's particular needs?
>
> 12. Are there ways in which the Principal Transaction Exemption could be revised or expanded to better serve investor interests and provide market flexibility? If so, how?

For investors like me, individual "accredited investors" under longstanding federal securities law standards, I believe the answers to question 3 are "No" and "No." The Fiduciary Rule and PTE have had the effect of restricting my ability to use my IRA to invest in IPOs and other principal transactions as I have successfully done for decades, and can still do in non-IRA accounts. Because of my experience and resources, I am able to make my own investment decisions and do not need to be protected, much less prevented, from taking investment risks.

Fortunately, the answer to question 12 is clearly "Yes." The PTE could easily be revised, at least for investors who meet the objective SEC criteria for accreditation, to include principal transactions beyond the very limited debt securities currently permitted.

Discussion

I am a self-directed professional investor, and have been an individual customer of a major Wall Street broker-dealer (the "Firm") since 1991. For many years, the Firm has allowed me to participate in public offerings on a principal basis. My accounts at the Firm, including my IRA and Roth IRA, are eligible to trade in the most aggressive risk category in the Firm's suitability matrix. In addition to participating in public offerings, I am an active trader, having made approximately 2000 trades in 2016 on an unsolicited basis. Finally, I meet the SEC's standards as an "accredited investor," with a net worth (excluding real estate) and income considerably in excess of the minimums of SEC Rule 501(a)(5) and (a)(6). (17 CFR 230.501.)

Now the Firm has advised me that, under the Rule and PTE, I am no longer eligible to participate in public or private offerings, or to conduct other principal trades, in my IRA and Roth IRA accounts. It is my understanding that the Firm, attempting in good faith to comply with the new rules, finds itself as a "fiduciary" unable to make principal trades outside of a very narrow set of fixed income securities defined in the PTE. This new restriction harms me in two ways: by limiting the amount of capital that I can use to implement my investment strategy, and by forcing me to use my taxable account for principal trades, which are inherently more likely to generate immediate taxable gains.

It is extremely difficult for me to understand how I am "protected" or how my best interests are served by restricting me from investing in the same way that I have for many years, and the same way I continue to trade in my taxable accounts.

I understand that this unfortunate, but very real, restriction may not have been intended by the Department. Informal Department guidance, in the PTE adopting release, suggests that non-fiduciary firms can engage in principal transactions with self-directed IRA investors.

> "[T]his exemption does not affect the ability of a self-directed investor to obtain the services of a financial professional to effect or execute a transaction involving any type of investment, in the absence of investment advice. In that sense, the Department is not limiting investment opportunities for individual investors or substituting the Department's judgment for theirs. . . ." Federal Register, Vol. 81, No. 68, at pp. 21098-9 (April 8, 2016).

Unfortunately, in practice, the Fiduciary Rule and PTE have <u>already</u> restricted my opportunities. In order to take advantage of principal transaction opportunities, under the current rules, I would have to find a financial services firm that (a) offers a comparable suite of products and (b) effectively precludes its registered representatives from offering anything that might fall under the broad definition of investment advice. In my case, the Firm does not offer such a business model, so I am in fact not free to invest as I have before. But even if the Firm chose to offer an advice-free "service," I fail to understand how it benefits me, as an experienced, accredited, self-directed investor, to be precluded from receiving information from my broker, which I am fully able to use or disregard.

I believe that the Department could get closer to its stated goal, of "not limiting investment opportunities for individual investors," by amending the PTE to allow principal trading with IRAs of accredited investors. In Regulation D of the Securities Act, the Securities and Exchange Commission created the concept of "accredited investor" for the very purpose of identifying investors who do not need the same degree of protection as the general public. Specifically, the term was defined in order "to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary." (Review of the Definition of "Accredited Investor," SEC Staff Report, December 18, 2015.)

It's important to note that Reg D makes accredited investors eligible to participate in unregistered offerings, which makes it even harder to understand why the Fiduciary Rule and PTE should restrict the very same investors from buying fully registered securities, which are far more transparent. Because accredited investors have the wherewithal to invest in unregistered offerings under Reg D, they should have more than sufficient capabilities to understand and bear the risks of principal trading in public securities, including IPOs and a broad array of debt instruments, which are far more transparent. The sophistication and resources of accredited investors, including our ability to access advice independent of their broker-dealers, also addresses the Department's other stated concerns about whether investors are able to evaluate the fairness, pricing and liquidity of other principal traded assets.

Such a change would have the advantage of being easy to monitor, and of fitting easily within the Department's overall regulatory scheme. All major brokerage firms, and any others that deal with private securities offerings, already have in place the systems to identify accredited investors under the SEC's existing standards. In addition, the amendment to the PTE would leave in place the "impartial conduct standards" applicable under the PTE; similarly, the Reg D safe harbor leaves in place the antifraud protections of the securities laws.

Conclusion

For these reasons, I respectfully request that the Department consider amending the Principal Transaction Exemption to allow "accredited investors," under existing SEC rules, to engage in principal transactions in their IRAs.

Sincerely,

/s/

Wayne Saker

Brookline, Massachusetts