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January 6, 2020

The Honorable William Galvin  
Office of the Secretary of the Commonwealth  
Attn: Proposed Regulations – Fiduciary Conduct Standard  
Massachusetts Securities Division  
One Ashburton Place, Room 1701  
Boston, MA 02108

**Re: UBS Comments on Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives**

Dear Secretary Galvin:

Thank you for the opportunity to further comment on the Proposed Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (the "Proposal") issued by the Massachusetts Securities Division (the "Division"). UBS Financial Services Inc., a subsidiary of UBS Group AG ("UBS"), is one of the largest securities firms in the United States with a long history of servicing investors in Massachusetts. Our history dates back to the founding in the 1880s of the Boston brokerage firm PaineWebber & Co. UBS currently has close to \$30 billion in brokerage assets held by Massachusetts investors that would be impacted by the Proposal.

We appreciate the Division's approach in receiving and reviewing preliminary comments and subsequently making some modifications to the preliminary Proposal. However, the revised Proposal remains tremendously problematic, and in some instances even more so. UBS reiterates our position that the Division reconsider its stance on the U.S. Securities and Exchange Commission's Regulation Best Interest ("Reg BI") and delay adoption of the Proposal until ample time has been given to assess Reg BI's effectiveness.

UBS, therefore, joins in the comments submitted by our relevant industry trade associations and, in particular, supports the comments submitted by the Securities Industry and Financial Markets Association ("SIFMA") and

the U.S. Chamber of Commerce. If the Division decides not to delay action on the Proposal, we urge the Division to adopt the suggestions discussed below, and move forward with an appropriate effective date that gives the industry sufficient time to make the many changes that would be necessary in order to attempt to comply with the Proposal.

## Comments

### **A. Several Of The Proposal's Most Problematic Provisions Will Encourage The Reduction Of Brokerage Services In Massachusetts**

Several of the Proposal's more problematic provisions should be amended because they would otherwise encourage the reduction of brokerage services in Massachusetts, and may lead industry participants to offer only advisory accounts in Massachusetts.

#### **1. The Ongoing Fiduciary Duty Obligation Will Discourage Firms From Providing Brokerage Services In Massachusetts**

The Proposal imposes an "ongoing" fiduciary duty when a customer has a "reasonable expectation" that their account is being monitored on a regular or periodic basis. This broad and subjective standard will discourage a broker-dealer from providing the courtesy of voluntarily periodically checking in on a client's account. So rather than encourage quality customer service, the Proposal would encourage firms to ignore their clients to avoid the risk of triggering an expectation that the account is being monitored.

We respectfully request that the ongoing fiduciary duty provision be amended to align with Reg BI so that the duty only arises in connection with recommendations or as otherwise contractually agreed with a customer.

#### **2. The Presumption That The Use Of Certain Titles, Credentials, Or Designations Will Trigger A Fiduciary Obligation Will Encourage The Elimination Of Brokerage Services In Massachusetts**

The ongoing fiduciary duty would be triggered automatically if any combination of a wide range of common titles are used. Financial professionals use various combinations of the terms "adviser, manager, consultant or planner" in conjunction with the terms "financial, investment, wealth, portfolio or retirement." The Proposal's titling restrictions would essentially subject every type of financial professional to an ongoing fiduciary duty. It is difficult to avoid using any type of title to describe brokerage services without using any of the terms above or their equivalent.

We therefore request that the Division eliminate this provision in its entirety.

#### **3. A Fiduciary Duty Imposed When A Firm Opens A Brokerage Or Like Account Or Transfers Assets From A Brokerage Or Like Account Will Restrict Investors From Freely Choosing Financial Services Firms**

The Division should clarify that the Proposal's categorization of advice regarding the "opening of or transferring of assets to any type of account" does not apply to a brokerage account or to the opening or transferring of one like account to another. Such a requirement when opening or transferring between such accounts would be a needless intrusion into normal business practices. Moreover, imposing a fiduciary duty on the opening of a

brokerage account that is not in connection with a recommendation means that the opening of a brokerage account is always subject to a fiduciary duty standard.

When UBS acquires a new client, it will often open or transfer all of a client's assets over to a UBS brokerage account or like account from a similar account at another financial services firm. But the opening of an account or asset transfer should not be considered "fiduciary advice" for brokerage accounts or like accounts. Firms should not be forced to perform an analysis on the relative merits and costs of a brokerage account or like account of its competitors' in any event. This provision only serves to restrict the acquisition of new clients, and may restrict or hinder customers from freely moving accounts.

We therefore request that the Division provide that a fiduciary duty is not triggered when firms open brokerage or like accounts or transfer assets from a brokerage or like accounts.

### **B. The Proposal's Push To Fee-Based Accounts Will Increase Costs To Many Investors and Eliminate Valuable Brokerage Services In Massachusetts**

The Proposal raises costs for brokerage investors who may be required to move from transaction-based accounts to fee-based accounts in order to maintain a relationship with their existing broker-dealer. In addition, broker-dealers may limit or do away with services to small accounts because the fees would not be worth the increased risk of offering them. As CoreData Research UK found with the similar DOL fiduciary rule, 71% of financial representatives would have "disengage[d] with" some investors with smaller accounts as a result of that 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>1</sup>

Additionally, the Proposal will reduce the ability of those unable to afford, or unwilling to switch to, advisory accounts from having access to market professionals and market information. The complexity of the financial markets will not change as a result of the Proposal – only the inability of a certain population of investors to access critical information to make sound investment decisions. Many Massachusetts investors will resort to seeking assistance from non-market professionals and engage in self-directed execution-only service through the internet or call centers. They will be at the mercy of news and market events without the valuable human experience once available to help temper impulsive actions.

#### **1. Low And Middle-Income Investors Will Operate With Less Access To Market Professionals**

The negative impact of reducing access to market professionals will be borne disproportionately by investors with fewer investable assets, as firms will be forced to raise the minimum thresholds for these accounts.<sup>2</sup> A

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<sup>1</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>2</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-%20in1210-ab79%20wo%20appendix.pdf?n=24493](http://www.sifma.org/uploadedfiles/correspondence/comment_letters/2017/sifma%20letter%20-%20in1210-ab79%20wo%20appendix.pdf?n=24493).

study by the management consultant A.T. Kearney found that because of the DOL's fiduciary rule “many low-balance accounts will no longer be served, shifting many assets to formats such as robo-advice and self-directed.”<sup>3</sup> This in turn will lead to low and middle-income residents having lower levels of savings and investing,<sup>4</sup> and limit their ability to build wealth.

Individuals are motivated to save more when they have access to a financial representative.<sup>5</sup> Similar to the impact of the DOL's fiduciary rule, the Proposal would reduce such assistance for those with lower incomes, who tend to save and invest less when they do not have assistance. Research studies, for instance, have tended to show that when clients do not have access to financial representative assistance, they end up holding fewer equities than investors who do receive assistance.<sup>6</sup>

Additionally, those individuals who lose access to assistance of this kind on average lose asset value.<sup>9</sup> Studies indicate that asset allocation, not mutual fund performance, explains, on average, 100% of performance.<sup>10</sup> Most brokerage investors do not have a clear understanding of the best way to build and manage a portfolio. They often lack the time and resources to do the requisite diligence. Market professionals help bridge this knowledge gap and make the markets more accessible.

## 2. *Brokerage Investors Generally Will Operate With Less Information When Making Investment Decisions*

The Proposal ignores the reality that for Massachusetts investors who do not opt for a potentially more costly fee-based advisory program, they will no longer have even limited access to valuable market information to assist with evaluating their investment decisions. In a rapidly changing world, investors need education from market professionals more than ever. An open conversation with a market professional adds value and is in the best interests of investors. Many investors would prefer to speak to a market professional and receive guidance than to be forced to navigate the maze of investing with inadequate information. Broker-dealers often provide guidance as to the wisdom of engaging in a particular transaction, whether it is refraining from entering into the market at a given time, maintaining a certain level of liquidity, or staying the course with an investment to fund their children's college education or their own retirement. The Proposal will therefore result in many investors having to evaluate such investments and decisions on their own.

### **C. The “Without Regard To Any Other Interest” Provision Creates A Standard That Cannot Be Confidently Met**

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<sup>3</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-b12ed3d2b0807d69>.

<sup>4</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>5</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 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>6</sup> See, e.g., S.R. Foerster, et al., *Retail Financial Advice: Does One Size Fit All?*, J. of Fin. (2017).

The Proposal's "without regard to" language is an impossible standard to meet. The language would make market professionals vulnerable to claims that any other consideration, no matter how insignificant, would subject them to violating the duty of loyalty. The fact that market professionals are compensated for their service of providing investment advice leaves them vulnerable to claims that they did not satisfy their duty of loyalty obligation. As the SEC recognized, the "without regard to" language could be inappropriately construed to require a broker-dealer to do the impossible, i.e., to eliminate all of its conflicts. A market professional could not confidently meet the "without regard to" requirement because they would be unable to understand and demonstrate how to comply. This would be another reason why industry participants may choose to offer only advisory accounts if the Proposal is adopted in its current form.

We respectfully urge the Division to replace the "without regard to" language with the "without placing the financial or other interest of the advisor or broker-dealer ahead of the customer" language from Reg BI.

**D. The Division Should Defer Acting On Insurance Products Or Expressly Exclude It From The Proposal**

Annuities and other insurance products are already subject to extensive and effective regulation by the Massachusetts Division of Insurance (the "MA DOI"), the SEC and FINRA. Additional regulation under the Proposal would be unnecessary, confusing, and potentially result in conflicting standards. Further, the National Association of Insurance Commissioners (the "NAIC") has nearly completed its work on similar enhancements to the standards applicable to sale of insurance producers under its model regulation governing annuity sales practices (the "NAIC Model"). Final approval of these modifications is expected imminently this year. We expect prompt action across the state insurance departments to adopt the uniform NAIC model. On this point, we join with the Insured Retirement Institute who has submitted a letter explaining how the NAIC model will effectively accomplish the Division's goals without the need for further and conflicting regulation and why the MA DOI is the more effective regulator for insurance products, including annuities.

We respectfully urge the Division to defer acting on insurance products or expressly exclude insurance products from the Proposal.

**E. If The Division Decides To Move Forward With The Proposal, Its Effective Date, With The Incorporation Of The Recommendations Above, Should Be At Least 18 Months**

The Proposal is a significant change from the well-established standards and is widely different than Reg BI. If the Division decides not to delay taking action on the Proposal, after incorporation of the recommendations above, an adequate transition period is required for the industry to implement systems and policies and procedures designed to comply with the Proposal. Implementing the Proposal will require significant legal, compliance and technological work. This is particularly the case as financial services firms will be forced to develop systems for supervision, monitoring, compensation, as well as extensive training and policies and procedures to comply with both Reg BI and the Proposal.

Further, because the Proposal introduces different requirements in Massachusetts than that of Reg BI and other states, the complexity of navigating these differences will result in increased implementation costs for UBS and the financial services industry. By way of comparison, a mere four months into the phase-in period of the Department of Labor's ("DOL") now vacated fiduciary rule, UBS alone incurred approximately \$23 million in



costs to study various compliance approaches and preparing to build them into our systems and practices. In fact, the DOL significantly underestimated the cost to comply with its fiduciary rule and exemptions. The DOL's "primary estimate" was \$16.1 billion over ten years, with \$1.5 billion in annual costs after the first year.<sup>7</sup> The true figures ended up appearing to be \$31.5 billion in total costs, with \$2 billion in annual impact.<sup>8</sup>

Increased costs requires a process of planning, managing, and assigning resources for effective implementation. Massachusetts investors and our clients will be best served by a thoughtful and comprehensive approach to implementation of this Proposal and that will take a reasonable amount of time and effective resource allocation. We respectfully request an effective date at least 18 months from the adoption of the final rule, and note that the SEC has given the industry substantial time to prepare for implementation of Reg BI.

### **Conclusion**

UBS wholeheartedly supports the Division's efforts in providing additional protections to Massachusetts investors. However, we do not believe that the Proposal fully takes into account the adverse potential consequences to the investors it seeks to protect. The Proposal upends the long-standing role of assistance that broker-dealers provide to investors and will limit investor information, choice and access. As we support added protections in our industry, most market professionals serve the purpose of educating investors by offering sound guidance, access to market intelligence, and assisting investors with achieving their short and long-term financial objectives. We, therefore, believe that the Division's Proposal requires revisions such as those set forth above and in the comment letters of our industry colleagues and relevant industry trade associations to best serve the interests of Massachusetts investors.

Sincerely,

A handwritten signature in black ink that reads "Jason R. Chandler". The signature is fluid and cursive, written over the printed name.

Jason R. Chandler

**Group Managing Director**

Head Wealth Management USA

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<sup>7</sup> 81 Fed. Reg. at 20,951.

<sup>8</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/>.