American Bankers Association
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July 21, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11933
U.S. Department of Labor
200 Constitution Ave., NW, Suite 400
Washington, D.C. 20210

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions – RIN 1210-AB82

Ladies and Gentlemen:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on the agency's Request for Information (RFI) on whether to extend the January 1, 2018 applicability date (Applicability Date) of the provisions of the Best Interest Contract (BIC) Exemption, Principal Transactions Exemption, and amendments to Prohibited Transaction Exemption 84-24 (collectively, Exemptions). The Department has issued the RFI in connection with its re-examination of the Fiduciary Rule[2] (which was finalized on June 9, 2017) and the Exemptions in order to determine whether the Department should undertake changes or revisions to the Fiduciary Rule and/or the Exemptions.[3] For the reasons described below, we recommend that the Department extend the Applicability Date by at least twelve months (*i.e.*, to January 1, 2019), or in the event that either the Fiduciary Rule or Exemptions are revised, by at least twelve months after the effective date of any such changes or revisions. We further request that the Department act expeditiously on our recommendation so that banks can optimize the implementation of their respective compliance strategies and resources.

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend more than $9 trillion in loans. Many of these banks are plan service providers, providing trust, custody, and other services for institutional clients, including employee benefit plans covered by the Employee Retirement Income Security Act (ERISA). Our member banks also routinely provide services for retail clients through individual retirement accounts and similar accounts that are covered by the Internal Revenue Code (Code). Learn more at www.aba.com.
[2] The Fiduciary Rule defines who is a "fiduciary" under ERISA and the Code as a result of giving investment advice for a fee or other compensation to a plan or its participants, or to the owner of an individual retirement account (IRA).
[3] *See* Department of Labor, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 *Fed. Reg.* 31,278 (2017).

I. Background: The Compliance Challenge.

The Fiduciary Rule and the Exemptions (particularly the BIC Exemption) are extraordinarily detailed and complex in their requirements and implementation. Since they were finalized in April 2016, they have required sustained attention of a bank's board of directors and senior management, as well as staff from multiple bank departments and divisions. For example, as a result of the Fiduciary Rule, a bank that provides Individual Retirement Account (IRA) products and services to its retail customers must decide whether these activities would trigger the Fiduciary Rule. If so, the bank then needs to assess and reconfigure its product line, policies and procedures, marketing and sales, investor assistance, software requirements, technology capability and support, and employee training, among other things. These compliance undertakings involve substantial time, labor, and costs, both initially and on an on-going basis.

Given these significant challenges and obstacles, it was impractical for the Department, when it finalized the Fiduciary Rule, to expect full compliance in 12 months. In our July 21, 2015, letter to the Department, which responded to the Fiduciary Rule as proposed, ABA concluded that it would take banks 36 months to comply with the Fiduciary Rule,[4] a timetable ABA still believes is more realistic and workable, assuming the Fiduciary Rule is modified to achieve functionality. Notwithstanding the Department's fast-track review process in which the Fiduciary Rule was finalized and put into effect, the Department should use the current rulemaking process to repeal or revise the Fiduciary Rule to achieve functionality, target *bona fide* fiduciary conduct, provide certainty of compliance, and thereby satisfy public policy standards that genuinely serve financial institution customers. Similar action should be taken also with respect to the BIC Exemption. As discussed below, this process will inevitably result in a timeframe well beyond the Applicability Date.

II. Extension of the Applicability Date.

The current trajectory of the Department's rulemaking process already points to a significant delay in the Applicability Date. The RFI's comment period ends on Monday, August 7, 2017. Even under the most favorable circumstances, the Department will require 60 days or longer to review these comments in order to determine whether any proposed revisions or changes to the Fiduciary Rule or the Exemptions are warranted.[5] Even were it assumed that the Department can complete its review in 60 days with no further action on its part, then that would place the date no earlier than October 6, 2017.

A. No Changes or Revisions to the Fiduciary Rule/Exemptions.

Even were the Department ultimately to conclude, based on the comments received, that no changes or revisions are necessary to the Fiduciary Rule or the Exemptions, the Department would still require sufficient time to deliberate and determine that such conclusion is warranted.

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[4] *See* ABA Letter to Joe Canary, Director, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor (July 21, 2015).

[5] It is likely that the Department will require a much longer period to review the comments. For instance, in the RFI, the Department noted that it is still "in the process of reviewing and analyzing comments received in response to its March 2, 2017, request for comments." *Id.* at 31,279.

Given the sustained high level of public interest in the Fiduciary Rule, this time period would probably include meetings with interested parties and stakeholders, possibly even a Department-sponsored public hearing. Although this deliberative process usually takes a number of months (sometimes a year or longer), assume that the Department is able to compress this entire process into just 90 days. That would already place the date beyond the Applicability Date (*i.e.*, January 4, 2018). Moreover, it is difficult for institutions to determine where to allocate resources for compliance when the Department itself is in the process of re-examining the Fiduciary Rule's scope and content. The uncertainty of regulatory changes or revisions may have institutions pursuing multiple or alternative paths to compliance that cannot be resolved fully until the Department determines that no further changes or revisions will be made.[6] As a result, the Department would need to allow additional time for institutions to achieve full compliance, which would require an extension well beyond the Applicability Date.

B. <u>Proposed Changes/Revisions to Fiduciary Rule/Exemptions</u>.

The more probable scenario, however, involves the Department proposing one or more substantive changes or revisions to the Fiduciary Rule and Exemptions, which will likely require a formal rulemaking process to amend the regulations.[7] In such event, the Department would need time to (i) consider the raft of possible changes and then draft the proposal (requiring some 3-6 months), (ii) submit a notice of proposed rulemaking (NPR) for public review and comment (with prior review and approval from the Office of Management and Budget) (requiring some 30 days), (iii) allow sufficient time for public comment (requiring approximately 60-90 days), (iv) review those comments (requiring 60+ days), and (v) finalize the changes, making any adjustments to the proposal based on public comments (requiring 30+ days).

Under the best of circumstances, such a process would take at least nine months from the October 6, 2017, date referenced above, well past the Applicability Date. This further does not account for the amount of time required for financial institutions to implement the revisions and come into compliance with the revised Fiduciary Rule and/or Exemptions. Typically this would involve a number of months, since the banks would not know what changes/revisions were made until they are finalized and published and presumably would need sufficient time to adjust their policies and procedures, banking practices, employee training, documentation, etc. On this basis, the Applicability Date should likely fall *no earlier than* between January 1, 2019 and July 1, 2019.

C. <u>Federal Banking Agencies</u>.

Another basis for extending the Applicability Date involves the level of readiness at the federal banking agencies (the Office of the Comptroller of the Currency (OCC), the Federal Reserve, and the Federal Deposit Insurance Corporation (FDIC)). As the primary federal regulators, these

[6] This situation further may lead to customer confusion as to which requirements apply to an institution under the Fiduciary Rule, given that the Fiduciary Rule itself may be subject to further changes or revisions.

[7] Timothy D. Hauser, Deputy Assistant Secretary for Program Operations at the Department's Employee Benefits Security Administration, recently indicated that the Department may consider more exemptions and that there could be further changes to the Fiduciary Rule, which would result in an extension to the January 1, 2018 effective date. *See* Knebel, Kristen Ricaurte. "Fiduciary Rule Could See Delays Past January," *Bloomberg BNA*, June 8, 2017, at https://www.bna.com.

agencies are charged with examining banks for compliance with ERISA and the Code, including the Fiduciary Rule and the Exemptions.[8] To date, however, these agencies *have not issued any guidance* to banks concerning these Department regulations. Given the volume of initial and on-going questions and issues raised by the Fiduciary Rule and the Exemptions,[9] it is also not clear whether the OCC, Federal Reserve, and FDIC will have achieved by the Applicability Date the level of understanding and expertise expected to conduct bank examinations in this subject area.

Although the federal banking agencies may defer to the Department for interpretation of the Fiduciary Rule and the Exemptions, the agencies have not made clear to the banking industry their expectations for supervision and examination. For example, the Department has stated that it "will not pursue claims against fiduciaries who are working diligently and in good-faith to comply with the [F]iduciary [R]ule and [E]xemptions."[10] What is complying "diligently and in good faith" mean? How will the federal banking agencies apply this standard in examinations? Will they do so consistently? Thus far, banks have not received any formal or informal guidance or direction from the OCC, Federal Reserve, or FDIC. Extending the Applicability Date will allow the federal banking regulators, in consultation with Department staff, the opportunity to determine and then communicate their regulatory expectations for banks subject to the Fiduciary Rule.

Thank you for your consideration of our request. If you have any questions or require any additional information, please do not hesitate to contact the undersigned at 202-663-5479 (tkeehan@aba.com).

Sincerely,

Timothy E. Keehan
Vice President & Senior Counsel

[8] *See, e.g., Comptroller's Handbook, Retirement Plan Products and Services* (2014), which provides national bank examiners with guidance for performing examinations of national banks and federal savings associations for compliance with the laws of ERISA and the Code. *See also id*. at 1 (national banks must comply with the OCC's fiduciary regulation, 12 C.F.R. Part 9, when providing products and services to retirement plans).

[9] The number, complexity, and pervasiveness of questions that have been raised has prompted the Department to issue multiple FAQs that attempt to clarify and interpret the provisions of the Fiduciary Rule and the Exemptions. *See* Department of Labor, Conflict of Interest Exemptions FAQs (October 2016); Conflict of Interest FAQs (Part II – Rule) (January 2017); Conflict of Interest FAQs (Transition Period) (May 2017).

[10] Department of Labor Conflict of Interest FAQ #15 (May 2017).