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Deputy General Counsel

August 7, 2017

EBSA.FiduciaryRuleExamination@dol.gov

Office of Exemption Determinations
Employee Benefits Security Administration (Attention: D-11933)
U.S. Department of Labor
200 Constitution Avenue, N.W., Suite 400
Washington, DC 20210

Re: *RIN 1210-AB82*

Dear Ladies and Gentlemen,

Bank of America[1] appreciates the opportunity to respond to the Department of Labor's ("DoL") Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions ("RFI").[2] We believe the DoL can make changes to the Fiduciary Rule and related exemptions that will more effectively and efficiently ensure that retirement investors receive investment advice that is in their best interest. We hope that our comments are helpful and constructive to the DoL's evaluation.

A Harmonized Fiduciary Standard Should Apply to All Account Types

As a threshold matter, we believe that retail investors should have the benefit of a best interest standard whenever they receive personalized investment advice, whether from broker-dealers or investment advisers and for all accounts, not just IRAs.[3] The Fiduciary Rule as

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[1] Bank of America Corporation is one of the world's largest financial institutions, serving its clients with a full range of banking, investing, asset management, and other financial and risk management products and services. Bank of America Corporation and/or its affiliates are registered as both broker-dealers and investment advisers and are among the world's leading wealth management companies.

[2] Request for Information Regarding Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31,278 (July 6, 2017).

[3] Letter from R. Scott Henderson, Deputy General Counsel, Bank of America to Office of Regulations and Interpretations, U.S. Dep't of Labor (July 21, 2015), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00229.pdf. *See also* Letter from R. Scott Henderson, Deputy General Counsel, Bank of America to Elizabeth M. Murphy, Sec'y, U.S. Sec. and Exch. Comm'n ("SEC") (Aug. 30, 2010), available at https://www.sec.gov/comments/4-606/4606-2583.pdf (addressing comments on File No. 4-606: Study Regarding Obligations of Brokers, Dealers, and Investment Advisers). We note that the primary "harm" to investors identified by the SEC study was confusion over different standards attached to advice from broker-dealers and investment advisors. *Id.* Without close coordination among regulators, the proliferation of standards would exacerbate investor confusion. *Id.*

currently configured creates inconsistent requirements for retirement and non-retirement accounts, leading to unnecessary complexity, confusion, and costs. A harmonized regulatory approach would better serve the interests of investors. Accordingly, we urge the DoL to seize the opportunity to find common ground with the Securities and Exchange Commission ("SEC") and craft a comprehensive, harmonized regulatory standard.[4]

Suggested Modifications to the Best Interest Contract Exemption

As noted in our previous comment letter, Bank of America believes that aspects of the Best Interest Contract Exemption ("BIC")[5] create significant uncertainty, burdens, and risks to financial services firms with few or no offsetting benefits to individual investors.[6] We are particularly concerned about the detail and complexity of mandated disclosures. Inadvertent, technical non-compliance with these disclosure requirements could lead to expensive and burdensome class action litigation, even in the absence of any harm to investors. Because litigation and related costs are inevitably passed on to consumers, we believe this aspect of the exemption will make investment advice in brokerage less available and more expensive across the industry.[7]

Provide Broader Relief for IRA Owners With at Least $50 Million in Total Assets

The DoL has taken the position that the "sophisticated independent fiduciary" exception is not available to the owner of an IRA that has at least $50 million in personal and IRA assets,

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[4] Mark Schoeff Jr., *Labor's Alexander Acosta and SEC's Jay Clayton tell lawmakers they will work together on fiduciary rule*, INVESTMENT NEWS (July 27, 2017, 2:13 PM), http://www.investmentnews.com/article/20170627/FREE/170629931 (noting Secretary Acosta's desire to work with the SEC on the Fiduciary Rule); Chairman Jay Clayton, *Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers* (June 1, 2017), https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31 ("welcom[ing] the Department of Labor's invitation to engage constructively as the Commission moves forward with its examination of the standards of conduct applicable to investment advisers and broker-dealers, and related matters."); Mark Schoeff Jr., *Jay Clayton says SEC, DOL can give market "clarity" on fiduciary rule*, INVESTMENT NEWS (July 26, 2017, 1:41 PM), http://www.investmentnews.com/article/20170726/FREE/170729957 (capturing Chairman Clayton's expression of confidence that the SEC and DoL can reach common ground on an investment advice standard across all accounts).

[5] Best Interest Contract Exemption, 81 Fed. Reg. 21,002 (Apr. 8, 2016).

[6] Letter from R. Scott Henderson, Deputy General Counsel, Bank of America to Office of Regulations and Interpretations, U.S. Dep't of Labor (July 21, 2015) available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00229.pdf.

[7] Bank of America is not alone in believing that use of the BIC will substantially increase the risks of class action litigation. *See* Michael Wong, *Costs of Fiduciary Rule Underestimated*, MORNINGSTAR (Feb. 9, 2017, 4:08 PM) http://news.morningstar.com/articlenet/article.aspx?id=793268 (estimating that the "long-term" annual range from class action settlements relating the BIC will be between $70 million to $150 million, and substantially higher than that in the first few years).

as the IRA owner would not be considered an "independent" fiduciary.[8] We urge the DoL to adopt a standard that is consistent with FINRA rule 4512(c). In particular, the definition of "institutional account" in FINRA rule 4512(c) includes natural persons with total assets of at least $50 million and does not exclude the owner of an IRA from satisfying this standard with respect to his IRA investments.[9] As discussed above, Bank of America believes that harmonization of different regulatory regimes is in the best interest of all retirement investors. If an individual qualifies as an "institutional" investor for purposes of FINRA rule 4512(c), we do not see any meaningful reason why the "sophisticated independent fiduciary" exception should not be available for communications about his IRA. The financial services firm transacting with the IRA owner will need to state clearly that it is not providing advice. This should provide sufficient protection such that if the individual wants investment advice, he can request to be directed to someone who could provide that advice.

As an alternative to broadening the sophisticated independent fiduciary exception, which we favor, the DoL could simplify the BIC or adopt a simpler exemption for IRA investments, where the IRA owner has at least $50 million of assets under management. These individuals already have sufficient knowledge and sophistication to decide whether to accept a recommendation, without the additional costs and burdens that are associated with the detailed disclosure and other requirements of the BIC. This approach would also be more consistent with SEC and other regulatory regimes that regard these individuals as sufficiently knowledgeable to make investment decisions without additional protections.[10]

Provide a Simpler Exemption for "Cash Products"

The detailed and complex provisions of the BIC are particularly burdensome and of dubious value for retail investors who are primarily interested in cash-based investments, such as money market funds, bank-certificates of deposit, or vehicles, such as health savings accounts, that often invest predominately in highly liquid cash-based products. The complex and detailed contract and disclosure requirements can be confusing, the costs of compliance are high, and the risks of class action litigation are daunting. Individual investors often have personal liquidity needs that make it in their best interest to retain a certain portion of their "nest egg" in cash-based investments (*e.g.*, required minimum distributions or paying for a grand child's college education). In our view, even if the DoL does not simplify the BIC or another exemption for all investment products, it should do so with respect to cash-based investments and health savings accounts.

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[8] Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 81 Fed. Reg. 20,981 (Apr. 8, 2016); U.S. Dep't of Labor, Conflict of Interest FAQs (Part II – Rule) (Jan. 2017) available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf.

[9] FINRA RULE 4512(c) (2011).

[10] *See* 17 C.F.R. § 275.205-3 (2012); FINRA RULE 4512(c) (2011).

Permit All Annuities to be Sold Using Prohibited Transaction Exemption 84-24

Bank of America further recommends that the DoL amend Prohibited Transaction Exemption ("PTE") 84-24[11] to cover all types of annuities, including fixed indexed annuities and variable annuities. PTE 84-24 was specifically adopted and designed to cover the purchase of insurance or annuity contracts and the receipt of compensation with respect to those transactions. We believe there is no need for the current construct adopted by the DoL, where some annuities can be sold in reliance on PTE 84-24 and others must utilize the BIC. The availability of PTE 84-24 for all annuities avoids unnecessary complexity and confusion. Retirement investors are protected as annuities are subject to extensive state regulation and licensing requirements and PTE 84-24 incorporates the same impartial conduct standards that apply to the BIC.

We further urge the DoL to amend PTE 84-24 to eliminate the current proscriptive definition of "Insurance Commission," which prohibits revenue sharing payments, administrative fees or marketing payments.[12] This definition has not historically been included in PTE 84-24 and, with the incorporation of the impartial conduct standards, there is no reason to specify the type of permitted compensation.

Bank of America believes that the changes outlined above would better advance the DoL's goal of promoting "best interest" advice to investors for retirement. Please let us know if you would like to discuss.

Sincerely,

R. Scott Henderson

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[11] Amendment to and Partial Revocation of Prohibited Transaction Exemption ("PTE") 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81 Fed. Reg. 21,147 (Apr. 8, 2016).

[12] *Id.* at 21,165.