American Bankers Association
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Timothy E. Keehan
VP, Senior Counsel
Center for Securities Trusts & Investments
202-663-5479
tkeehan@aba.com

September 22, 2015

Mr. Joe Canary, Director
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, D.C. 20210

Re: Proposed Rule on the Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment – RIN 1210-AB32; Proposed Exemptions and Proposed Amendments to Exemptions – ZRIN 1210-ZA25

Dear Mr. Canary:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide additional comments to the Department of Labor (Department) on the proposed rule (Proposal) regarding the expanded circumstances under which a person is considered to be a "fiduciary" under the Employee Retirement Income Security Act of 1974 (ERISA) or the Internal Revenue Code (Code). This letter follows up on ABA's testimony (Testimony) provided to the Department on August 12, 2015, as part of the four-day public hearing on the Proposal which was held August 10-13, 2015 (Hearing).

We commend the Department for its efforts to solicit public responses and input to the Proposal through the rulemaking process and the Hearing. We wish to reiterate the concerns raised in our comment letter of July 21, 2015 (Letter) and in our Testimony that the Proposal is overbroad and captures a number of persons who should not be viewed as, nor reasonably considered to be, a "fiduciary" under ERISA and the Code, points that we believe were reinforced in the Hearing exchange between ABA's witness and Department officials. If finalized in its current form, without appropriate amendment, the Proposal would make it difficult, complex, and costly for banks to deliver the investment-related products, services, and information necessary for retirement investors to achieve a financially sound retirement, services that our customers

[1] The American Bankers Association is the voice of the nation's $15 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits, and extend more than $8 trillion in loans. Many of these banks are plan service providers, providing trust, custody, routine deposit/cash management, and other services for institutional clients, including employee benefit plans covered by the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code. Our member banks also routinely provide services for retail clients through individual retirement accounts and similar accounts that are covered by the Code. Learn more at www.aba.com.

currently rely on. This will likely harm the very individuals that the Department is seeking to protect by restricting access to, and availability of, valuable investment information and services that should continue to fall outside ERISA's fiduciary framework.

Therefore, we reiterate our request that the Department withdraw the Proposal, analyze and evaluate less burdensome and less costly alternatives, and re-submit for public review and comment an amended Proposal that is more effectively crafted to achieve the Department's regulatory objectives. We wish to emphasize the following points of particular concern that we believe should be highlighted in view of the Hearing discussions.

1. Definition of "Recommendation."

In our Letter and Testimony, we point out that under the unnecessarily broad language of the Proposal, virtually any investment-related conversation between a bank and the retirement investor could be deemed a "recommendation," thus triggering fiduciary status under ERISA and the Code. In particular, we state that "[e]xtending fiduciary status to any service provider who 'specifically directs' an investment-related 'suggestion' to a plan fiduciary or retirement investor would capture vast swaths of written and oral communications from banks that are clearly not acting as fiduciary investment advisers."[2] This would include, for example, sales conversations, requests for proposals, discussions of new products and services, discussions of performance data, and other communications that should fall well outside the scope of ERISA's fiduciary responsibility requirements.

In response to this testimony, Timothy D. Hauser, Deputy Assistant Secretary of EBSA, said at the Hearing:

> In the American Bankers Association comment letter[,] there are a number of places where you say things like any nugget of information about investment would be treated as a fiduciary. ***Clearly not so.*** There needs to be a recommendation. . . . So if there's something more you think we need to say in that space to make that clearer[,] that would certainly be helpful.[3]

We appreciate that recognition and clarification. Based on Mr. Hauser's response (and as highlighted in our Letter), the Department appears to believe that a "recommendation" should *not* include routine conversations between a service provider and retirement investor regarding the provider's products and services. This does lead to the need for written clarification of intent as to *what* constitutes a "recommendation" under the Proposal. While the Department refers to this as an "objective test," the inclusion of the word "suggestion" in the Proposal's definition of "recommendation" seems to be inherently subjective, leaving uncertain whether both parties (the service provider and retirement investor) truly understand whether, and on what basis, a fiduciary relationship is established.

Therefore, we believe that the definition of "recommendation" – as stated in our Letter and Testimony – should be revised to include *only* those communications that constitute a "*clear,*

[2] Testimony, p. 3.
[3] Department of Labor, Hearing Testimony at 851. [Emphasis added.]

affirmative statement of active endorsement and support" (and not merely a "suggestion") for taking or refraining from a particular investment course of action. In addition, the current mutual understanding requirement, along with its "primary basis" and "individualized" prongs, should be reinstated to make it clear that, for services to be treated as "investment advice," both the service provider and the retirement investor must be aware that services include tailored advice that will serve as a primary basis for investment decisions. Finally, in order to provide both clarity and mutuality of understanding, the Department should provide a sufficient number of detailed, clearly written examples specific to the retirement investor context, so that affected parties can better discern what results in a "recommendation."[4]

2. Institutional Marketplace.

Another concern is the Department's focus on the *retail* marketplace, without having adequately analyzed the Proposal's impact in the *institutional* marketplace or any need to reach there. Thus far in the rulemaking process and at the Hearing, no evidence has been presented that institutional plan fiduciaries are being systematically misled, disadvantaged, or abused by banks or other service providers as they seek market information or viewpoints for their consideration in making their own independent investment decisions. The Department's application of a "one-size-fits-all" approach to all potential advice providers, no matter how sophisticated the retirement investor, will needlessly lead to a massive, costly, and continual disruption to routine, longstanding, settled, and mutually beneficial business dealings between service providers and institutional retirement investors.

We believe that institutional and other sophisticated investors should not have an onerous regulatory scheme artificially imposed on, and awkwardly applied to, a currently sound and successful business model. The Department should recognize that institutional investors often rely on their own investment experts and are in no way expecting their custodian banks to act as ERISA fiduciaries every time they make a suggestion regarding their products or other investments. In this regard, we further note that FINRA Rule 2111(b) clearly recognizes this distinction, which essentially eliminates the "suitability" requirement for sophisticated institutional investors who acknowledge that they are exercising their own judgment. We urge the Department to make a similar distinction in the ERISA context by excluding institutional retirement investors from the scope of the Proposal.

3. Statements of Value.

In our Letter and Testimony, we state that a bank's issuance of periodic statements of value to the retirement customer should not be deemed "advice" because no recommendation is involved in providing any such service. The Proposal, on the other hand, exempts statements of value from the definition of "advice" only where required for reporting and disclosure purposes under applicable law. As stated in our Letter and Testimony, however, bank custodians, trustees, and recordkeepers provide monthly or quarterly statements, calculate net asset values for investment funds, and make available continuous access online to current information regarding plan

[4] The Department can refer to the examples provided by FINRA in its definition of recommendation as guidance in formulating examples that would shed light on advisory versus non-advisory activity. *See* FINRA Rule 2111 Frequently Asked Questions (FAQ), www.finra.org/industry/faq-finra-rule-2111-suitability-faq.

investments. Each of these services is purely an administrative function and not a fiduciary act. Consequently, as described in our Letter, the Department should amend the Proposal to exclude entirely from its coverage any statement of value that is not intended as investment advice.

4. Bank Deposit Products.

Our Letter requests the Department to confirm that a bank's disclosures and communications in connection with the deposit products (for example, such as savings accounts, certificates of deposit) offered by the bank to its IRA and other customers are within the scope of Section 408(b)(4) of ERISA (or possibly another available exemption, to the extent exemptive relief is necessary) and thereby are excluded from the Proposal. In our subsequent conversations with the Department, the agency's staff appears to have informally confirmed that the Department would not deem a bank making its deposit products available to IRA customers or other customers to be considered an advisory activity (and therefore outside the scope of the Proposal), including where the customer is provided with a list of these products for IRA accounts (and applicable interest rates) and, at the customer' direction, the bank invests the customer's IRA funds in such products. In these situations, bank branch personnel do not provide investment recommendations or discuss the customer's retirement needs.

5. Conflicts with Federal Securities and Banking Laws.

As part of the Department's renewed consideration of revisions to the Proposal, we want to alert the Department to two provisions of the Proposal that may conflict with federal law. First, under the Gramm-Leach-Bliley Act (GLBA) amending certain provisions of the Securities Act of 1933 (Securities Act) and implementing federal banking and securities regulations, bank employees are expressly permitted to receive a fee for referring bank customers to the bank's brokerage unit or unaffiliated third party, without triggering the broker registration provisions of the Securities Act.[5] Under the Proposal, however, such employee still could be deemed a "fiduciary," and therefore subject to the prohibited transaction provisions of ERISA and the Code (whether or not a referral fee is received). We believe it would be inconsistent to have an expressly authorized activity under the federal banking laws raise potential liability concerns under ERISA. The Proposal, therefore, should provide a carve-out for employee referrals where authorized under federal or state law, so that the Proposal does not frustrate the objectives and purposes of GLBA.

Second, the books and records provisions of the Proposal's Best Interest Contract Exemption (BICE) – the exemption on which banks would need to rely to continue providing certain types of services if they are to be treated as investment advice fiduciaries – violate the federal banking laws that prohibit other agencies from exercising visitorial powers[6] over national banks (and by extension, over federal savings associations).[7] Specifically, the National Bank Act states in relevant part that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law."[8] In turn, Office of the Comptroller of the Currency (OCC)

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[5] *See* 15 U.S.C. § 78c(a)(4)(B)(i).
[6] "Visitorial powers" refers to the power of a regulator or superintendent to inspect, examine, supervise, and regulate the affairs of an entity. *See* OCC, Visitorial Powers Final Rule Questions and Answers (Jan. 7, 2004).
[7] *See* 12 U.S.C. § 1465(c) (extending the visitorial powers provisions to federal savings associations).
[8] 12 U.S.C. § 484(a).

regulations specifically provide that "[u]nder 12 U.S.C. Section 484, only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks."[9] The OCC's regulations further define "visitorial powers" to include, in relevant part, "[i]nspection of a bank's books and records."[10] The regulations create, in relevant part, a limited exception to the general limits on the exercise of visitorial powers "as are provided by Federal *law*" to other governmental entities.[11]

Under the Proposal, the records of any national bank kept in connection with compliance with the BICE must be made "*unconditionally available* at their customary location *for examination* during normal business hours by . . . *any authorized employee or representative of the Department*."[12] ERISA, however, only gives the Department the statutory authority to examine bank records in connection with an investigation to determine whether the bank has violated or is about to violate any provision of ERISA or Department regulation or order. We are concerned that this limited investigative authority does *not* give the Department the unconditional authority to create out of whole cloth a regulatory (non-statutory) exception to the general visitorial powers rule, or to examine national bank records in the absence of an actual or prospective violation of law or regulation. We urge that the Department meet and consult with the OCC and work with OCC staff in revising the Proposal in order to ensure that the Department is not unlawfully seeking to engage in the inspection of a national bank's or federal savings association's books and records.

We would be glad to work with the Department as it evaluates how to revise and improve the Proposal for public review and comment, consistent with the federal government's priority that the rulemaking respond to a compelling need and offer the least burdensome tools to accomplish the Department's objectives.

Thank you for your consideration of these views. 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

Timothy E. Keehan
Vice President & Senior Counsel

[9] 12 C.F.R. § 7.4000(a).
[10] *Id.*
[11] 12 C.F.R. § 7.4000(c)(1). [Emphasis added.]
[12] BICE, Section V(d)(1)(A). [Emphasis added.]