

August 6, 2020

Office of Exemption Determinations  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: Notification of Proposed Class Exemption: Improving Investment Advice for Workers & Retirees (Application No. D-12011)

Ladies and Gentlemen:

The American Bankers Association<sup>1</sup> (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on a proposed class exemption (Exemption) that would permit investment advice fiduciaries under the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the Internal Revenue Code (Code) to receive compensation for rendering investment advice that would otherwise violate the prohibited transaction provisions of ERISA and the Code.<sup>2</sup> The term “investment advice” is defined in relevant part by a Department regulation – known as the “Five-Part Test”<sup>3</sup> – that has been reinstated as a result of a 2018 federal appellate court decision that vacated the Department’s previous amended rule on fiduciary investment advice.<sup>4</sup> The Exemption would be available to financial institutions and investment professionals that provide investment advice for compensation to (i) any participant or beneficiary of a retirement plan (plan), (ii) any owner of an individual retirement account (IRA), and (iii) any fiduciary of a plan or IRA (collectively, retirement investors).<sup>5</sup> The Exemption would require an investment advice fiduciary to adhere to conduct standards and protective conditions designed to safeguard the interests of retirement investors.

We commend the Department for its efforts to promote fiduciary investment advice that is intended to meet the needs of retirement investors while preserving the availability and variety of investment advice arrangements. We further concur with the Department that aligning the Exemption with the Securities and Exchange Commission’s (SEC’s) Regulation Best Interest

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<sup>1</sup> The American Bankers Association is the voice of the nation’s \$20.3 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$15.8 trillion in deposits, and extend nearly \$11 trillion in loans. Learn more at [www.aba.com](http://www.aba.com).

<sup>2</sup> See Department, Improving Investment Advice for Workers & Retirees, 85 *Fed. Reg.* 40,834 (2020) (Exemption).

<sup>3</sup> See 29 C.F.R. § 2510.3-21(c)(1)(ii)(B) (Five-Part Test); Conflict of Interest Rule – Retirement Investment Advice: Notice of Court Vacatur, 85 *Fed. Reg.* 40,589 (2020) (reinstatement of Five-Part Test).

<sup>4</sup> See *Chamber of Commerce of the United States of America et al v. United States Department of Labor*, 885 F.3d 360 (5<sup>th</sup> Cir. 2018) (*US Chamber v. DOL*). The vacated rule on investment advice had been finalized in 2016 as a replacement for the Five-Part Test.

<sup>5</sup> See Exemption, Section V(h), 85 *Fed. Reg.* at 40,865.

facilitates consistency in the application of federal regulatory standards.<sup>6</sup> The Exemption’s provisions generally work toward achieving transparency and compliance certainty while providing exemptive relief that is broader than currently available exemptions. We therefore support approval of the Exemption, with recommendations for additional modifications as described below that are intended to reasonably accommodate the distinct business models and the unique legal and regulatory framework of the banking industry with respect to the provision of investment advice. We further seek clarification of certain Department interpretations of the Five-Part Test that are contained in the preamble of the Exemption, as described herein.

## I. The Preamble.

The preamble to the Exemption not only describes the Exemption’s requirements but also details the Department’s views on various requirements the Five-Part Test. The Department’s implementing regulation reinstates the Five-Part Test for determining status as an investment advice fiduciary under ERISA.<sup>7</sup> Under the Five-Part Test, for advice to constitute “investment advice” to a plan or IRA, a financial institution or investment professional must:

- (1) **render advice to the plan or IRA** as to the value of securities or other property, **or make recommendations** as to the advisability of investing in, purchasing, or selling securities or other property,
- (2) on a **regular basis**,
- (3) pursuant to a **mutual agreement**, arrangement, or understanding with the plan, plan fiduciary, or IRA owner, that
- (4) the advice will serve as a **primary basis** for investment decisions with respect to the plan or IRA assets, and that
- (5) the **advice will be individualized** based on the particular needs of the plan or IRA.<sup>8</sup>

A financial institution or investment professional that meets the Five-Part Test and receives a fee or other compensation is an investment advice fiduciary with respect to the plan or IRA under ERISA and/or the Code.<sup>9</sup> On the other hand, a variety of plan and IRA services would not meet one or more requirements of the Five-Part Test, and therefore, would not trigger investment advice fiduciary status. For instance, marketing, solicitation, administrative, investment education, and plan platform services, such as those provided by financial institutions, third party administrators, and service providers that involve 401(k) plans and IRAs (including health

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<sup>6</sup> See SEC, Regulation Best Interest, 17 C.F.R. § 240.151-1 (2020).

<sup>7</sup> See 29 C.F.R. § 2510.3-21(c)(1). See also 26 C.F.R. § 54.4975-9 (parallel Code regulation).

<sup>8</sup> See 29 C.F.R. § 2510.3-21(c)(1)(i) & (ii)(B). [Emphasis added.]

<sup>9</sup> For purposes of this letter, we assume that a financial institution or investment professional that satisfies the Five-Part Test will receive compensation in connection with the investment advice rendered, thereby triggering status as an investment advice fiduciary.

savings accounts, Archer medical savings accounts, and Coverdell education savings accounts) would not implicate the Five-Part Test.

Those financial institutions and investment professionals that do become investment advice fiduciaries are subject to duties and liabilities under ERISA and/or the Code and further are barred from engaging in certain specified “prohibited transactions” involving plans and IRAs.<sup>10</sup> The receipt of compensation in connection with transactions for which investment advice has been rendered is included among the prohibited transactions as interpreted by the Department and thus may be permitted only through an exemption granted by the Department. Certain prohibited transaction exemptions are available that allow compensation received for investment advice, but these class exemptions are limited to discrete, specifically identified transactions.<sup>11</sup>

## **II. The Exemption.**

The Department has proposed the Exemption in order to provide relief for investment advice fiduciaries that is broader and more flexible than the existing prohibited transaction exemptions. The Exemption follows a principles-based approach that requires investment advice to be provided in accordance with (i) a best interest standard, (ii) a reasonable compensation standard, and (iii) a requirement to make no materially misleading statements (collectively, the Impartial Conduct Standards).<sup>12</sup> Included are additional customer protections that require (i) disclosures to retirement investors, (ii) conflict mitigation, and (iii) annual compliance reviews.<sup>13</sup> The Exemption further requires among other things that investment advice fiduciaries (i) acknowledge their fiduciary status in writing under ERISA and the Code, (ii) adopt policies and procedures designed to ensure compliance with the Impartial Conduct Standards, and (iii) provide reasonable oversight of investment professionals acting on their behalf.<sup>14</sup> The Exemption thus is intended generally to align with the requirements of the SEC’s Regulation Best Interest, which applies to broker-dealers providing investment advice to their retail customers but in certain key instances, the Exemption diverges from Regulation Best Interest, as we discuss below.

In the preamble, the Department requests comment on “whether banks and their employees provide investment advice to Retirement Investors, and if so, whether the proposal needs adjustment to address any unique aspects of their business models.”<sup>15</sup> Banks employ a wide variety of approaches to service their retirement customers that involve both advisory and non-advisory business models, including advisory services that may include discretionary and non-discretionary elements. Although there is some overlap in the area of investment advice, the nature, range, and legal and regulatory requirements of bank business models often differ markedly from the broker-dealer business model. Moreover, banks that render investment

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<sup>10</sup> See, e.g., 29 U.S.C. § 1106 and 26 U.S.C. § 4975.

<sup>11</sup> See, e.g., ERISA § 408(b)(4) (bank deposits exemption); PTE 77-4, Class Exemption for Certain Transactions between Investment Companies and Employee Benefit Plans, 42 *Fed. Reg.* 18,732 (1977); PTE 86-128, Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers, 51 *Fed. Reg.* 41,686 (1986). See also Discussion at III.B., below.

<sup>12</sup> See Exemption, Section II(a), 85 *Fed. Reg.* at 40,862-63.

<sup>13</sup> See *id.*, Section II(b)–(d), 85 *Fed. Reg.* at 40,863.

<sup>14</sup> *Id.*

<sup>15</sup> 85 *Fed. Reg.* at 40,837-38.

advice are fully subject to applicable federal and state banking laws governing fiduciary status and activities, including fiduciary duties and obligations to their customers.<sup>16</sup> This is significant since the Exemption is intended to align with Regulation Best Interest and Regulation Best Interest is designed expressly to regulate broker-dealer business models. Consequently, it would be problematic and challenging for banks to rely on the Exemption as proposed. We believe, however, that if the Department were to adopt our recommendations as described below, the Exemption would be more closely tailored to accommodate the bank business models that would allow banks to prudently consider reliance on the Exemption where appropriate.

Throughout the preamble are Department statements interpreting the meaning and applicability of the Five-Part Test. We have concerns about the consistency of these statements with the “regular basis” requirement of the Five-Part Test.<sup>17</sup> We therefore seek clarification of the Department generally regarding the plain meaning of the Five-Part Test and its applicability for determining whether a financial institution is an investment advice fiduciary. Because these interpretations may impact whether, and the manner and degree to which, banks rely on the Exemption, we address these immediate concerns below, followed by our recommendations on modifications to the Exemption.

### **III. Department Interpretations of the Five-Part Test.**

#### **A. Confirm that the “regular basis” requirement of the Five-Part Test is not satisfied by a one-time recommendation to roll over assets from a plan or IRA unless the bank provides investment advice on a regular basis with respect to the assets of the plan or IRA from which the rollover assets are drawn.**

In the preamble, the Department states that “[a]ll prongs of the five-part test must be satisfied for the investment advice provider to be a fiduciary within the meaning of the regulatory definition,” including the “regular basis” prong.<sup>18</sup> The Department further acknowledges that advice to take a distribution from a plan and roll over the assets into another retirement vehicle (*i.e.*, a rollover) “may be an isolated and independent transaction that would fail to meet the regular basis prong.”<sup>19</sup> We agree with the Department that a one-time recommendation to rollover assets from a plan or IRA into another IRA would not amount to rendering advice on a “regular basis.”

The Department, however, appears nevertheless to interpret the “regular basis” requirement in the preamble to apply to virtually *every* conceivable instance that involves a rollover, including in situations where the financial institution is *not* an adviser or other fiduciary to the plan or IRA

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<sup>16</sup> See, e.g., 12 C.F.R. Part 9 (fiduciary activities of national banks).

<sup>17</sup> We further have concerns about the Department’s interpretive statements on Five-Part Test appearing, not in a proposed rulemaking on the Five-Part Test, but instead in the preamble of a separate proposed class exemption. Such interpretive statements raise possible procedural issues under the Administrative Procedure Act. See 5 U.S.C. § 551 *et seq.* It is also unclear whether the Department intends to treat these statements as *non-binding* guidance as required under Executive Order 13891. See Executive Order No. 13891, 84 *Fed. Reg.* 55,235 (2019) (executive branch policy is to treat any “agency statement of general applicability, intended to have a future effect on the behavior of regulated parties, that sets forth . . . an interpretation of a statute or regulation” as “non-binding both in law and practice.”).

<sup>18</sup> 85 *Fed. Reg.* at 40,839.

<sup>19</sup> *Id.*

from which the rollover assets are drawn. The Department reaches this position by concluding that a one-time recommendation to roll over assets from a plan or IRA into another IRA, where followed by regular financial advice in the course of a more lengthy relationship, “would be the start of an advice relationship that satisfies the ‘regular basis’ requirement,” essentially applying the “regular basis” requirement prospectively rather than presently.<sup>20</sup> If interpreted in this fashion, the regular basis requirement becomes essentially meaningless with respect to rollovers since, as a practical matter, there would be virtually no instances where the financial institution could be certain that the regular basis requirement would *not* be satisfied. Moreover, this interpretation would be at odds with the plain language of the Five-Part Test, which defines the circumstances under which “[a] person shall be deemed to be rendering ‘investment advice’ to *an employee benefit plan*,” and require that advice be rendered “on a regular basis *to the plan*.”<sup>21</sup> This means that a bank or other financial institution advising a retirement customer on a rollover from an employer-sponsored 401(k) plan would only be an investment advice fiduciary with respect to the rollover advice if it had been giving advice regarding the 401(k) plan’s assets on a “regular basis.” This is clearly not the case where the only advice regarding the 401(k) assets consisted of a one-time recommendation to roll the plan assets over to an IRA.

Since the Department’s reading of the Five-Part Test in the preamble appears to be inconsistent with the plain language of the regulation, we assume that the Department intended to treat the regular basis requirement as being satisfied with respect to a rollover recommendation only where the financial institution or investment professional provides investment advice on a regular basis with respect to the assets of “the Plan”; *i.e.*, the plan or IRA from which the assets are rolled over.<sup>22</sup> Similarly, under the plain language of the regulation, a financial institution or investment professional only acts as an investment advice fiduciary for the new plan or IRA if the Five-Part Test is satisfied with respect to the assets of that plan or IRA. We therefore request that the Department confirm that the “regular basis” requirement is not satisfied by a one-time recommendation to roll over assets from a plan or IRA unless the financial institution provides investment advice on a regular basis with respect to the assets of the plan or IRA from which the rollover assets are drawn.<sup>23</sup>

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<sup>20</sup> *Id.* Notably, the Five-Part Test states the regular basis prong in the *present* tense, not the future tense (“[r]enders any advice . . . on a regular basis” rather than “*will* render advice on a regular basis”). Consequently, the regular basis prong is not satisfied by a one-time recommendation but only by an advice relationship between the financial institution and the retirement investor that may follow the one-time recommendation.

<sup>21</sup> 29 C.F.R. § 2510.3-21(c)(1)(ii)(B).

<sup>22</sup> As the Department acknowledges, “a recommendation to roll assets *out of a Plan* is advice with respect to the moneys or other property *of the Plan*.” 85 *Fed. Reg.* 40,839. [Emphasis added.] Under a plain reading of the regulation, the other four elements of the Five-Part Test, including the regular basis requirement, also must be satisfied with respect to the same plan.

<sup>23</sup> If the Department intends otherwise, we note again that the preamble is not an appropriate place to interpret a regulation, let alone modify its unambiguous language, given the lack of any such interpretation by Congress, the courts, or the Department itself. See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *John Hancock Mut. Life. Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993).

**B. Confirm that (i) customer-directed bank IRA programs do not meet (come within) the Five-Part Test, and (ii) banks that are investment advice fiduciaries may rely on the exemptions provided under ERISA § 408(b)(4) and Code § 4975 (d)(4) as appropriate to sponsor and administer bank discretionary IRA programs.**

In discussing in the preamble the types of activities that may satisfy the Five-Part Test and thereby trigger possible status as an investment advice fiduciary, the Department does not expressly refer to bank IRA deposit products. There are generally two types of bank IRA investment programs available for retirement customers: (i) customer-directed bank IRA-CD and other bank deposit programs; and (ii) bank discretionary IRA programs. We believe neither program would be required to rely on the Exemption since section 408(b)(4) of ERISA and section 4975(d)(4) of the Code each provide that the respective prohibited transaction provisions of ERISA and the Code do not apply to investments in bank deposit products, provided that the conditions of the respective exemptions are met.<sup>24</sup>

In a customer-directed bank IRA-CD program or similar program, banks typically provide their retail IRA customers who are interested in making an investment with information on deposit products offered by the bank (*e.g.*, savings accounts, certificates of deposit) together with their investment yield, answer questions about how the products work, and assist the customer in opening the FDIC-insured bank account. Bank branch personnel, however, do not provide rollover or investment recommendations or otherwise provide individualized investment advice based on the customer's retirement needs, but instead allow customers to perform their own analysis in order to make their investment decisions. We request that the Department confirm that these activities performed in connection with bank deposit products offered to its IRA customers and other customers would not require reliance on the Exemption but instead would fall within the scope of (i) investment education as set forth in the Department's Interpretive Bulletin 96-1, and/or (ii) section 408(b)(4) of ERISA/4975(d)(4) of the Code as applicable, provided the applicable conditions are met.

In a bank discretionary IRA program or other bank deposit program, the bank does not make rollover recommendations or otherwise provide fiduciary investment advice with respect to assets held by retirement investors in 401(k) or other retirement plans. However, in connection with its discretionary management of the IRA's assets, the bank may recommend that a portion of the IRA assets be invested in the bank's deposit products. The bank in this instance likely would be deemed to be providing fiduciary investment advice to the IRA. However, the above-cited exemptions would still apply where the bank is an investment advice fiduciary.<sup>25</sup> We therefore request that the Department confirm that banks likewise may rely on section 4975(d)(4) of the Code, as appropriate, in connection with the recommendation of bank deposit products as investments for managed IRAs.

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<sup>24</sup> ERISA § 408(b)(4). *See also* Code § 4975(d)(4) (parallel provision).

<sup>25</sup> *See* Morgan, Lewis & Bockius LLP, Department of Labor (DOL) Fiduciary Rule: Exemption for Bank IRA Deposit Programs (Aug. 24, 2016), §5A.

**C. Confirm that bank networking arrangements and referral programs implemented in compliance with federal banking regulatory requirements on non-deposit investment products do not come within the scope of the Five-Part Test.**

The Department refers to bank networking arrangements in the preamble. These are programs banks maintain to sell non-deposit investment products to retail customers. Under these arrangements, bank employees are expressly permitted to receive a nominal fee for referring bank customers to the bank's brokerage unit or unaffiliated third party, without triggering the broker-dealer registration provisions of the Securities Exchange Act of 1934.<sup>26</sup> As the Department points out, bank employees are limited to performing clerical or ministerial activities in connection with brokerage transactions, although they may forward customer funds or securities and may describe, in general terms, the types of investment vehicles available from the bank and broker-dealer. Some banks allow employees to be registered as registered representatives of an affiliated or subsidiary broker-dealer, in which case they are supervised by the broker-dealer as to any securities activities.

We have expressed previously that it would be inconsistent to have an expressly authorized activity under the federal banking laws raise potential liability concerns under ERISA.<sup>27</sup> As a result, the Department has concluded that these referrals in most cases do not constitute investment advice. We therefore request that the Department expressly conclude that bank networking arrangements and referral programs that are implemented in compliance with federal bank regulatory requirements on non-deposit investment products do not come within the scope of the Five-Part Test, and therefore, do not trigger fiduciary status for either the bank or for their employees.

**IV. Exemption Issues.**

**A. Delete the requirement that financial institutions acknowledge fiduciary status under ERISA and/or the Code as a condition for reliance on the Exemption since that would make the Exemption unavailable for financial institutions that later may become fiduciaries as a result of a change in the nature of the customer relationship.**

The Exemption requires financial institutions, prior to engaging in a transaction, to acknowledge in writing that they are fiduciaries under ERISA and/or the Code with respect to any fiduciary investment advice provided to the retirement investor.<sup>28</sup> This requirement assumes that the financial institution knows in advance which activities constitute fiduciary investment advice. There may be instances, however, where it is *not* clear whether a particular activity rises to the level of fiduciary investment advice, since this is a facts-and-circumstances determination. The

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<sup>26</sup> See 15 U.S.C. § 78c(a)(4)(B)(i). Banks may also pay bonuses under a discretionary multifactor bonus plan not based on specific referrals in which securities activities are an insignificant factor. See also Regulation R, 12 C.F.R. § 218.700 (Federal Reserve regulation) and 17 C.F.R. § 247.700 (SEC regulation).

<sup>27</sup> See ABA Letter to Department of Labor (Sept. 22, 2015).

<sup>28</sup> See Exemption, Section II(b), 85 *Fed. Reg.* at 40,863.

Department itself has acknowledged this possibility.<sup>29</sup> Additionally, there may be circumstances where the financial institution's services to the customer begins as a non-fiduciary relationship that, as a result of the evolving relationship, becomes a fiduciary relationship that would necessitate reliance on the Exemption. It is challenging, in other words, for a financial institution to define at every point in time when it might or might not become a fiduciary.

In such instances, the financial institution should not be penalized by not being able to rely on the Exemption solely as a result of (i) its good-faith belief that an activity previously thought to have been non-fiduciary subsequently is deemed fiduciary investment advice, or (ii) the financial institution-customer relationship evolving over time from a non-fiduciary to a fiduciary relationship.<sup>30</sup> Moreover, we note that the SEC, in adopting Regulation Best Interest, declined to impose fiduciary status on broker-dealers. Accordingly, the fiduciary status acknowledgment is likely to discourage widespread compliance with the terms of the Exemption by broker-dealers (and others) who have a good-faith belief that they will not be acting as fiduciaries under the Five-Part Test, particularly when the acknowledgment would be inaccurate (and confusing to the client) at the inception of the relationship.<sup>31</sup> We request, therefore, that the Department delete the requirement that financial institutions acknowledge fiduciary status under ERISA and/or the Code as a condition for reliance on the Exemption.

**B. Do not adopt the CEO/COO certification requirement for banks since this imposes an unusually significant regulatory and cost burden on banks.**

As part of the Exemption's compliance requirements, a bank would be required to have its chief executive officer (or equivalent officer) (CEO) certify annually that: (i) the CEO has reviewed the report of the bank's retrospective review, (ii) the bank has in place policies and procedures prudently designed to achieve compliance with the conditions of the Exemption, and (iii) the bank has in place a prudent process to modify such policies and procedures as business, regulatory, and legislative changes and events dictate, and to test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with the conditions of the Exemption.<sup>32</sup> The Department included this requirement as "a means of creating accountability for the [retrospective] review" and "to protect Retirement Investors in the context of conflicted investment advice transactions."<sup>33</sup>

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<sup>29</sup> See Exemption, 85 *Fed. Reg.* at 40,839 ("All prongs of the five-part test must be satisfied for the investment advice provider to be a fiduciary within the meaning of the regulatory definition, . . . *these inquiries will be informed by all the surrounding facts and circumstances.*"). [Emphasis added.]

<sup>30</sup> The Exemption provides relief "if the Financial Institution and Investment Professionals provide fiduciary investment advice in accordance with the conditions set forth in Section II," which presumably includes the Exemption's requirement to make a written acknowledgment prior to engaging in a transaction with the retirement investor that the financial institution/investment professional is a fiduciary under ERISA and/or the Code. Exemption, Section I(a) and II(b)(1), 85 *Fed. Reg.* at 40,862.

<sup>31</sup> For example, in the case of a relationship that evolves over time from a non-fiduciary to a fiduciary relationship, it would be inaccurate for the financial institution to acknowledge fiduciary status at the inception of the relationship; the financial institution instead would have to define the precise time at which the relationship became fiduciary and would need to ensure compliance with the Exemption prior to making any investment recommendations after that date (assuming the recommendations would involve a conflict of interest).

<sup>32</sup> See Exemption, Section II(d)(3), 85 *Fed. Reg.* at 40,863.

<sup>33</sup> 85 *Fed. Reg.* at 40,848.

The CEO certification requirement would be a significantly onerous obligation for banks, involving the establishment of an internal certification structure, procedural review and requirements, and intersection and coordination with the bank’s audit trail needed to support the CEO’s certification. This is an instance highlighting a key difference between bank and broker-dealer business models. In particular, the proposed requirement is based on the rules of the Financial Industry Regulatory Authority (FINRA) governing how broker-dealers supervise associated persons. The CEO certification requirement, however, is a rare and unusual requirement in bank regulation and in the Department’s own prohibited transaction class exemptions. While we affirm the importance of compliance with the Exemption, banks should not be required to expend the enormous resources necessary to satisfy every 12 months a requirement that signals that the material subject to certification is more critical than virtually all other bank regulatory requirements. We therefore request that the Department exclude banks from the CEO certification, or alternatively, permit an appropriate-level bank officer (*e.g.*, the program compliance manager) to provide such certification.

**C. Clarify in the Investment Advice Arrangement (Section II) that availability of bank information to the Department is subject to the National Bank Act’s prohibitions/restrictions on access to such information.**

The Exemption’s recordkeeping requirements implicitly acknowledge the National Bank Act’s restrictions on making the records of national banks and federal savings associations available to persons other than the Office of the Comptroller of the Currency (OCC). In particular, the recordkeeping provisions require a financial institution to maintain “for a period of six years records demonstrating compliance with this exemption” and to make “such records available to the extent permitted by law *including 12 U.S.C. 484* to the following persons or their authorized representatives.”<sup>34</sup> This provision of the National Bank Act, however, *prohibits* any person from exercising visitorial powers over national banks and federal savings associations except as authorized by Federal law.<sup>35</sup> In turn, OCC regulations specifically provide that “[u]nder 12 U.S.C. 484, only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks.”<sup>36</sup> OCC regulations further define “visitorial powers” to include, in relevant part, “[i]nspection of a bank’s books and records.”<sup>37</sup>

Section II(d)(5) of the Exemption states that a financial institution must retain “the [retrospective] report, certification, and supporting data for a period of six years and make the report, certification, and supporting data available to the Department.”<sup>38</sup> 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.<sup>39</sup> This limited investigative authority does not give the Department the authority to carve out an exception to the general visitorial powers statute or

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<sup>34</sup> Exemption, Section IV(a), 85 *Fed. Reg.* at 40,864. [Emphasis added.]

<sup>35</sup> See 12 U.S.C. § 484(a).

<sup>36</sup> 12 C.F.R. § 7.4000(a).

<sup>37</sup> *Id.*

<sup>38</sup> Exemption, Section II(d)(5), 85 *Fed. Reg.* 40,863.

<sup>39</sup> See ERISA § 504(a), 29 U.S.C. § 1134(a) (violations of Title I of ERISA). See also ERISA § 506(b), 29 U.S.C. § 1136(b) (criminal violations).

OCC regulation, or to examine national bank/federal savings association records in the absence of an actual or prospective violation of law or regulation. We therefore recommend that the Exemption be amended in this section by adding language at the end of the sentence to read, “except as prohibited under 12 U.S.C. § 484.”

**D. Do not include ineligibility provisions within the language of the Exemption since such provisions are unnecessary and rarely made part of Department class exemptions. Continue to rely instead on the Department’s robust enforcement framework and mechanisms already in place.**

The Exemption contains an ineligibility provision for any financial institution or investment professional who is convicted of a crime arising out of such person’s provision of investment advice to retirement investors, or who has intentionally violated, or has been engaged in a systemic pattern of violating, the conditions of the Exemption, or who has provided materially misleading information to the Department in connection with the financial institution’s conduct under the Exemption. Any financial institution or investment professional found to be ineligible (subject to Department petition and determination) would be unable to rely on the Exemption for 10 years following any such misconduct as described in the Exemption.<sup>40</sup>

It is unclear why these eligibility requirements appear in the Exemption. The inclusion of punitive provisions in a class exemption is virtually without precedent, as similar provisions appear only in one other exemption.<sup>41</sup> The Exemption’s suspension provisions, moreover, do not augment any enforcement authority that the Department already possesses against entities that violate the provisions of ERISA, including the prohibited transaction exemptions. We recommend, therefore, that the Department refrain from including these ineligibility provisions in the Exemption. Instead, the Department should continue to rely on the supervisory authority and enforcement framework already in place to monitor compliance with the Exemption.

**E. Delete requirement making available to retirement investors the bank’s records that demonstrate compliance with the Exemption, since this does not add materially to the protective provisions already in place and unnecessarily increases regulatory compliance costs.**

The Exemption provides that certain parties be allowed to review the financial institution’s records demonstrating compliance with the Exemption. These include any retirement investor who engaged in an investment transaction pursuant to the Exemption.<sup>42</sup> The Department does not explain the basis for this authorization or its purpose.<sup>43</sup> In the absence of any such explanation or public policy rationale, we do not believe it is necessary to make the bank records available to these parties. Moreover, the National Bank Act’s visitorial powers provision and OCC regulations would prevent retirement investors from accessing the records of national

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<sup>40</sup> See Exemption, Section III(a), 85 *Fed. Reg.* at 40,863.

<sup>41</sup> See PTE 84-14, 49 *Fed. Reg.* 9494 (1984) (qualified professional asset manager (QPAM) class exemption).

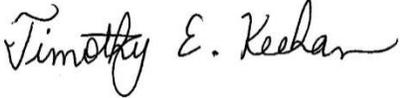
<sup>42</sup> See Exemption, Section IV(a)(4), 85 *Fed. Reg.* at 40,864.

<sup>43</sup> Retirement investors presumably already have access to their account information, including investment transactions and holdings. It is unclear why a retirement investor would want to review additional records of the bank except in anticipation of possible litigation against the bank or an affiliate.

banks and federal savings associations, leading to an unintended discriminatory effect between these banks and state-chartered banks, which may not have the same available safeguards on the release of bank records. We recommend, therefore, that the Department delete section (a)(4) that would allow retirement investors direct access to Exemption-related records of certain banks.

Thank you for your consideration of our views and recommendations. 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](mailto:tkeehan@aba.com)).

Sincerely,

A handwritten signature in black ink that reads "Timothy E. Keehan". The signature is written in a cursive style with a large initial 'T' and a long, sweeping underline.

Timothy E. Keehan  
Vice President & Senior Counsel