American Bankers Association
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February 23, 2018

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW, Room S-2524
Washington, D.C. 20210

Re: Department of Labor Fiduciary Rule Examination

Dear Assistant Secretary Rutledge:

The American Bankers Association[1] (ABA) congratulates you on assuming the position of Assistant Secretary, Employee Benefits Security Administration. Your distinguished background and experience in ERISA and retirement industry issues will serve the Department of Labor (Department) well as it continues its work in matters of significant importance to our member banks and their customers.

We wish to address you with regard to the Department's current, on-going evaluation of the Fiduciary Rule and related Prohibited Transaction Exemptions (Exemptions).[2] Consistent with the directives of the *Presidential Memorandum on Fiduciary Duty Rule* (Presidential Memorandum),[3] the Department's assessment is intended to determine whether it should repeal or revise the Fiduciary Rule. As explained in our attached comment letter of August 7, 2017 responding to the Department's most recent Request for Information (RFI) on the subject,[4] we believe that the Fiduciary Rule remains an unfinished work that is deeply flawed in several critical areas which prevent it from functioning properly, thereby harming retirement investors

[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). The Prohibited Transaction Exemptions refer collectively to the Best Interest Contract Exemption (BIC Exemption), the Principal Transactions Exemption, and PTE 84-24 dealing with variable and fixed income annuities.
[3] Presidential Memorandum (Feb. 3, 2017).
[4] *See* Department of Labor, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 *Fed. Reg.* 31,278 (2017).

and making compliance a needlessly challenging and often fruitless exercise for our member banks. **It is therefore vital for the Department to revise the Fiduciary Rule itself – rather than just the Exemptions – in order to provide a finished, measured, and functional regulation on investment advice.**

In particular, the definition of investment advice under the Fiduciary Rule is overbroad and creates considerable uncertainty and risk as to when a person is, or is not, acting as a "fiduciary" under ERISA and the Code.[5] Consequently, and despite the Department's multiple issuances of FAQs as guidance, there is no clear path to compliance with the exceptions from fiduciary status and with the Exemptions. This uncertainty breeds the potential for numerous regulatory "gotchas" that create outsized, unwarranted, and unnecessary regulatory compliance and litigation risks for our members, discouraging them from offering services that customers have shown a steady interest in receiving. As a result, since taking effect in June 2017, the Fiduciary Rule has resulted in bank customers' diminished access to retirement products, and in some cases, elimination of retirement customer services. Our August 2017 letter lays out a number of issues that the Fiduciary Rule raises and then provides suggested revisions that we believe should mitigate the Fiduciary Rule's harm to retirement investors. There are two issues in particular with the Fiduciary Rule that we would like to highlight in this letter: (i) the definition of "recommendation," and (ii) bank IRA CD programs.

First, the definition of "recommendation" – the linchpin for determining whether investment advice is rendered under the Fiduciary Rule – is unclear and therefore subject to multiple (and often conflicting) interpretations. The "gotcha" is that a single statement from one bank employee at any time could constitute under the rule a "recommendation," and therefore may unintentionally impose fiduciary status for the bank. As such, the Fiduciary Rule is laden with significant hidden liability for the bank. Because fiduciary status is important, with its attendant duties and liabilities, banks (and all market participants) need to know when it is triggered. These rules, based on strict liability, cannot effectively operate as a surprise. This places banks in a precarious position, as there will be numerous, repeated, and unanticipated situations in which the bank and its retirement customer may differ on whether a recommendation under the terms of the regulation was in fact provided to the customer, one of the Fiduciary Rule's biggest "gotchas."

Because the consequences of becoming a "fiduciary" under ERISA and section 4975 of the Code are highly significant – with its attendant, significant liability and penalties for failure to comply – the definition of "recommendation" therefore *must provide certainty* in order for the Fiduciary Rule to function properly. As written, it does not. The Department has implicitly acknowledged this deficiency by publishing in a January 2017 agency release additional guidance on what constitutes a "recommendation."[6] Even with this guidance, however, the definition of "recommendation" remains operationally vague as to what it does and does not include. We

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[5] *See, e.g.,* ABA Comment Letter on Fiduciary Rule Examination (March 15, 2017); ABA Comment Letter on Proposed Rule on the Definition of the Term "Fiduciary" (Sept. 22, 2015); ABA Comment Letter on Proposed Rule on the Definition of the Term "Fiduciary" (July 15, 2015).

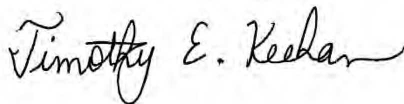
[6] *See* Department of Labor, Conflict of Interest FAQs (Part II – Rule), Q1- Q7 (Jan. 2017), at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf.

believe, therefore, that it is critical for the Department to revise the definition of "recommendation" so that this level of uncertainty – with the immediate and lasting damage being caused to bank retirement services customers – is minimized or removed entirely. As we have stated in our prior comment letters, there are definitions of the term "recommendation" that would make this possible.[7]

Second, we have raised continually the Fiduciary Rule's possible impact on IRA/CD programs as a major area of concern. Under this program, the IRA account owner invests assets in his or her IRA in one or more bank deposit products, most commonly a certificate of deposit, or CD. A bank IRA CD is both a popular and affordable retirement investment vehicle for small-account retail customers. Bank IRA/CD programs thus are a primary retirement service at many banks, particularly at community and midsize banks.[8] In providing this benefit to customers, banks have routinely relied on the statutory exemption available for bank deposit product programs under section 4975(d)(4) of the Code. We have requested on several occasions that the Department confirm that banks may continue to rely on the statutory provision of the Code (or section 408(b)(4) of ERISA, as applicable to plans).[9] Furthermore, we have discussed with Department staff the structure of bank IRA/CD programs and the available statutory exemptions. We believe that banks should be able to rely on the exemption of Code section 4975(d)(4) to conduct their bank IRA/CD and similar programs, without triggering the applicability or requirements of the Fiduciary Rule and Exemptions.[10] The Department, therefore, should confirm that the statutory exemption under Code section 4975(d)(4) sufficiently covers recommendations of CDs and other bank deposit products for IRAs and related rollovers.

We would be pleased to meet with you to discuss these 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).

Sincerely,



Timothy E. Keehan
Vice President & Senior Counsel

[7] In the July 2015 comment letter, ABA proposed that "recommendation" be defined as a communication that reasonably would be viewed as "a clear, affirmative statement of active endorsement and support for the advice recipient to engage in or refrain from taking a particular investment course of action." ABA believes that this would ensure that both the bank and the retirement customer would be able to know when a recommendation is genuinely taking place.

[8] In a recent ABA survey, 95% of banks surveyed stated that they provide a bank IRA CD as an investment option for retirement customers. *See* ABA Survey Summary Report (July 2017).

[9] *See* ABA Comment Letter (Sept. 22, 2015), *supra*; ABA Comment Letter (July 21, 2015), *supra*.

[10] The law firm of Morgan, Lewis & Bockius LLP has provided ABA with a white paper discussing the statutory exemption available for bank IRA deposit programs (Aug. 24, 2016). This white paper has been shared with ABA members and was shared with, and presented to, Department staff on December 20, 2016 and is attached to this letter.

American Bankers Association
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August 7, 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) regarding the Department's on-going review of the Fiduciary Rule and the Prohibited Transaction Exemptions (Exemptions). The Department has issued the RFI in connection with its re-examination of the Fiduciary Rule[2] and the Prohibited Transaction Exemptions in order to determine whether the Department should undertake changes or revisions to the Fiduciary Rule and whether to adopt additional exemption approaches.[3] The Department further requests a description of the issues that would best be addressed by changes to the Fiduciary Rule or by providing additional relief through the issuance of one or more Exemptions.

We commend the Department for its efforts to solicit public responses and input to the Fiduciary Rule and the Exemptions. We continue to believe that the Fiduciary Rule and the Exemptions remain deeply flawed in several critical areas that prevent it from functioning properly, making compliance a difficult, if not insuperable challenge. In particular, as stated in our previous comment letters, the definition of investment advice under the Fiduciary Rule is overbroad and creates considerable uncertainty and risk as to when a person is, or is not, acting as a "fiduciary"

[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) (RFI).

under ERISA and the Code.[4] At the same time, even with the Department's multiple sets of FAQs as guidance, there is no clear path to compliance with the exceptions from fiduciary status and the Exemptions. This uncertainty breeds the potential for numerous regulatory "gotchas" that, when paired with the Fiduciary Rule's class action enforcement mechanism, creates significant, unwarranted, and unnecessary regulatory compliance and litigation risks on our members. As a result, banks already are re-evaluating and reducing their offerings to retirement customers. In fact, since taking effect on June 9, 2017 (Applicability Date), the Fiduciary Rule already has resulted in bank customers' diminished access to retirement products, and in some cases, elimination of retirement customer services.

In our view, however, the changes to the Fiduciary Rule and the Exemptions proposed in this letter would substantially lessen or minimize these disruptions to the ability of banks to continue servicing the financial needs and objectives of their retirement customers, while preserving the protections for retirement investors that the Department seeks to implement. Failure to take action on these concerns, on the other hand, will harm the very individuals that the Department is seeking to protect by eliminating or restricting access to, and availability of, valuable investment information and services, and further would wholly contravene the directives of the *Presidential Memorandum on Fiduciary Duty Rule* (Presidential Memorandum).[5]

I. **Presidential Directive on Updated Analysis to Fiduciary Rule.**

The Department issued the RFI in response to the directive in the Presidential Memorandum that the Department prepare an updated economic and legal analysis of the likely impact of the Fiduciary Rule on access to retirement information and financial advice. The Presidential Memorandum directs the Department, in performing this analysis, to consider at least three factors:

1. Whether the Fiduciary Rule is likely to harm investors due to a reduction in access to retirement products and services;

2. Whether the Fiduciary Rule's anticipated applicability will result in dislocations or disruptions to the retirement services industry that may adversely affect investors or retirees; and

3. Whether the Fiduciary Rule is likely to cause an increase in litigation or in the prices that investors and retirees must pay to gain access to retirement services.

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[4] *See, e.g.,* ABA Comment Letter on Fiduciary Rule Examination (March 15, 2017); ABA Comment Letter on Proposed Rule on the Definition of the Term "Fiduciary" (Sept. 22, 2015); ABA Comment Letter on Proposed Rule on the Definition of the Term "Fiduciary" (July 15, 2015). These concerns are further illustrated by a recent article taking the view that fiduciary status under the new rules could even extend to ERISA class action lawyers, an area very likely not contemplated by the Department. *See* Mason, Kent. "Plaintiffs' Lawyers Can Have Fiduciary Conflicts of Interest in Soliciting Plaintiffs for Lawsuits in the Retirement Area," *Bloomberg BNA*, July 19, 2017 (asserting that ERISA class-action lawyers, when soliciting plaintiffs advising them that the plan investments that are the subject of the litigation are imprudent, trigger fiduciary status under the Fiduciary Rule, and therefore, are engaged in prohibited transactions under ERISA).

[5] Presidential Memorandum (February 3, 2017).

Should the Labor Secretary find that the Fiduciary Rule is harmful under any of the three factors above, or if the Labor Secretary concludes for any other reason that the Fiduciary Rule is inconsistent with the priorities listed in the Presidential Memorandum, then the Secretary is directed to issue a proposed rule that would rescind or revise the Fiduciary Rule.[6]

Based on new and updated information provided in this letter (and in particular, the results of the recent ABA Survey described below), it is evident that *all three* of these factors (reduction in access, dislocation/disruption to industry, increased litigation risk) have been triggered. Therefore, after comments to the RFI are reviewed and considered, the Department immediately should undertake either to rescind or revise the Fiduciary Rule, in accordance with the Presidential Memorandum's directives.[7]

II. **ABA Survey of the Fiduciary Rule.**

We understand that a primary purpose of the Department's RFI is to gather new information and data from interested parties, including the financial services industry, concerning their experiences and issues with the Fiduciary Rule since the Applicability Date. Banks now have had approximately two months to work with the finalized Fiduciary Rule. In order to document their experiences with the Fiduciary Rule, ABA conducted a survey between July 6, 2017, and July 20, 2017, which focused on selected ABA working groups of member banks that service retirement investors (Survey) (a summary report of which is attached to this letter). The Survey requested information on banks' understanding of the Fiduciary Rule, the continued availability of retirement products and services, which bank customers have been most affected, and the overall impact that the Fiduciary Rule has had on banks and their customers since the Applicability Date. Banks of all asset sizes and locations participated in the Survey.[8] We will refer to the results of this Survey throughout the letter.

III. **The Fiduciary Rule Is Unclear, Confusing, and Harming Bank Retirement Customers.**

A. **Determining Fiduciary Status Remains Elusive.**

Since the Fiduciary Rule was finalized in April 2016, banks have diligently sought to understand and implement the Rule. This has involved sustained and heightened time-, labor-, and cost-intensive efforts by banks to review, revise, and restructure their retirement products and services. Among other things, this has included (i) a comprehensive and detailed review and evaluation of multiple lines of business, (ii) a review and renegotiation of contracts with vendors and third-party service providers, (iii) the design and/or updating of technology systems and software packages (including testing and remediation), (iv) the creation and/or modification of

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[6] *See id*.

[7] This would include rescinding the changes made to previously issued prohibited transaction exemptions as a result of the Fiduciary Rule.

[8] Of the Survey's participants, 73% were community banks (under $10 billion in assets), 14% were midsize banks ($10-$50 billion in assets), 5% were regional banks ($50-$100 billion in assets), and 7% were large banks (over $100 billion in assets). *See* ABA Survey (July 20, 2017).

policies and procedures, (v) the drafting or revision of contracts, disclosures, and correspondence for new and/or existing retirement customers, and (vi) training for bank personnel on the new policies, procedures, and new or revised documentation. An integral part of this process has been the review of every customer account in order to ensure conformance to the Fiduciary Rule's requirements. Any revision, addition, or modification to a bank's offering of retirement services further has been reviewed and evaluated to ensure its on-going compliance with bank legal and regulatory requirements under applicable federal and state banking laws.

Notwithstanding these efforts and commitment to full and timely compliance, the Survey reveals that *only 2% of banks* surveyed agree that the definition of "investment advice" under the Fiduciary Rule is clear and allows the bank to determine readily, at any given time, whether it is a "fiduciary."[9] In contrast, 72% of banks surveyed believe that the definition of a "recommendation" – the linchpin of determining whether investment advice is rendered – is not clear in certain places or is not clear at all, making it difficult for the bank to determine whether it is a fiduciary under the Fiduciary Rule.[10] The "gotcha" is that even one statement from one bank employee at any time could constitute a "recommendation," and therefore may unintentionally trigger fiduciary status for the bank. As such, the Fiduciary Rule is laden with significant hidden liability for the bank. Because fiduciary status is important, with its attendant duties and liabilities, banks (and all market participants) need to know when it is triggered – these rules, based on strict liability, cannot effectively operate as a surprise. Banks, looking for ways to address their risk exposures under this ruleset, will have to curtail product and service offerings to retirement customers (or more specifically, for the retirement assets of their customers), as discussed in the next subsection.

B. Retirement Customers Are Being Harmed.

The Survey results show that more than 9 out of 10 banks (94%) believe that the bank and the customer "sometimes" or "often" may not understand when the bank is providing investment advice that is fiduciary in nature (as defined by the Rule).[11] Only 6% agree that the investment advice definition allows the bank and customer to be able always to understand when fiduciary investment advice is being rendered.[12] This means that in the vast majority of bank-customer relationships, there will be one or more instances in which there is no understanding between the bank and its customer as to whether "fiduciary investment advice" is actually being rendered, sowing confusion and uncertainty in retirement services and customer expectations.

Only two months into this new definition, banks already are reporting that this confusion and uncertainty has caused them to reduce their product offerings or to withdraw altogether from providing retirement services. Thirty percent of banks surveyed report that, as a result of the Fiduciary Rule, their bank "has eliminated or reduced the number of retirement products and/or services available to customers," while 38 percent agree that the Fiduciary Rule has fragmented

[9] ABA Survey, *supra*.
[10] *Id.*
[11] *Id.*
[12] *Id.*

the bank's advisory and/or financial relationship with customers.[13] One bank states that "[o]ur bank is unsure as to its ability to communicate with our customers when they ask rollover questions."[14] As a result, "the bank may need to severely limit its retirement products and services."[15] Another bank reports that "[c]ustomers are substantially confused."[16] Disappointingly, the same bank adds "[b]ecause of uncertainty as to the applicability of the rule, we've had to train bankers to essentially stop 'helping' their customers so that they won't be deemed to have given 'advice'."[17] Consequently, as another bank notes, "[t]he rule is restricting the way we help customers," while still another bank reports that "we will reduce offering for low dollar investments due to [the] cost to administer compliance with the [R]ule."[18] These unfortunate outcomes cannot be the Department's intended outcome.

IV. **<u>The Fiduciary Rule Definition of "Recommendation" Is Deeply Flawed and Requires Significant Revision</u>.**

A. **<u>The Definition of "Recommendation" – Tied to Strict Liability – Is Vague, Subjective, and Inadequate</u>.**

In general, the Fiduciary Rule considers a person to be a "fiduciary" if such person for compensation makes a "recommendation" (i) to invest in securities or other investment property, (ii) regarding the management of securities or other investment property, or (iii) with respect to rollovers, transfers, or distributions from a plan or IRA.[19] The definition of "recommendation" therefore is foundational, since it drives whether or not a person is a "fiduciary" under the Rule.

The Department further defines a "recommendation" as a communication that "would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."[20] We have asserted repeatedly that inclusion of the word "suggestion" in the definition is inherently subjective, leaving in doubt whether both parties (the bank and the retirement investor) truly understand whether, and on what basis, a fiduciary relationship has been established. Moreover, although the Department frames the term "recommendation" as a "call to action,"[21] the definition remains vague and subject to multiple (and often conflicting) interpretations. This places banks in a precarious position, as there will be – and as the Survey confirms – numerous, repeated, and unanticipated situations in which the bank and its retirement customer may differ on whether a recommendation was in fact provided to the customer, one of the Fiduciary Rule's biggest "gotchas."

Because the consequences of becoming a "fiduciary" under ERISA and section 4975 of the Code are highly significant – with its attendant, significant liability and penalties for failure to comply

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *See* Fiduciary Rule, 29 C.F.R. § 2510.3-21(a)(1).
[20] Fiduciary Rule, 29 C.F.R. § 2510.3-21(b)(1).
[21] *See id.*

– the definition of "recommendation" therefore *must provide certainty* in order for the Fiduciary Rule to function properly. As written, it does not. The Department has implicitly acknowledged this deficiency by publishing additional guidance on what constitutes a "recommendation" in a January 2017 agency release.[22] Even with this guidance, however, the definition of "recommendation" remains operationally vague as to what it does and does not include. This critical piece of the Fiduciary Rule, in other words, is still an incomplete and unfinished work. One bank reports the following:

> [I]t is truly difficult to know whether or not we are in full compliance with all of the [Fiduciary Rule's] requirements outlined. We still have numerous questions and may have to engage outside counsel at significant cost to ensure that we are on track. Even then, there are no assurances.[23]

The Survey confirms the inevitable result of the definition's confusion and uncertainty. As stated above, over 90% of banks surveyed report that "sometimes" (59%) or "often" (35%) neither the bank nor the customer may understand when fiduciary investment advice is being given.[24] This is clearly disrupting the bank-customer relationship and impairing efforts at customer retirement assistance, guidance, and service that customers have come to expect and rely upon.

We believe, therefore, that it is critical for the Department to revise the definition of "recommendation" so that this level of uncertainty – with the immediate and lasting damage it is currently causing bank retirement customers – is minimized or removed entirely. As we have stated in our prior comment letters, there are definitions of the term "recommendation" that would make this possible.[25] We would be glad to provide the Department with further information on formulating a definition that would accomplish the objectives of consumer protection while making the definition functional in the retirement marketplace. Alternatively, this subjective, principles-based definition should be matched with a principles-based remedy system, as opposed to strict liability or private class action risks.

B. The Definition Confusingly Imposes Fiduciary Status from Aggregating Exempt Activities.

The Fiduciary Rule raises another significant obstacle that adversely impacts compliance – another "gotcha" – that significantly frustrates comprehensive compliance efforts for banks (and

[22] *See* Department of Labor, Conflict of Interest FAQs (Part II – Rule), Q1- Q7 (Jan. 2017), at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf.
[23] *Id.*
[24] ABA Survey, *supra.*
[25] In its July 2015 comment letter, ABA proposed that "recommendation" be defined as a communication that reasonably would be viewed as "a clear, affirmative statement of active endorsement and support for the advice recipient to engage in or refrain from taking a particular investment course of action." ABA believes that this would ensure that both the bank and the retirement customer would be able to know when a recommendation is genuinely taking place.

other market participants). Under the definition of "recommendation," the Fiduciary Rule states the following:

> [A] series of actions, directly or indirectly (e.g., through or together with any affiliate) that may not constitute a recommendation when viewed individually may amount to a recommendation when considered in the aggregate.[26]

This language (Aggregation Provision) purportedly was inserted to prevent an evasion of the Fiduciary Rule. It is important to note that the Department added this provision *after* closure of the public notice and comment period, and without any prior indication it would do so, thus preventing the public and affected parties from commenting and providing input on this significant and far-reaching addition.

From a regulatory rulemaking standpoint, this sleight of hand is unacceptable. From a regulatory supervision and compliance standpoint, this may be unmanageable. In essence, multiple unrelated conversations, each of which separately is not a "recommendation" with individuals across the bank and its affiliates, which could include broker-dealers, insurance agencies, and other consumer finance service providers, could in retrospect be "aggregated" into a "recommendation." There seem to be no limits and no nexus requirements to these individual conversations.

Rather than addressing the problem of evasion in measured fashion, the Department has affixed an Aggregation Provision that operates instead as an outsized, erratic, and unwieldy regulatory club, again tied to strict liability. The Survey confirms the compliance problems the Aggregation Provision creates. Nearly *all banks* surveyed (98%) agree that this provision "muddies the definition of 'recommendation' and is therefore not helpful."[27] When asked to explain why,

- Nearly two-thirds (65%) of banks said that it "[m]akes it more difficult to determine whether a recommendation was actually given in these circumstances (*i.e.*, as a result of non-recommending actions)."[28]

- Well over half (56%) said that it "[m]akes it virtually impossible to determine in advance whether any particular set of actions would be deemed a 'recommendation'."[29]

- Nearly half (49%) of bank respondents agreed that the Aggregation Provision "[m]akes it virtually impossible to comply since a bank at all times would need to supervise and monitor its employees and all of its affiliates."[30]

- More than seven out of every ten respondents (71%) stated that the provision "[m]akes it virtually impossible to comply with the Fiduciary Rule since at any time and with the benefit

[26] Fiduciary Rule, 29 C.F.R. § 2510.3-21(b)(1).
[27] ABA Survey, *supra*.
[28] *Id.*
[29] *Id.*
[30] *Id.*

of hindsight, the Department could conclude that a bank's program or activity is captured by the Fiduciary Rule, notwithstanding that the program or activity was reasonably structured in good faith to operate outside the [Fiduciary] Rule."[31]

- The same percentage of respondents (71%) acknowledge that the Aggregation Provision "will increase liability risk as a result of being unable to always determine, in advance and with certainty, whether any two or more non-recommendations will be aggregated into a recommendation," thus triggering fiduciary status under the Fiduciary Rule.[32]

The Survey indicates that the Aggregation Provision not only is unworkable but also significantly and unnecessarily hampers compliance efforts and increases liability risk. The Aggregation Provision further interferes with the operations of routine banking activities and programs that should be well outside the Fiduciary Rule's reach. This serves only to drive up costs for the retirement investor. Therefore, the provision should be eliminated and perhaps replaced with a general anti-evasion provision that better serves efficient and prudent administration of the Fiduciary Rule, without diminishing the Department's supervision and enforcement authority. A possible provision could read simply as follows:

> No person shall knowingly act in a manner that functions as an evasion of the purposes of this regulation.

This language will ensure that a person cannot deliberately structure a program to evade fiduciary status, while the language would remove the Aggregation Provision's cloud of compliance uncertainty and with it, the needless costs and liability risks.[33]

V. The Fiduciary Rule and Exemptions Require Additional Revisions and Clarifications.

A. Bank IRA/CD Programs Should Be Excluded from the Fiduciary Rule.

We commend the Department for raising the issue of bank deposits and recognizing that banks do not intend to exercise any fiduciary functions for customers when their employees discuss opening IRAs or investing their IRAs in bank deposit products, such as certificates of deposit (CDs). In Question 15 of the RFI, the Department asks whether there should be an amendment to the Fiduciary Rule or a streamlined exemption for particular classes of investment transactions involving bank deposit products, and if so, what conditions should apply. As discussed below, we believe that banks should be able to rely on the exemption of Code section 4975(d)(4) to

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[31] *Id.*
[32] *Id.*
[33] We further note that the Department supported its addition of this provision to the final rule in part by reasoning that the provision tracks similar FINRA guidance 81 *Fed. Reg.* at 20,972. But what is lost here is that FINRA does not apply a "one-size fits all" rule designed for a strict liability regime. FINRA applies varying levels of duties depending on the type and extent of the actual recommendation. For example, recommendations made as part of general marketing materials trigger different obligations than recommendation of a specific security to an individual investor. This nuanced approach is lost in a regulatory regime that applies only one standard without regard to the type or context of the particular recommendation.

conduct their bank IRA/CD programs and similar programs, without triggering the applicability or requirements of the Fiduciary Rule and Exemptions.[34]

We have raised continually the Fiduciary Rule's possible impact on IRA/CD programs as a major area of concern for banks. Bank IRA/CD programs are a primary retirement service at many banks, particularly at community and midsize banks. Under this program, the IRA account owner invests assets in his or her IRA in one or more bank deposit products, most commonly a CD. In providing this benefit to customers, banks have routinely relied on the statutory exemption available for bank deposit product programs under section 4975(d)(4) of the Code. We have requested on several occasions that the Department confirm that banks may continue to rely on the statutory provision of the Code (or section 408(b)(4) of ERISA, as applicable to plans).[35] Furthermore, we have discussed with Department staff the structure of bank IRA/CD programs and the available statutory exemptions. As it has issued guidance on numerous issues through its FAQs since our discussion, we find the Department's continued silence on this issue to be deeply concerning and disappointing, as it creates significant and unnecessary uncertainty for banks with respect to a commonplace and important product offering.

In the absence of Department response or guidance, banks may reasonably be relying on section 4975(d)(4) of the Code to continue operating their respective IRA/CD programs without implicating the Fiduciary Rule. If, however, the Department were ever to conclude that the statutory exemption under ERISA or the Code cannot be relied upon, or can be only partially relied upon, then banks operating these programs in reliance on the statutory exemption could be possibly in violation of, and potentially liable under, the prohibited transaction rules – another "gotcha." As a result, these banks would need to restructure their bank IRA/CD programs in major ways to conform to the requirements of the Fiduciary Rule and the Exemptions, which process would take months to complete. The Survey shows that, if the Department were to determine that the Fiduciary Rule applies to bank IRA/CD programs, then 54% of banks would convert their bank IRA/CD program into a customer-directed program, thus significantly disrupting an integral program of current banking industry services and resulting in substantial numbers of retirement customers losing access to retirement savings assistance.[36]

We continue to believe that section 4975(d)(4) of the Code and section 408(b)(4) of ERISA apply to a bank operating its IRA/CD program or similar program, consistent with the requirements of those statutory exemptions. The Department should confirm that the statutory exemption under Code section 4975(d)(4) sufficiently covers recommendations of CDs and other bank deposit products for IRAs and related rollovers.

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[34] The law firm of Morgan, Lewis & Bockius LLP has provided ABA with a white paper discussing the statutory exemption available for bank IRA deposit programs (Aug. 24, 2016). This white paper has been shared with ABA members and was shared with, and presented to, Department staff on December 20, 2016.
[35] *See* ABA Comment Letter (Sept. 22, 2015), *supra*; ABA Comment Letter (July 21, 2015), *supra*.
[36] ABA Survey, *supra.* An additional 2% said they would discontinue their IRA/CD program altogether. *See id.*

B. The "Hire Me" Exclusion Should Be Clarified.

When finalizing the Fiduciary Rule, the Department made clear that an adviser can recommend to a retirement investor that the investor enter into an advisory relationship with the adviser, without acting as a fiduciary.[37] This is commonly known as the "hire me" exception to the Fiduciary Rule, in which "a person or firm can tout the quality of his, her, or its own advisory or investment management services or those of any other person known to the investor to be, or fairly identified by the adviser as, an affiliate, without triggering fiduciary obligations."[38] In fashioning this exclusion, the Department made clear that one should not be deemed a "fiduciary" under the Fiduciary Rule, "merely by engaging in the normal activity of marketing oneself or an affiliate as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making an investment recommendation."[39]

Banks (like other market participants), however, have found the "hire me" exception difficult to employ, due to uncertainty regarding its boundaries. For example, a bank may be pitching business to a customer relying on the "hire me" exception, but will be challenged to know whether the "hire me" exception covers responses to retirement investor inquiries regarding *why* the bank should be hired, or what the bank would suggest as an investment strategy for the investor if it were hired. The ill-defined "hire me" exception thus creates another "gotcha" under the Fiduciary Rule.

As a result of this uncertainty, many banks may feel that they have to reduce pitches for customer business to a one-way declaration that the bank simply be hired on faith, eliminating routine dialogue and customer-specific question-and-answer sessions. These pre-hire conversations, which clearly are not intended or reasonably understood to result in fiduciary status, are critical to helping the customer decide whether to use the bank's services.

Therefore, we request that the Department consider a broader, more clearly defined "seller's exception" covering retail retirement investors that would clearly and expressly permit marketing and sales pitches, that may involve or include investment recommendations (including, for example, sample allocations and product choices) to come within the "hire me" exception, where fiduciary status would be attached upon the engagement of the bank, not the marketing of services. For example, the "hire me" exception could exempt from fiduciary status any marketing and sales activity until the customer agrees to hire the bank as an adviser, at which point going forward the bank would become subject to the applicable fiduciary standards under ERISA or prohibited transaction rules under the Code. Reliance on the "hire me" exception further can be conditioned on the bank providing a statement beforehand to the retirement investor that the information to be provided to the investor is a marketing and/or sales presentation, not investment advice. These revisions would allow for more transparent, informed

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[37] *See* Department of Labor, Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment, 81 *Fed. Reg.* 20,946, 20,968 (2016).
[38] *Id.*
[39] *Id.*

sales pitches to be made to the customer – who can use such information to decide whether to retain the bank as an adviser – while upholding the protections of the Fiduciary Rule.[40]

C. The Exemption for Grandfathered Accounts Should Be Expanded.

Section VII of the BIC Exemption permits advisers to continue receiving compensation (*e.g.*, 12b-1 fees) in connection with the purchase, sale, or holding of securities or other investment property that was acquired before the Applicability Date ("Grandfathered Account" or "Account"). Among the conditions for maintaining status as a Grandfathered Account, no new investments may be made (based on an adviser's recommendation) other than those that are part of a "systematic purchase program" that was established before the Applicability Date.[41] If an adviser, for example, were to recommend an additional investment in an existing asset held in an IRA owner's Grandfathered Account for which the adviser would receive compensation after the Applicability Date, then at least those additional investments in the Grandfathered Account would lose their grandfathered status, requiring the adviser to rely on the full conditions of the BIC Exemption to administer those assets.

Banks are reporting that the necessity to be able to distinguish between grandfathered assets and non-grandfathered assets has led to a number of retirement customers having two separate sets of accounts at the bank – one account or more subject to the Fiduciary Rule/BIC Exemption (BIC Accounts), and one or more Grandfathered Accounts. This unnecessarily poses an administrative and customer relations challenge. In particular, since the Applicability Date, banks may have narrowed the list of available investment products for their retirement customers. Consequently, there may be investment assets in the Grandfathered Account that are not available for investment in the BIC Accounts. Banks, in other words, are separately administering two sets of accounts, which raises costs to customers and which strains the bank-customer relationship. Customers also may be confused as to why two sets of accounts are necessary, and why they are being administered differently (*i.e.*, the customer receives routine advice for the BIC Account while receiving limited or no advice for the Grandfathered Account, in order to preserve its grandfathered status).

This awkward result fragments the bank-customer relationship and raises transaction and account costs to customers. Over time, it will also result in a sclerotic administration of the Grandfathered Accounts and risks reduced ability to meet the customer's current or future investment needs and objectives. Moreover, even if the adviser were to instruct the owner of a Grandfathered Account not to make any additional investments into the Account, a contribution may *still* make its way into the Grandfathered Account in the case of a SEP-IRA, SIMPLE-IRA, or Coverdell Education Savings Account through a third-party contributor/investor (*e.g.*, the employer of the Account's owner, or a relative), threatening further the Account's grandfathered

[40] Other applications of the "hire me" exception further could allow a bank to serve in multiple capacities without triggering fiduciary status, as when a bank retained by a plan could serve as (or have an affiliate appointed as) a subadviser to a collective investment fund (CIF) managed by another fiduciary and in which the plan's assets are invested, where compensation is received only at the plan level and no additional compensation is received at the CIF level.

[41] *See* BIC Exemption § VII(b).

status by reason of the inability to distinguish between the original, pre-Applicability Date assets in that Account and the new assets. Therefore, the BIC Exemption should be amended to allow a bank to provide advice on additional contributions (outside a systematic purchase program) to *existing* investments for the Grandfathered Account without impacting its grandfathered status, provided that the compensation arrangement is consistent with the existing arrangement in the Grandfathered Account.

D. The Fiduciary Rule's Independent Fiduciary Exception Should Be Clarified.

The Fiduciary Rule provides an exception for a party transacting business with an independent fiduciary of a plan or IRA in an arm's length transaction, if certain disclosure requirements are met and the party reasonably believes that the independent fiduciary is a bank, insurance carrier, or registered broker-dealer or registered investment adviser, or any other independent fiduciary who manages or controls at least $50 million (Independent Fiduciary Exception or IFE).[42] Thus, independent fiduciaries are generally recognized as sophisticated persons or corporate entities with professional knowledge and experience in financial matters. Question 18 of the RFI asks whether the scope of the Independent Fiduciary Exception should provide additional relief, citing in particular communications with independent fiduciaries with financial expertise.[43]

There has been confusion on both sides (advisers and counterparties, on the one hand, and independent fiduciaries on the other) about how the Independent Fiduciary Exception is intended to operate. We believe this confusion stems from plan fiduciaries misunderstanding the scope, purpose, and nature of statements or disclosures they receive under the IFE from a bank service provider that may be acting as a fiduciary for other purposes (*e.g.*, discretionary asset management) as a broad disclaimer of *any* fiduciary status.

For example, some fiduciaries to ERISA plans are concluding that a bank that acts as an asset manager to one ERISA plan cannot rely on the Independent Fiduciary Exception for any purpose given its status as an ERISA fiduciary in connection with its asset management responsibilities.[44] More specifically, some ERISA plan fiduciaries believe that a bank that provides fiduciary asset management to a defined *benefit* plan cannot rely on the IFE to recommend products or transactions for the customer's defined *contribution* plan, even though the bank is not a fiduciary with respect to the defined contribution plan. To address this confusion, we believe the IFE should be amended to clarify that the IFE can be relied upon with respect to particular transactions with respect to which a firm is not acting as a fiduciary to the plan, even if the firm acts as a fiduciary with respect to other transactions or services to such plan, or another plan.

We further believe that an asset manager's fiduciary duty to manage the ERISA plan's assets does *not* extend to the manager recommending to the plan client that the client hire, fire, or remove the bank asset manager and invest elsewhere. The Independent Fiduciary Exception

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[42] *See* 29 C.F.R. § 2510.3-2(c)(1).
[43] *See* RFI, *supra*.
[44] One bank reports that "[t]o claim relief under the [Independent Fiduciary E]xception, as we communicate with plan investors, we are finding that the plans do not understand the distinction between the 'investment manager' fiduciary role and the 'advice fiduciary' role." ABA Survey, *supra*.

should also be clarified so that a bank that manages ERISA plan assets, whether as a separate account or through a collective investment fund, does not trigger the Fiduciary Rule simply for refraining from advising the plan to invest with another bank or other asset manager.

E. <u>The BIC Exemption's Website Disclosure Requirement Requires Revision</u>.

We appreciate the Department's willingness to re-examine the disclosure requirements of the BIC Exemption. Question 13 of the RFI asks,

> Are there ways to simplify the BIC Exemption disclosures or to focus the investor's attention on a few key issues, subject to more complete disclosure upon request? For example, would it be helpful for the Department to develop a simple up-front model disclosure that alerts the retirement investor to the fiduciary nature of the relationship, compensation structure, and potential sources of conflicts of interest, and invites the investor to obtain additional information from a designated source at the firm?[45]

The Department's question points squarely at provisions of the BIC Exemption that require detailed disclosures that are excessive and costly to produce, monitor, and revise on an on-going basis, and which provides little or no benefit to the retirement investor. Specifically, section III(b)(v) and (vi) of the BIC Exemption requires the financial institution fiduciary to disclose the following to the retirement investor:

> (v) To the extent applicable, a list of all product manufacturers and other parties with whom the Financial Institution maintains arrangements that provide Third Party Payments to either the Adviser or the Financial Institution with respect to specific investment products or classes of investments recommended to Retirement Investors; a description of the arrangements, including a statement on whether and how these arrangements impact Adviser compensation, and a statement on any benefits the Financial Institution provides to the product manufacturers or other parties in exchange for the Third Party Payments;
>
> (vi) Disclosure of the Financial Institution's compensation and incentive arrangements with Advisers including, if applicable, any incentives (including both cash and non-cash compensation or awards) to Advisers for recommending particular product manufacturers, investments or categories of investments to Retirement Investors, or for Advisers to move to the Financial Institution from another firm or to stay at the Financial Institution, and a full and fair description of any payout or compensation grids, but not including information that is specific to any individual Adviser's compensation or compensation arrangement.[46]

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[45] RFI, 82 *Fed. Reg.* at 31,280.
[46] BIC Exemption, Section III(b)(v) and (vi).

These two requirements, which may require producing a detailed description of every product manufacturer and every compensation and incentive arrangement, mutates a straightforward disclosure process into a spiraling paper chase. Moreover, the initial and on-going costs of developing and implementing the technology, particularly for smaller banks, significantly outweighs the incremental benefit of website disclosure. The Department, therefore, should eliminate the website disclosure requirement in favor of a simple, clear, up-front disclosure as the more effective and efficient means of delivering key information to retirement investors.

If the Department retains the website disclosure requirements, then the BIC Exemption should be amended to clarify that more general disclosures can still accomplish the regulatory objective of information and transparency, without the burden of excessive detail and paperwork that blunts the effectiveness of the disclosures for retirement investors while adding significant compliance expenses for the bank, expenses that in turn will raise the cost of advice to consumers.

A simplified disclosure should suffice. In particular, section (v) should be amended to read:

> Acknowledgment that the Financial Institution has a conflict of interest in connection with certain products recommended to the Retirement Investor due to Third Party Payments that the Financial Institution receives in connection with those products, including (i) a statement that the types and amounts of Third Party Payments received may vary by product, and (ii) the maximum amount (expressed in dollars or as a percentage of assets under management) received from the investment.

A bank fiduciary would then be deemed in compliance, for example, in making the following disclosure:

> We may have a conflict of interest in connection with certain products we recommend to you because of Third Party Payments we receive in connection with those products. They types and amounts of Third Party Payments we receive vary by product but may consist of [A, B, and/or C], and generally do not exceed [X basis points (0.0X%)] of the amount of the investment.

In similar fashion, section (vi) should be amended to read,

> A statement that the Financial Institution has a financial incentive to recommend one or more products or services to the Retirement Investor and a description of how Adviser bonuses and other incentive arrangements are determined.

A bank then could make the following disclosure in compliance with this section:

> Your Adviser has a financial incentive to recommend that you open a rollover IRA account with us. Adviser bonuses are determined in the discretion of his or her manager taking into account a number of factors including X, Y and Z. Advisers who sell more new business generally receive higher bonuses than

those who sell less. Adviser bonuses can represent a significant portion of overall compensation.

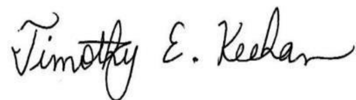
VI. **Conclusion.**

For the reasons stated herein, and in accordance with the Presidential Memorandum's directives, the Department either should rescind or revise the Fiduciary Rule and the Exemptions as described in this letter. If the Department decides to make revisions, then it should strive for an amended Fiduciary Rule that would provide for a sharpened, targeted definition of who is a "fiduciary" that would provide discernible boundaries and certainty of compliance, instead of a series of "gotchas" creating unwarranted legal and regulatory ambiguities and risks for banks and other financial institutions trying to help investors, including retirement investors, achieve their investment objectives and retirement savings goals. If such revisions are not made, we believe that the Fiduciary Rule and the Exemptions will continue to 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 banking customers have long relied on. In such event, customers will continue to experience reduced or eliminated access to retirement products and services. Moreover, the inability of financial institutions to determine fiduciary status with certainty increases liability risk and will result in increased litigation, resulting in higher costs for customers.

We would be glad to work with the Department to provide information that would be of value as it works to revise the Fiduciary Rule and Exemptions, consistent with the Presidential Memorandum and the federal government's goal for rulemaking that meets a compelling need while offering the least burdensome tools to accomplish its objectives. We would likewise encourage the Department to work with the Securities and Exchange Commission and the federal banking regulators in order to ensure a uniform and consistently applied standard.

Thank you for 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
Vice President & Senior Counsel

ABA Survey

Department of Labor Fiduciary Rule

July 20, 2017

ABA Survey

Department of Labor Fiduciary Rule

July 20, 2017

Summary Report

This report provides the results of an American Bankers Association (ABA) Survey on the U.S. Department of Labor's Fiduciary Rule (Fiduciary Rule or Rule) that was conducted among its membership, July 6-20, 2017. The purpose of the Survey was to determine banks' understanding of the Fiduciary Rule and its impact on banks and their retirement customers. The Survey consisted of nine questions, the last of which provided an opportunity for banks to comment on the ways in which the Fiduciary Rule has impacted the bank and/or its customers.

The Fiduciary Rule defines who is a "fiduciary" under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code) as a result of giving investment advice for a fee or other compensation to an employee benefit plan or its participants, or to the owner of an individual retirement account (IRA). The Department of Labor (Department) finalized the Fiduciary Rule in April 2016 and the Rule became applicable on June 9, 2017.

The Survey focused on selected ABA working groups of member banks that service retirement investors. Approximately 250 banks participate in these working groups. Fifty-seven banks responded to the Survey. Of the Survey's participants, 73% were community banks (under $10 billion in assets), 14% were midsize banks ($10-$50 billion in assets), 5% were regional banks ($50-$100 billion in assets), and 7% were large banks (over $100 billion in assets). Data from the responses was submitted and aggregated on a blind basis so that individual institutions and their employees could not be identified. Responses were limited to one per institution.[47]

<u>Banks' Understanding of the Fiduciary Rule's Definition of "Investment Advice"</u>

Question 1 sought to obtain banks' understanding of the definition of "investment advice" under the Fiduciary Rule. Under the Rule, a bank or other adviser is giving investment advice (and therefore is a "fiduciary") if it gives a "recommendation" for compensation. The Fiduciary Rule defines "recommendation" as "*a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.*" Understanding the definition is essential for determining whether one is a "fiduciary" under the Fiduciary Rule.

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[47] Throughout this report, percentages cited for each Survey question do not always total to 100% due to rounding or multiple responses provided by the Survey participants.

Of the banks surveyed, 28% agreed that the definition is "clear" (2%) or "clear enough" (26%) to allow the bank to readily determine at any given time whether it is a fiduciary under the Rule, while 72% found that the definition is "not clear in certain places" (61%) or is "not clear at all" (11%), making it difficult for the bank to determine whether it is a fiduciary under the Rule.

Bank and Customer Understanding When Fiduciary Investment Advice Is Given

Question 2 was intended to determine a bank and customer's knowledge of the boundaries between investment advice as defined under the Rule and non-advice. It asked whether the bank and its retirement customers understand when fiduciary investment advice is being given by the bank, thus triggering fiduciary status for the bank. Based on the definition of "investment advice" under the Fiduciary Rule, 6% of banks said that the bank and its customer will "both" be able to understand when the bank is providing investment advice, while 94% of banks said that the bank and its customer "sometimes" (59%) or "often" (35%) may not understand when the bank is providing investment advice.

Banks' Ability to Determine Compliance with the Fiduciary Rule

Question 3 asked whether, and the extent to which, banks are able to determine with certainty whether they are in compliance with the Fiduciary Rule. Two percent of banks surveyed said that the bank is "always able to determine with certainty" whether it is in compliance with the Fiduciary Rule. In contrast, 52% of banks said that "sometimes" and 30% of banks said "often" the bank is unable to determine with certainty whether it is in compliance with the Fiduciary Rule. Twenty-five percent of banks added that their bank is unable to determine with certainty whether it is in compliance with the Fiduciary Rule "in critical areas," citing sales and marketing activity, IRAs invested in bank deposit products, and asset allocation discussions with customers, among others.

Fiduciary Rule's Impact on Products and Services Available to Retirement Investors

Question 4 requested information on the Fiduciary Rule's impact on the bank-customer relationship and the availability of products and services to retirement investors. Zero percent of banks surveyed said they have "added" to the number of retirement products and/or services available to customers in order to take advantage of fiduciary status under the Fiduciary Rule, while 30% said that they have "eliminated or reduced" the number of retirement products and/or services available to customers in order to avoid triggering fiduciary status under the Fiduciary Rule. Thirty-eight percent of banks also agreed that the bank's advisory and/or financial relationship with customers "has been fragmented" as a result of the Fiduciary Rule applying to retirement assets only, "since the bank is unable to provide holistic financial advice to its customers." Forty-five percent stated that the bank has "neither added nor reduced" the number of retirement investor products and/or services available at the bank.

A follow-up question asked which customers have been most impacted by those banks that have eliminated or reduced the availability of products and services for retirement accounts. Six percent of banks reported that customer accounts of more than $100,000 have been most impacted while 63% of banks report customer accounts of $25,000 or less have been most impacted.

<u>Impact of Fiduciary Rule's "Aggregation Provision" on Bank Compliance</u>

Question 5 concerned the Fiduciary Rule's "Aggregation Provision," which defines a "recommendation" to include the following: "*Furthermore, a series of actions, directly or indirectly (e.g., through or together with any affiliate), that may not constitute a recommendation when viewed individually may amount to a recommendation when considered in the aggregate.*" This gives the Department the authority to aggregate non-recommendations in order to conclude that a recommendation (and therefore fiduciary investment advice) has been given, thus triggering fiduciary status under the Rule. Question 5 asked whether or not this portion of the definition of "recommendation" was helpful in clarifying the definition. Two percent of banks surveyed agreed that the Aggregation Provision "[c]larifies the definition of 'recommendation' in a helpful way," while 98% of banks agreed that the Aggregation Provision "[m]uddies the definition of 'recommendation' and is therefore not helpful."

For those banks which disagreed that the Aggregation Provision was helpful in this way, nearly two-thirds of banks (65%) said it made it more difficult to determine whether a recommendation was actually given in these circumstances (*i.e.*, as a result of non-recommending actions). Furthermore, 56% said the Aggregation Provision makes it "virtually impossible" to determine in advance whether any particular set of actions would be deemed a "recommendation," while 49% said it makes it "virtually impossible" to comply since a bank would need to supervise and monitor its employees and all of its affiliates, where each action is not intended to implicate the Fiduciary Rule.

Citing examination concerns, more than seven out of every ten banks surveyed (71%) said that the Aggregation Provision makes it "virtually impossible" to comply with the Fiduciary Rule "since at any time and with the benefit of hindsight, the Department could conclude that a bank's program or activity is captured by the Fiduciary Rule, notwithstanding that the program/activity was reasonably structured in good faith to operate outside the Rule." Liability also was expressed as a concern: 71% of banks agreed that the Aggregation Provision increases liability risk as a result of the bank being unable to determine, in advance and with certainty, whether any two or more non-recommendations will be aggregated into a recommendation.

Bank Investment Options for IRAs

Question 6 asked banks to list the investment options for IRAs (including brokerage account IRAs). Ninety-five percent of banks surveyed provide certificates of deposit (CDs) as an investment option, 49% provide other bank products (such as money market deposit accounts), 65% provide managed investments, and 58% provide customer-directed investments.

Fiduciary Rule's Impact on Bank IRA/CD Programs

Question 7 asked banks what they would do if the Department were ever to determine that the Fiduciary Rule applies to bank IRA/CD programs (*i.e.*, where a retirement customer invests IRA assets in a bank CD or other FDIC-insured bank product). Forty-four percent of banks surveyed said they would continue their bank's IRA/CD program and make any changes necessary to comply with the Fiduciary Rule, while 56% of banks said they would convert to a customer-directed program (54%) or discontinue the IRA/CD program altogether (2%).

Fiduciary Rule's Impact on Bank Liability and Litigation Risk

Question 8 inquired into bank liability and litigation risk under the Fiduciary Rule. Two-thirds (67%) of banks surveyed believe that the Fiduciary Rule has increased the bank's liability and litigation risk under ERISA and/or the Code, while nearly a third (31%) said such risks have "significantly increased." Fifteen percent said the Fiduciary Rule has not changed bank's liability or litigation risk equation under ERISA and/or the Code. Zero percent of banks said that the Fiduciary Rule either decreased or significantly decreased the liability/litigation risk under ERISA and/or the Code.

Fiduciary Rule's Impact on the Bank and the Customer

Question 9 provided banks the opportunity to describe the ways in which the Fiduciary Rule has impacted the bank and/or the bank's customers. Thirty-two comments were provided. Most of the comments focused either on (i) how the Fiduciary Rule has resulted in customer confusion, frustration, and dissatisfaction due to the reduced availability of advice, guidance, and offerings from the bank on retirement products and services, or (ii) the bank's difficulties and challenges of implementing the Fiduciary Rule's requirements, due primarily to the disruption on bank marketing and sales activity, the complexity of the Rule, the uncertainty of the Rule's applicability and scope, and the elevated risks of noncompliance. Respondents that have scaled back or eliminated retirement services cite concerns about liability for noncompliance or litigation (including class action litigation) risk.

Morgan Lewis

Department of Labor (DOL) Fiduciary Rule: Exemption for Bank IRA Deposit Programs

Prepared by Morgan, Lewis & Bockius LLP
for the American Bankers Association

August 24, 2016

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Executive Summary

The Department of Labor (DOL) recently finalized changes to its regulation on fiduciary status (Fiduciary Rule or Rule), which greatly expands the definition of an "investment advice" fiduciary for purposes of the ERISA and IRA prohibited transaction rules. In particular, a bank that provides "advice" in the course of marketing its retirement investment products and services, including IRA rollovers, may now be deemed a "fiduciary" under the Rule. If so, any compensation the bank receives as a result of such "advice" may be considered a "prohibited transaction" under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code) because the bank would be using its fiduciary advice role to cause itself to be paid additional fees. Absent an available exemption, the penalty could be to repay the fees, plus interest, plus an excise tax. Thus, for example, a bank's receipt of compensation in connection with its advice to retail customers on IRA investments or IRA rollovers, or as a result of its routine marketing and sales practices in connection with these activities, may trigger prohibited transaction liability, unless the bank can rely on an exemption.

We believe that a statutory exemption – Section 4975(d)(4) of the Code – permits a bank to advise its customers on IRA investments and on IRA rollovers, so long as the IRA is designed to invest exclusively in the bank's deposits. Thus, provided the conditions of this exemption are met, a bank may reasonably rely on Section 4975(d)(4) to conduct its bank IRA CD program (or other IRA bank deposit program), including accepting rollovers into that program, without triggering prohibited transaction liability, and without triggering the applicability or requirements of the Fiduciary Rule or the related exemptions.[1]

[1] In order to address certain compensation and fiduciary liability issues raised by the expanded "investment advice" definition, the DOL has created a new regulatory exemption, known as the "Best Interest Contract Exemption" (BIC Exemption). Compliance with the BIC Exemption generally will allow an investment advice fiduciary to receive certain types of compensation for advice provided to a customer, without giving rise to prohibited transaction liability. The BIC Exemption's requirements, however, are lengthy and complex, and raise numerous interpretive questions. A fiduciary, however, may rely on *any* available exemption from the proh bited transaction provisions of ERISA and the Code, not simply the BIC Exemption. Thus, where the Section 4975(d)(4) exemption is available, it should not be necessary to rely on the BIC Exemption in order to market rollovers into these types of IRAs.

Introduction

We have been asked to analyze the availability of the bank deposit exemption under Section 4975(d)(4) of the Internal Revenue Code of 1986, as amended (the "Code"), for an individual retirement account (an "IRA") that invests exclusively in bank deposits, and for any rollover into an IRA that makes such investment, in light of the recent amendment to the DOL regulation defining fiduciary "investment advice" for purposes of the Section 4975 prohibited transaction rules (the "Amended Regulation").[2]

This briefing paper describes the basis for the position that the Section 4975(d)(4) exemption, in conjunction with the Section 4975(d)(2) exemption for services, provides sufficient authority and relief to cover (1) an IRA's investment in bank deposits (including bank certificates of deposit), and (2) rollovers into an IRA that invests exclusively in bank deposits (including bank certificates of deposit), such that reliance on Prohibited Transaction Exemption 2016-01, the newly-adopted Best Interest Contract ("BIC") Exemption,[3] is not necessary. While we believe this position to be reasonable and supportable for the reasons described below, because the Amended Regulation and BIC Exemption were only recently finalized (April 2016), and because there is no additional guidance as yet as to how they apply, there is no assurance that the DOL or a court would reach this conclusion. The DOL has informally indicated that it expects to provide additional guidance on the Amended Regulation and related exemptions before their April 10, 2017, applicability date, which may or may not address this issue.

This briefing paper begins with an overview of the features of a "deposit IRA" product for purposes of this discussion. It then provides relevant background on the Code Section 4975 prohibited transaction rules and the Section 4975(d)(4) bank deposits exemption. The paper then turns to the potential impact of the new Rule on the marketing and sales of deposit IRAs, followed by the reasons why the Section 4975(d)(4) exemption would be available to address those issues, including for IRA rollovers, in conjunction with a separate statutory exemption for IRA services under Section 4975(d)(2).

1. Overview of Deposit IRAs

In this briefing paper, we are assuming, for purposes of the legal analysis and in order to meet all the conditions of the bank deposit exemption, that an IRA that invests exclusively in bank deposits (a "Deposit IRA") operates as follows:

- The Deposit IRA product is offered by a bank ("Bank") that is incorporated and doing business under the laws of the United States or a State (including the District of Columbia) and is subject to supervision and examination by a Federal or State banking authority, such as the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), or a State banking commissioner.

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[2] Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 81 Fed. Reg. 20,946 (2016).

[3] Best Interest Contract Exemption – Adoption of Class Exemption, 81 Fed. Reg. 21,002 (2016), technical corrections, 81 Fed. Reg. 44,773 (2016).

- The Deposit IRA is opened in the same manner as any other type of IRA, and subject to the same contribution, withdrawal, and other rules applicable to IRAs under the Code, including the prohibited transaction rules and related exemptions under Section 4975.
- The Deposit IRA product is made available through a Bank or its branches, with the Bank serving as the IRA's trustee and/or custodian.
- The IRA owner elects in the opening documentation to limit IRA investments exclusively to deposits in the offering Bank. These may be certificates of deposit ("CDs") (including so-called "IRA CDs" that have special terms designed for IRA investors, such as the ability to make penalty-free withdrawals to meet the minimum required distribution rules), money market accounts, and savings accounts. All such deposits are insured by the Federal Deposit Insurance Corporation up to applicable limits.
- The Bank pays interest, and may impose service fees or other charges, in accordance with the terms it makes available for the particular types of deposit accounts. For example, CDs may be subject to early withdrawal penalties.
- The Deposit IRA may or may not be subject to trust or custody fees to cover the Bank's services as IRA trustee or custodian, as applicable.

2. Section 4975 Prohibited Transaction Rules

Section 4975 of the Code prohibits certain enumerated transactions between a "plan," defined in Section 4975(e)(1) to include an IRA, and a "disqualified person"[4] with respect to the plan/IRA, as well as imposing certain additional prohibitions where the disqualified person is a fiduciary to the plan/IRA.[5] The penalty for violation is an excise tax imposed on the disqualified person that participates in the prohibited transaction (other than a fiduciary acting only as such) or, if the disqualified person is the individual for whose benefit the IRA was established, loss of the IRA's tax-exempt status.[6] Furthermore, to avoid additional excise taxes, the prohibited transaction must be "corrected," meaning that the transaction must be undone to the extent possible, in any case placing the plan/IRA in a financial position not worse than as if the prohibited transaction had not occurred.[7]

Most IRAs are not "employee benefit plans" subject to Title I of ERISA,[8] so the general fiduciary standards of ERISA do not apply to them. Under current law, however, interpretations of and exemptions from the Section 4975 prohibited transaction rules generally are issued by the DOL, and DOL interpretations of the

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[4] The term "disqualified person" is defined in Section 4975(e)(2) to include, among others, a fiduciary or person providing services to the plan/IRA, as well as certain affiliates of the fiduciary or service provider.

[5] Because the focus of this briefing paper is on IRAs, the term "IRA" is used where, in most cases, the text can refer either to a plan or to an IRA.

[6] Code §§ 408(e)(2), 4975(a).

[7] Code §§ 4975(b), (f)(5).

[8] *See* 29 C.F.R. § 2510.3-2(d) (stating the general rule that IRAs are not "plans" under ERISA, except in certain circumstances).

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parallel prohibited transaction and exemption provisions in Sections 406 and 408 of ERISA generally apply in determining how the Section 4975 prohibited transaction rules apply to non-ERISA IRAs.[9]

3. Bank Deposits Covered by a Statutory Exemption

As a provider of trust and/or custody services to an IRA, the Bank would be a "disqualified person" with respect to the IRA within the meaning of Section 4975(e)(2)(B). Consequently, certain types of transactions between the Bank and the IRA would be prohibited by Section 4975, absent an exemption.

The categories of prohibited transactions in Section 4975(c)(1) include the lending of money or other extension of credit between an IRA and a disqualified person (Section 4975(c)(1)(B)), and the use of IRA assets by or for the benefit of a disqualified person (Section 4975(c)(1)(D)). According to guidance from the DOL, the deposit of an IRA's funds in a bank deposit account would be viewed as an extension of credit from the IRA to the bank and also a "use" of the IRA's funds for the benefit of the bank, thereby requiring an exemption if the bank is a disqualified person.[10] In addition, where the bank has investment discretion or provides investment advice that makes it a fiduciary with respect to the IRA, the transaction may raise issues under the prohibitions on fiduciary self-dealing and conflicts of interest in Section 4975(c)(1)(E) and (F).

Recognizing this potential issue, Congress included in the statute an exemption for a bank to invest an IRA's assets in its own deposit accounts. This exemption is found in Section 4975(d)(4) of the Code and Section 408(b)(4) of ERISA. It provides exemptive relief for "the investment of all or part of [an IRA's] assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State," subject to conditions contained in the statute and described further by regulation.[11] The exemption covers the extension of credit between the IRA and the bank that is inherent in the IRA's investment in the bank's deposits and the bank's use of the deposited assets, as well as fiduciary self-dealing and conflicts of interest otherwise prohibited by Section 4975(c)(1)(E).[12] The term

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[9] *See* Reorganization Plan No. 4 of 1978, § 102, 43 Fed. Reg. 47,713 (1978) (transfer of IRS authority to issue regulations, rulings, opinions and exemptions under Section 4975 transferred to DOL, with limited exceptions).

In focusing on the application of Section 4975 of the Code, this white paper assumes that the Deposit IRAs would not be employee benefit plans subject to Title I of ERISA. It also is poss ble that an IRA would, depending principally on the level of employer involvement, be considered part of an ERISA Title I plan. For example, IRAs that are part of a "simplified employee pension," or SEP, or a "simple retirement account" would be considered part of an ERISA Title I plan if the employer makes any contr butions to those IRAs. If so, the same general analysis still would apply under the largely parallel proh bited transaction rules and exemptions of ERISA, which are subject to the same DOL interpretations as descr bed herein.

[10] For a description of bank deposits as raising these issues, *see* Proposed Exemptions; Deutsche Bank AG, 68 Fed. Reg. 10,035, 10,038 n.6 (2003) (in the absence of the ERISA Section 408(b)(4) exemption being available, a bank could rely on another exemption "to exempt the extension of credit and the use of plan assets by the foreign [bank] party in interest inherent in the investment in that [bank's] deposits").

[11] Treas. Reg. § 54.4975-6(b) and 29 C.F.R. § 2550.408b-4 (IRS and DOL regulations, respectively).

[12] Under the regulations, the exemption does not provide relief from Section 4975(c)(1)(F) (and its ERISA equivalent, Section 406(b)(3)), which prohibits an IRA fiduciary from receiving consideration for the fiduciary's own personal account from any party dealing with the IRA in connection with a transaction involving IRA assets. The DOL, however, has taken the position that the normal benefit a bank would receive from holding deposits – decreased overnight borrowing needs from Federal institutions – is not received from a "party dealing with" the IRA so as to violate Section 406(b)(3). DOL Advisory Opinion 2009-01A (Jan. 13, 2009).

"deposits" is broadly defined to include "any account, temporary or otherwise, upon which a reasonable rate of interest is paid, including a certificate of deposit issued by a bank."[13]

In providing coverage where the bank is a fiduciary, the exemption and the regulation do not draw any distinction as to the capacity or role in which the bank is serving as a fiduciary. For example, the exemption does not specify whether the bank has to be a fiduciary by reason of having investment discretion over the IRA's assets, versus acting in a non-discretionary investment advisory capacity.

In addition to requiring that the deposits bear a "reasonable" interest rate (generally measured by reference to interest rates available to other customers of the same bank and from other banks in the same geographic area[14]), the exemption also requires authorization of the bank deposits as an investment for the particular IRA. According to the regulation, to meet this condition, the investment must be either expressly authorized by a provision of the IRA trust or custody agreement, or by a fiduciary of the IRA – other than the bank – who has authority to make such investments and who has no interest in the transaction that may affect the exercise of its best judgment as a fiduciary. If in the IRA trust or custody agreement, then the authorization must name the bank and must state that the bank may make investments in deposits that bear a reasonable rate of interest in itself or an affiliate.[15]

4. Prohibited Transaction Issues Raised by the Amended Regulation

A. Amended Regulation Expands the Definition of Fiduciary "Investment Advice"

The Amended Regulation amends the definition of the term "fiduciary" under both ERISA and Section 4975 of the Code, effective April 10, 2017, to expand what is considered fiduciary "investment advice" for purposes of these provisions. [16]

As relevant here, the fiduciary definition in the statute includes any person who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of

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13 Treas. Reg. § 54.4975-6(b)(4)(iii); 29 C.F.R. § 2550.408b-4(c)(3).

14 While the concept of a "reasonable" rate of interest is not defined in the exemption itself or the related regulation, it is defined in an individual exemption based on Section 4975(d)(4), as "a rate of interest determinable by reference to short-term rates available to other customers of the bank, those offered by other banks, those available from money market funds, those applicable to short-term instruments such as repurchase agreements, or by reference to a benchmark such as sovereign short term debt (e.g., in the U.S., treasury bills), all in the jurisdiction where the rate is being evaluated." Prohibited Transaction Exemption 2003-11, §III(f), 68 Fed. Reg. 34,648 (2003).

15 Treas. Reg. § 54.4975-6(b)(3)(i); 29 C.F.R. § 2550.408b-4(b)(2).

16 While the technical "effective date" of the Amended Regulation was June 7, 2016, the new rules actually take effect on the Amended Regulation's "applicability date" of April 10, 2017.

While there is a separate regulation under Section 4975 on the definition of a "fiduciary" – Treas. Reg. § 54.4975-9 – that provision has not been specifically amended by the recent change. Rather, the DOL regulation under ERISA now cross-references the relevant subsection under Section 4975, effectively superseding the 1975 Treasury regulation. Commenters on the proposed regulation challenged the DOL's authority to regulate IRAs that are not subject to ERISA and therefore under a different statute; the DOL responded that it has such authority under Reorganization Plan No. 4 of 1978, cited above, including the authority to interpret the definition of the term "fiduciary" under Section 4975(e)(3). 81 Fed. Reg. at 20,991.

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such plan, or has any authority or responsibility to do so."[17] A 1975 regulation created what has been referred to as a "five-part" test for determining whether advice constitutes "investment advice" for this purpose.[18]

The Amended Regulation considerably revises the five-part test and expands the categories of "recommendations" that can, subject to certain other factors, constitute fiduciary "investment advice." These now include recommendations with respect to:

1. the advisability of acquiring, holding, disposing of, or exchanging securities or other investment property;
2. rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made;
3. how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred or distributed from a plan or IRA; and
4. the management of securities or other investment property, including, among other things, with regard to:

- investment policies or strategies,
- portfolio composition,
- selection of other persons to provide investment advice or investment management services, or
- selection of investment account arrangements (*e.g.,* brokerage versus advisory).[19]

The 1975 regulation, by its terms, effectively only covered the first category, although there were DOL interpretations extending the definition to parts of the fourth category. The second and third categories are new, representing in part the reversal of a 2005 DOL position that recommendations as to distribution options, even if accompanied by a recommendation as to where the distribution would be invested, were not fiduciary investment advice.[20]

B. Prohibited Transaction Issues in Marketing and Selling Deposit IRAs

The Amended Regulation raises the following question: To what extent may the marketing and sales of Deposit IRAs, including discussions of rollovers from qualified plans or other IRAs into a Deposit IRA,

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[17] Code § 4975(e)(3)(B). The ERISA definition, in Section 3(21)(A)(ii), includes the additional language "to the extent," so that a person is a fiduciary only "to the extent" the person performs the enumerated functions. While "to the extent" is missing from the Code definition, it is reflected in the associated regulation (see Treas. Reg. § 54.4975-9(c)(2)), and DOL interpretations do not draw any distinction on this basis.

[18] Treas. Reg. § 54.4975-9; 29 C.F.R. § 2510.3-21. *See* 40 Fed. Reg. 50,840 (1975) (adopting these regulations).

[19] 29 C.F.R. § 2510.3-21(a)(1), as amended by the Amended Regulation.

[20] *See* 81 Fed. Reg. at 20,964, indicating that the Amended Regulation supersedes DOL Advisory Opinion 2005-23A (Dec. 7, 2005).

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now constitute fiduciary investment advice subject to the prohibited transaction rules? Because the DOL declined to exclude recommendations of bank CDs from the categories of recommendations that may result in fiduciary status, fees or other compensation received as a result of recommending CD investments may require an exemption.[21]

In its explanation of the Amended Regulation, the DOL clarified that so-called "hire me" discussions are not covered investment advice, as follows:

> [T]he final rule was revised to state, as an example of a covered recommendation on investment management, a recommendation on the selection of "other persons" to provide investment advice or investment management services. Accordingly, a person or firm can tout the quality of his, her, or its own advisory or investment management services or those of any other person known by the investor to be, or fairly identified by the adviser as, an affiliate, without triggering fiduciary obligations.[22]

However, the DOL cautioned that the Amended Regulation does not necessarily exempt a person from being a fiduciary merely because the person is recommending its own services. The same passage in the preamble states:

> The final rule draws a line between an adviser's marketing of the value of its own advisory or investment management services, on the one hand, and making recommendations to retirement investors on how to invest or manage their savings, on the other. An adviser can recommend that a retirement investor enter into an advisory relationship with the adviser without acting as a fiduciary. But when the adviser recommends, for example, that the investor pull money out of a plan or invest in a particular fund, that advice is given in a fiduciary capacity even if part of a presentation in which the adviser is also recommending that the person enter into an advisory relationship. … Thus, when a recommendation to "hire me" effectively includes a recommendation on how to invest or manage plan or IRA assets (*e.g.,* whether to roll assets into an IRA or plan or how to invest assets if rolled over), that recommendation would need to be evaluated separately under the provisions in the final rule.[23]

5. Reasons Why the Section 4975(d)(4) Exemption Would be Available

The following discussion assumes that the conditions of Section 4975(d)(4) are otherwise being met, including the reasonable rate of interest and authorization requirements, and that the only type of IRA that the Bank is making available to the customer is a Deposit IRA.

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[21] 81 Fed. Reg. at 20,962 ("the definition of investment property … should include bank CDs and similar investment products," because the DOL "does not see any basis for differentiating advice regarding investments in CDs … from other investment products. … To the extent an adviser will receive a fee or other compensation as a result of a recommended investment in a CD, that communication presents the type of conflict of interest that is the focus of the rule.").

[22] *Id.* at 20,968.

[23] *Id.*

A. Section 4975(d)(4) Exemption Covers Fiduciary Investment Advice

The threshold question is whether the exemptive relief provided by Section 4975(d)(4) extends to non-discretionary "investment advice" fiduciaries. There is no indication that this would *not* be the case. As noted above, the statute and regulation use the term "fiduciary" without distinguishing in which capacity the bank is acting as a fiduciary.

This interpretation is confirmed by the DOL's preamble to the final BIC Exemption, which indicates that Section 4975(d)(4), like the BIC Exemption, can provide exemptive relief for compensation received as a result of "investment advice" recommendations. In response to a request for broader supplemental relief for the extensions of credit viewed as being inherent in a bank deposit and certificate of deposit transaction, where such deposits may be recommended by an "investment advice" fiduciary in accordance with Section I of the exemption, the DOL said that while the final exemption did not include such relief, this relief is generally available under existing statutory exemptions such as ERISA Section 408(b)(4) and Code Section 4975(d)(4).[24]

B. Section 4975(d)(4) Exemption Can Cover Rollover Advice

The next question is whether Section 4975(d)(4) can cover any investment advice that the Amended Regulation would deem to occur in connection with an individual's rollover of qualified plan or IRA assets into a Deposit IRA.

When Section 4975(d)(4) was enacted and the related regulation was adopted, rollover advice was not considered fiduciary investment advice. However, once the definition of fiduciary investment advice is expanded to include rollovers, any reference to fiduciary status in the statute or the regulations should presumably now be interpreted to include rollover advice as well, whether as part of a prohibition or part of an exemption from a prohibition. Therefore, the term fiduciary as used in Section 4975(d)(4) can now reasonably be viewed to cover a person that is a fiduciary by reason of providing rollover advice, to the extent such advice triggers fiduciary status, unless there were a reason to interpret the exemption by its terms to exclude rollover transactions.

If other investments were available within an IRA, or alternative forms of IRA were available, then additional exemptive relief could be necessary to address conflicts of interest in recommending between, for example, a Deposit IRA versus a brokerage account IRA that permits investments in a wide range of securities. If the only available form of IRA is a Deposit IRA and the only available investments within

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[24] 81 Fed. Reg. at 21,064. In the same discussion, the DOL pointed out that a statutory exemption that could be available for purchases of debt securities – ERISA Section 408(b)(17) and Code Section 4975(d)(20) – would not provide relief where the issuer is a fiduciary, requiring a separate exemption to provide fiduciary relief. However, the DOL did not draw any such distinction with regard to ERISA Section 408(b)(4) and Code Section 4975(d)(4).

This result is consistent with the position that the DOL took when a similar question arose in connection with an administrative exemption for a plan fiduciary to execute securities transactions for a fee through itself or an affiliate. Prohibited Transaction Exemption ("PTE") 86-128, 51 Fed. Reg. 41,686 (1986), most recently amended at 81 Fed. Reg. 21,181 (2016). The DOL took the view that PTE 86-128, by its terms, provides relief for covered transactions engaged in by any person who meets the definition of a fiduciary under ERISA (and, by extension, the Code), including a person who is a fiduciary solely by reason of rendering investment advice. The DOL said that while the exemption specifically excludes relief for plan administrators and plan sponsors, it contains no exclusion for "investment advice" fiduciaries. DOL Advisory Opinion 2011-08A (June 21, 2011).

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the IRA are Bank deposits, however, then a Bank's recommendation of a rollover into a Deposit IRA would be the same as a recommendation to invest in the Bank's deposits. As that is what the Section 4975(d)(4) exemption covers, it is reasonable to read the exemption as covering all aspects of the investment advice that leads to the Bank deposit investments, including the rollover advice.[25]

6. Separate Exemptive Relief Is Available for IRA Trust and Custody Services

The Section 4975(d)(4) exemption would not cover the Bank's role as trustee or custodian of a Deposit IRA, or any fees or other compensation the Bank receives for its trust or custody services. As a general matter, the Bank's compensation for such services would be covered by a separate exemption, Section 4975(d)(2), which provides relief for reasonable arrangements for the provision by a disqualified person of services necessary for the establishment or operation of an IRA, if no more than reasonable compensation is paid for the services. However, this exemption has been interpreted not to provide relief from the prohibition against fiduciary self-dealing.[26] The question, then, would be whether a Bank's advice with regard to using a Deposit IRA to which the Bank provides trust or custody services, for compensation, could be viewed as raising a separate prohibited self-dealing issue under the new definition that is not covered by the Section 4975(d)(2) exemption.[27]

There are two arguments as to why retaining the Bank as a Deposit IRA trustee or custodian should not be considered to be the result of fiduciary investment advice. The first is that the Bank, in marketing its IRA trust and custody services, should come within the so-called "hire me" exception described in Section IV.B. above, because the Bank would only be marketing its own services. The second is that, unless the Bank is at the same time marketing its services as an investment adviser or investment manager for the IRA (including as part of its role as trustee, if applicable), it has not done anything that comes within the scope of an investment advice recommendation as contemplated by the Amended Regulation. The preamble to the final regulation clarified this view in response to concerns as to whether recommendations of service providers who are not fiduciary investment advisers or investment managers

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[25] We note that one of the administrative class exemptions that was amended in conjunction with the Amended Regulation, PTE 84-24 (which permits "investment advice" fiduciaries to receive compensation in connection with the purchase of insurance and annuity contracts and mutual fund shares), was specifically revised to include rollover and distribution transactions within the scope of relief. Amendment to and Partial Revocation of Proh bited 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 (2016). Notably, though, the DOL did not originally include this revision in its proposed changes to PTE 84-24. In response to comments that expressed concern as to whether the amended exemption would cover transactions resulting from a rollover or distribution, the DOL responded that it had intended the exemption's original language to cover such transactions, but it nevertheless amended the text to state specifically that it applies. 81 Fed. Reg. at 21,155. Thus, consistent with the reading of Section 4975(d)(4) described here, the DOL's position is that inclusion of rollover/distr bution language is not necessary for an exemption otherwise providing exemptive relief to fiduciaries to reach such transactions.

An additional consideration is whether a rollover recommendation to an ERISA plan participant brings into consideration Title I of ERISA. In the preamble to the Amended Regulation, the DOL took the view that recommendations on distr butions from an ERISA plan, including rollovers, would be covered by Title I of ERISA. 81 Fed. Reg. at 20,964. If that is the case, then the same analysis should apply under the parallel provisions of ERISA, including the parallel bank deposit exemption under ERISA Section 408(b)(4).

[26] Treas. Reg. § 54.4975-6(a)(1).

[27] If the Bank does not charge separately for its trust or custody services, however, there would not be a separate fiduciary self-dealing issue. *See* Treas. Reg. § 54.4975-6(a)(5)(iii) ("Services without compensation," stating that if a fiduciary provides services to a plan without the receipt of compensation, the provision of the services would not, in and of itself, constitute prohibited self-dealing).

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may be considered fiduciary advice. The DOL stated that it did not intend the regulation to reach recommendations of persons to provide services, such as non-discretionary execution of securities transactions or recordkeeping, that did not come within these categories. [28]

A possible question on these arguments is raised by the DOL's distinction, in its "hire me" discussion, that recommending whether to roll over assets into an IRA would not come within the "hire me" exception and would need to be evaluated separately under the provisions in the final rule.[29] But in the context of a rollover to a Deposit IRA that exclusively invests in bank deposits, this separate evaluation would then lead to looking to the Section 4975(d)(4) exemption to cover that particular recommendation, as discussed above. The DOL did not say that a discussion of rollovers or investments results in the "hire me" discussion becoming investment advice, only that such discussions are not within the "hire me" exception. Thus, where the retention of the Bank as IRA trustee or custodian is ancillary to the advice to roll over into a Deposit IRA, these statements should not affect the ability to treat the recommendation of the Bank's IRA trust or custody services, standing alone, as coming within that exception.

7. Conclusion

The expanded definition of fiduciary investment advice under the Amended Regulation has called into question a number of practices that now, according to the DOL, will become subject to fiduciary status and the prohibited transaction rules. Nevertheless, where a Bank is making available only a Deposit IRA that will invest exclusively in the Bank's deposits, it should be reasonable for the Bank to take the position that any additional prohibited transaction issues raised by the expanded definition in its marketing of Deposit IRAs would be covered by the Section 4975(d)(4) exemption for bank deposit investments, and by the Section 4975(d)(2) exemption to the extent necessary to cover the Bank's IRA trust or custody services. A bank, therefore, may reasonably rely on these statutory exemptions, rather than on the BIC Exemption, to cover (1) an IRA's investment in bank deposits (including bank CDs), and (2) rollovers into an IRA that invests exclusively in bank deposits (including bank CDs).

This paper has been prepared for the American Bankers Association by Morgan, Lewis & Bockius LLP, an international law firm. The information contained in this paper is provided as general information. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship.

[28] 81 Fed. Reg. at 20,968.

[29] 81 Fed. Reg. at 20,968.