International Bancshares Corporation

July 21, 2015

Via [*www.regulations.gov*](http://www.regulations.gov)

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: RIN 1210—AB32; Definition of the Term "Fiduciary;" Conflict of Interest Rule—Retirement Investment Advice and Related Proposed Prohibited Transaction Exemptions (the "Proposal")

Dear Sir or Madam:

The following comments are submitted on behalf of International Bancshares Corporation ("IBC"), a multi-bank financial holding company headquartered in Laredo, Texas. IBC holds four state nonmember banks serving Texas and Oklahoma with each bank having less than $10 billion in assets. With over $12 billion in total consolidated assets, IBC is the largest Hispanic-controlled financial holding company in the continental United States. IBC is a publicly-traded bank holding company. We appreciate the opportunity to comment on the Employee Benefits Security Administration ("EBSA") of the Department of Labor (the "Department") Proposal.

I. Overview of Proposal

On April 20, 2015, the EBSA published the Proposal in which it seeks to re-define who is rendered a "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act ("ERISA") by providing investment advice for a fee or other compensation to a plan or its participants or beneficiaries, including expanding ERISA's fiduciary standards to cover advice provided to an individual retirement account ("IRA"). As proposed, the Proposal will substantially modify the existing and established rules for determining when investment advice is provided that would render the advisor a fiduciary under ERISA. The Proposal is aimed at protecting retirement investors and ensuring that representatives of registered investment advisors, banks, similar financial institutions, insurance companies, and broker-dealers are regulated when they provide investment advice to retirement plans and IRAs.

Under the Proposal, the definition of fiduciary investment advice includes (1) investment recommendations, (2) investment management recommendations, (3) appraisals of investments, or (4) recommendations of persons to provide investment advice for a fee or to manage plan assets. This specifically includes recommendations to take a distribution from a plan or IRA, as well as a recommendation as to the investment of assets distributed or rolled over from a plan or IRA.

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The term fiduciary under ERISA determines who owes the highest level of care to a retirement plan, their participants and beneficiaries. Individuals providing fiduciary investment advice are required to act impartially and provide advice that is in their clients' best interest. Under the Proposal, ERISA and the Internal Revenue Code ("the "Code") prohibited transaction rules will be applied to all individuals providing "fiduciary investment advice" to plan sponsors, plan participants, and IRA owners, even without a mutual agreement between the service provider and the retirement plan or investor. The Proposal includes a broad definition of "fee or other compensation," to include sales commissions, brokerage fees as well as any fee or compensation "incident to the transaction in which the investment advice has been or will be rendered."

In essence, the new proposal expands the scope of what is considered "fiduciary investment advice" subjecting financial institutions to an entirely new regulatory regime." These advisors will be prohibited from receiving payments creating conflicts of interest without a prohibited transaction exemption. Under the Best Interest Contract Exception ("BICE"), investment advice fiduciaries are given relief from the ERISA and Code prohibited transaction rules for the receipt of compensation for services provided in connection with the purchase, sale, or holding of certain investments by participants and beneficiaries, IRAs, and certain plans with fewer than 100 investors. The BICE is designed to allow for 12b-1 fees and revenue sharing, but it presents significant legal compliance costs and liability exposure. The BICE requires that the advisor enter into a written contract with the retirement investor in which the advisor acknowledges it is a fiduciary and agrees to only provide investment advice that is in the "best interest" of the retirement investor. The BICE has detailed compliance, recordkeeping and disclosure requirements and creates a basis upon which the retirement investor could enforce a private cause of action against the advisor for breach of the contract, as well as a fiduciary breach under ERISA.

II. Comments

A. Deference to Current Regulatory Scheme under the SEC and FINRA

Any change to current rules under ERISA that would have the effect of regulating the conduct of broker-dealers, which is the responsibility of the U.S. Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"), should take into consideration the existing comprehensive regulatory framework applicable to securities broker-dealers. The SEC is the agency that Congress designated to oversee and regulate the conduct of persons providing investment advice and effecting securities transactions in the United States. Congress also mandated that any registered broker or dealer must be a member of a registered securities association unless an exemption applies. Since the enactment of the Securities Exchange Act of 1934, FINRA (or its predecessor) has been the sole registered securities association. The SEC and FINRA both conduct regular examinations of registered broker-dealers.

The SEC and FINRA have significant familiarity with the regulatory regime already in place to oversee broker-dealers and their registered representatives. These capital markets regulatory authorities should undertake any remedial action necessary to address the perceived inadequacies of the system in protecting the needs of investors with smaller account balances, including workers saving for retirement in a broad range of products, not just IRAs and other products that receive tax beneficial treatment under the Code.

Under current rules, retirement investors have access to substantial resources when making decisions about what type of investment advice they would like to receive and the fees associated with the different types of advice. Moreover, the securities regulators have extensive examination and enforcement programs designed to deter and punish egregious behavior. As a result, U.S. capital markets regulators effectively address improper conduct by securities broker-dealers and registered investment advisers. Therefore, any change to current rules under ERISA that fails to take into account the comprehensive oversight and enforcement programs administered by securities regulators could have the effect of limiting retirement savers' access to beneficial investment guidance and products.

The regulators charged directly with the protection of these investors have not opted to adopt a far-reaching "fiduciary" definition that could have adverse effects on the industry; rather, they have worked (and continue to work) to make improvements in the industry that protect such investors without potentially curtailing the ability of such investors to access much-needed and wanted professional expertise. Additionally, financial institutions are subject to state and/or federal bank regulators that enforce numerous consumer protection laws and regulations through regular examinations, and if necessary, enforcement actions.

Furthermore, the Department's Proposal provides for a private cause of action for breach of contract. This squarely conflicts with FINRA's arbitration and mediation procedures which are an important alternative to traditional litigation for investment-related claims. FINRA operates the largest securities dispute resolution forum in the United States and has extensive experience in providing a fair, efficient and effective venue to handle a securities-related dispute. The resolution of problems and disputes is accomplished through the two non-judicial proceedings of arbitration and mediation. Arbitration and mediation are two distinct ways of resolving securities and business disputes between and among investors, brokerage firms and individual brokers, and offer a prompt and inexpensive means of resolving issues compared to traditional litigation which can be protracted and very expensive. Standard brokerage account agreements contain provisions wherein the parties agree to arbitrate their dispute before FINRA. Even if an investor did not open an account with a brokerage firm, the claim may still be eligible for arbitration under FINRA rules. Accordingly, the Department's Proposal would circumvent FINRA's beneficial dispute resolution process to the disadvantage of investment advisors, brokerage firms, and their customers.

Based on the foregoing, the Department should defer to the SEC and FINRA for purposes of establishing a new "fiduciary" standard.

B. Potential Confusion or Conflict With SEC's Future Fiduciary Definition

The SEC and the Commodities and Futures Trading Commission are developing their own definitions of "fiduciary" pursuant to the Dodd-Frank Act. If the Department proceeds to establish its own "fiduciary" definition, all of these different "fiduciary" definitions are likely to be inconsistent and, therefore, cause uncertainty and confusion for banks and other providers of retirement investment advice, and, most importantly, consumers.

Section 913 of Dodd-Frank authorized the SEC to study the effectiveness of regulations governing broker-dealer reps and registered investment advisors. The result of the study was a recommendation that the SEC adopt a uniform fiduciary rule for all brokers that is "no less stringent" than the fiduciary standard governing registered investment advisors that evolved from the 1940 Investment Advisors Act. In March 2015, SEC Chairwoman, Mary Jo White, said that the SEC should "act" on a uniform fiduciary standard for brokers and investment advisors, one that should be a "codified principles-based standard rooted in the current fiduciary standard for investment advisors." In an article last year, SEC Commissioner Daniel Gallagher was quoted as saying the Department has not formally engaged the SEC commissioners in the process of adopting an expansive fiduciary standard.[1] We believe that in adopting Section 913 of the Dodd-Frank Act, Congress clearly intended that a single [fiduciary] standard should apply to retail accounts, including retirement accounts, based on specific guidelines enumerated in Section 913.

The Department's attempt to run on a different track than the SEC in adopting a fiduciary standard as it relates to all types of retirement savings comes at a time when our country is undergoing an uneven economic recovery and is in great need for encouraging savings and investment in retirement plans. Consumers need help, guidance, advice and support for their retirement plans. Making it more difficult especially to serve smaller investors is counterproductive to this overall objective. Financial institutions are just now beginning to recover from the financial crisis and the passage of the Dodd-Frank Act in 2010 and are inundated with new and costly federal regulations under the Dodd-Frank Act. Implementing additional and potentially conflicting rules will cause uncertainty and further disruption to the industry. The vast majority of regional and community banks in this country have neither the human nor financial resources to deploy toward compliance with all of the new regulations issued in the last few years. Unfortunately, with the continued spiraling of compliance costs, the ultimate losers in the continuing barrage of new, burdensome regulations are consumers who will face higher costs in obtaining banking services and products and the diminished availability of both credit and bank services.

Accordingly, we believe the Department should withdraw its Proposal and work with the SEC in establishing a uniform fiduciary standard in accordance with the Dodd-Frank Act. To continue with its independent efforts to establish a fiduciary standard will likely lead to an inconsistent and, therefore, confusing effect on banks and other providers of retirement advice.

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[1] "SEC's Gallagher: Fiduciary Debate Biased Against Brokers," ThinkAdvisor.com, May 12, 2014 (http://www.thinkadvisor.com/2014/05/12/secs-gallagher-fiduciary-debate-biased-against-bro.).

At a minimum, the Department should not issue "final" fiduciary regulations until the SEC has completed its work on its fiduciary rule and that any regulation the Department ultimately may propose should be carefully crafted so that it does not conflict with the SEC's rule.

C. Clarity Needed in Defined Terms and Recommendations

In its current proposed status, defined terms in the Proposal are ambiguous and with insufficient guidance on the full scope of coverage. Accordingly, we recommend that the Department incorporate well established SEC and FINRA rules to any fiduciary rule proposed or adopted in the future.

a. Investment Advice - Referral

It is critical that the Proposal make it clear who is acting as a fiduciary and who is not. Under the terms of the Proposal, an advisor is rendered a fiduciary when providing investment advice for a fee or other compensation, with the term "investment advice" involving a single "recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property." The Proposal notes that the communication must constitute a "recommendation" to fall within the scope of fiduciary investment advice, but how broad will the term recommendation be viewed by the Department? If a financial institution solely recommends its banking customer contact an unaffiliated independent third party broker-dealer or independent retirement plan consultant for assistance with a retirement account investment, will it be considered to provide "investment advice" and become a fiduciary if there is a fee paid back to the financial institution for administrative services? If the financial institution only provides its customer the option to put the retirement investment in traditional financial institution savings products, like certificates of deposit (CDs), does that constitute an investment recommendation? If the financial institution states it is not providing "individualized investment advice" can it be exempt from the Proposal?

The Proposal invites comment on whether the Department should adopt some or all of the standards developed by FINRA in determining communications that rise to the level of recommendations. To the extent that the Department follows FINRA's guidance that a recommendation generally requires a reasonable basis to believe that a specific recommended transaction or investment strategy involving a security be suitable to the customer, then the concern about the unintended consequence of having a referral to an unaffiliated third party turn into a fiduciary responsibility is alleviated. But, the plain text of the Proposal does not state what it means to "recommend," and therefore, any final definition of the term should clearly require actual, direct, and investment advice related to a specific security. Thus, in the scenario involving a referral to an unaffiliated third party broker-dealer noted above, only the third party broker-dealer would be rendered a fiduciary, not the referring financial institution who merely directs its client to contact an independent third party advisor for specific investment advice, even if the financial institution receives an administrative fee for contractual services to a broker-dealer.

Not clear from the Proposal is if the financial institution only provides its customer the option to put the retirement investment in traditional financial institution savings products, like CDs, will it be providing investment advice? Does that constitute a recommendation? If so, is the financial institution considered to receive direct or indirect compensation, subjecting it to fiduciary responsibility merely for opening up an IRA that is invested in a CD? This issue is more fully explored below.

b. Fee or Other Compensation, Direct or Indirect

A necessary element of the defined fiduciary term in the Proposal is a fee or other compensation, direct or indirect. This is defined in the Proposal to include any fee or compensation received incident to a transaction in which retirement advice was provided, including compensation to an affiliate. The Proposal notes that the receipt of an affiliate of advisory fees from a mutual fund is considered indirect compensation with the rendering of investment advice. It is clear from the terms of the BICE that compensation includes fees earned related to bank deposits and CDs. What is not clear is whether a financial institution is considered to earn a direct or indirect fee or compensation when a retirement product is invested within the institution in a retail banking product. For example, a bank customer opens an IRA account; the funds are placed in a savings account or CD, the customer is not charged a direct fee, and the bank employee does not earn a commission on the transaction. Will the financial institution be deemed to receive compensation, direct or indirect, solely by having the account as a deposit on its books? We recommend that the Department make it clear that direct and indirect commissions or a fee does not include any financial benefit the financial institution receives from its deposit base.

The Proposal notes that the Department is considering an additional "streamlined exception" that would apply to compensation received in connection with investments by plans, participants, beneficiaries, and IRA owners, in certain high-quality low-fee investments. Community banks offer simple certificates of deposit as investment options for individual IRAs and SEPs. The bank customer rather than the new accounts officer indicates a desire to use such an account, often due to the simplicity of the transaction, the customer's familiarity with the account type, the desire for a quick and simple transaction, and the lack of any fees to an adviser. These simple, traditional bank products should not trigger the application of the new fiduciary definition. To do so will significantly impair the ability of community banks to continue to offer these low-cost products to the host of consumers seeking a simple tax-deductible retirement option. Therefore, to the extent that the Proposal operates to make a financial institution or its employees to become a fiduciary on retirement based depository accounts, we recommend that the Department incorporate a carve out from the definition of fiduciary for retirement investments in high-quality low-cost financial institution savings products, like CDs, when a direct fee is not charged and a commission is not earned by the bank employee. To the extent a carve out is not adopted, we recommend a streamlined exemption be adopted for certain low-fee investments that would allow investment advice fiduciaries and their financial institutions to accept payments that might otherwise be prohibited and subject that exception to far fewer conditions than in the proposed BICE.

Based on the foregoing, we recommend that the Department incorporate the foregoing recommendations to any fiduciary rule proposed or adopted in the future.

D. Proposal Will Harm Low-And Moderate-Income Individuals

Any change to the current rules under ERISA that would expand the class of individuals and firms who are considered fiduciaries would reduce the availability of essential advisory services for low- and moderate-income workers saving to meet their needs in retirement. A large proportion of individual investors, particularly low- and moderate-income individuals, seek the advice of financial professionals for professional guidance, including encouragement to plan and save for retirement and the development of financial literacy. These individuals generally do not have the knowledge necessary to understand the many complex investment options available, nor the time and predisposition to acquire such knowledge. These individuals are also apprehensive about making the wrong investment decision. Therefore, these individuals engage financial professionals for guidance, particularly those that are most accessible, such as those found at regional and community banks, with the understanding that these professionals are typically compensated on a commission basis.

Instead of requiring a separate fee from consumers who cannot afford or are unwilling to pay separately for advice, financial professionals offer the option of commission-based arrangements as compensation for their services. Financial professionals have been a primary reason why low-and moderate-income workers have become retirement savers. If commissions and other sell-side compensation arrangements were prohibited absent compliance with the BICE, service providers might limit or discontinue the availability of their services or products to retirement plans thereby discouraging low- and moderate-income individuals from seeking out what would have otherwise been affordable retirement advice. Without the encouragement provided by financial professionals, it is likely that such individuals would save less, or not at all. Any change to current rules that would lead to higher fees for investment advice and guidance, such as the compliance cost and liability exposure created by the BICE, may have the unintended effect of reducing the number of, and the amounts set aside by, these low- and moderate-income retirement savers. Thus, we strongly recommend a carve out from the fiduciary rules for high-quality low-fee investments that are in safe, traditional, and insured financial institution products. The Proposal may also have the unintended consequence of limiting education and financial literacy due to service providers being concerned that they will be considered to provide investment advice subjecting the advisor to fiduciary responsibility, thus harming not improving the retirement savings of low-and moderate-income workers.

Any change to current rules that would increase the regulatory burdens on financial professionals who service small plans and low- and moderate-income retirement savers will in turn result in knowledgeable professionals, particularly at regional and community banks exiting this field and not offering their clients retirement saving options over which they would have fiduciary responsibility. The increased cost related to fiduciary liability insurance alone could render smaller providers unable to continue to offer retirement services. Thus, it is reasonable to conclude that many low-to moderate-income retirement savers would no longer be able to rely on their community or regional bank.

These individuals would be forced to "fend for themselves" in an increasingly complex investing environment if the Proposal results in a reduction in the number of financial professionals that are available to work with these retirement savers at a higher out-of-pocket cost. Low-and moderate-income retirement savers could be forced out of the market due to providers not wanting to take on the risk of fiduciary responsibility for minimal economic benefits, and thus only offering services to account holders of significant account size. Low-and moderate income savers will be unable to find investment advisors willing to provide retirement advice.

Based on the foregoing, we request that the Department not adopt a fiduciary standard that would increase the regulatory burdens on financial professionals who service small plans and low- and moderate-income retirement savers, particularly those at regional and community banks.

E. Two-Year Delayed Implementation Date

If the Department issues a final rule re-defining the term "fiduciary" and imposing additional disclosure requirements on investment advisors, we respectfully request the Department to delay the effective date of the final rule for a minimum of two years. A final rule will require extensive time and resources to review, analyze, and implement. Financial institutions will need time to assess the interplay of the final rule with other federal laws, state laws, industry rules, including regulations, existing regulatory framework for securities, insurance and banking, and the voluminous rules adopted pursuant to the Dodd-Frank Act. Financial institutions will also require time to assess their respective ability to comply with the Proposal, including its exemptions which are fundamental to the ability of many financial institutions to provide essential services to their customers. Additionally, a final rule will require a significant change in policies, practices, and computer systems, including the production of expansive new disclosures.

The continued crush of regulatory burden for financial institutions since the passage of the Dodd-Frank Act has strained the staff and resources of regional and community banks enormously. The regional and community segment of the banking industry is a critically important sector of the banking system and the national economy. It is vital that this segment continue to remain viable for the long term, particularly as to providing investment products and services for low-and moderate-income individuals. A delayed two-year implementation date would greatly assist financial institutions in fully complying with a final rule.

Thank you for the opportunity to comment on the Proposal and for your consideration.

Respectfully,

Dennis E. Nixon
President