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Building Success. Together.

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Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210-AC02)

Dear Assistant Secretary Gomez:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on proposed amendments to the Department's investment advice regulation (Fiduciary Rule) and related prohibited transaction exemptions (collectively, Fiduciary Proposal or Proposal) regarding the expanded circumstances under which a person is considered to be a "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended (ERISA) or the Internal Revenue Code of 1986, as amended (Code).[2] Specifically, the Fiduciary Proposal provides (i) a new regulatory definition of "fiduciary" when a person renders investment advice for a fee or other compensation for purposes of Title I and Title II of ERISA, and (ii) related proposed amendments to Prohibited Transaction Exemption 2020-02 (PTE 2020-02) and several other administrative exemptions from the prohibited transaction rules applicable to fiduciaries under ERISA.[3]

Retirement investors have long looked to and relied on their bank to provide retirement services, including investment products, retirement planning, and investor education, in order to achieve a secure financial retirement. When acting in an ERISA fiduciary capacity, banks have always sought the best interest of their retirement customers and take great pride and satisfaction in successfully serving their customers' retirement needs. We agree with the Department that retirement service providers, when acting as ERISA fiduciaries, should act in the best interest of customers and that such customers deserve protection from financial abuse. We also believe that

[1] The American Bankers Association is the voice of the nation's $23.4 trillion banking industry, which is composed of small, regional, and large banks that together employ approximately 2.1 million people, safeguard $18.6 trillion in deposits, and extend $12.3 trillion in loans. Learn more at www.aba.com.
[2] *See* 29 C.F.R. § 2510.3-21 (2023) (Definition of "Fiduciary"). Section 2510.3-21(c) covers the definition of fiduciary for purposes of rendering investment advice.
[3] *See* U.S. Department of Labor, Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 *Fed. Reg.* 75,890 (2023) (Fiduciary Rule); 88 *Fed. Reg.* 75,979 (PTE 2020-02); 88 *Fed. Reg.* 76,004 (PTE 84-24); 88 *Fed. Reg.* 76,032 (PTEs 75-1, 77-4, 80-83, 83-1, and 86-128).

regulations should be carefully crafted to meet their objectives without stifling the delivery of retirement products and services to customers, or capturing communications, conversations, or relationships that are not appropriately regarded as fiduciary in nature.

The definition of "fiduciary" is a foundational element of ERISA. Consequently, any structural, transformative change to the definition will fundamentally affect the availability and delivery of retirement products and services provided by our member banks. This calls for measured, targeted, and sensible rulemaking, since agencies must "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[4] Any proposed rule, therefore, should (i) convincingly demonstrate a "compelling need" for such a change, and (ii) employ the "least burdensome tools" to accomplish its objective(s).[5]

We believe that the Fiduciary Proposal neither demonstrates a compelling need to undertake a drastic regulatory reset nor employs the least burdensome tools to effect such change. On the contrary, we believe that the Proposal is overbroad and overreaching, and that it captures numerous persons and entities who provide valuable services to plans, plan fiduciaries, plan participants and beneficiaries, and IRA owners but who should not be viewed as, nor reasonably considered to be, a "fiduciary" under ERISA and the Code. If adopted in its current form, the Proposal is likely to harm the very plans, plan participants and beneficiaries, and IRA account owners that the Department is seeking to protect by making it extremely and unnecessarily difficult, complex, and costly for banks to make and deliver the products, services, and information necessary, helpful, and appropriate for achieving a financially sound retirement. As a result, the retirement planning benefits provided to these institutions and individuals will be significantly reduced or altogether eliminated.

We note that the Department has focused its attention and much of its regulatory analysis on retail customers and the retail IRA marketplace. We question, however, whether the Department has adequately analyzed the need for, and cost of, the Fiduciary Proposal in the *institutional* marketplace. We believe the Proposal could cause a massive disruption to the institutional marketplace, particularly by failing to provide any exemptions or safe harbors to accommodate longstanding, prudent, and proven industry practices that safeguard retirement investor goals and expectations. We further believe that the Department has not presented sufficient evidence of the need for such a monumental shift in the investment management of institutional retirement plan relationships where the parties' abilities to contract for services and allocate fiduciary risks should be respected.

We recommend therefore that the Department **withdraw the Fiduciary Proposal** and, following the suggested procedures described herein, research, analyze, and evaluate regulatory alternatives that are less burdensome and costly, and re-submit for public review and comment an amended Proposal that is more appropriately targeted to achieve the Department's regulatory objectives. If the Department proceeds with the Proposal, then we recommend that the Department adopt all of the recommendations described herein.[6] We believe these

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[4] OMB Circular No. A-4 (Nov. 9, 2023), *quoting* Executive Order 12866, Regulatory Planning and Review § 1(b) (Oct. 4, 1993).
[5] Executive Order 13563, Improving Regulation and Regulatory Review § 1 (Jan. 18, 2011).
[6] *See* Sections IV(A) through IV(P), *infra*.

recommendations, if implemented in full, not only would provide tangible benefits to retirement investors but also would work to mitigate the compliance uncertainty, excessive administrative costs, and liability risks presented by the Fiduciary Proposal.

I. **The Fiduciary Proposal**.

Section 3(21)(A) of ERISA and section 4975(e)(3) of the Code each provides that a person is a "fiduciary" with respect to a "plan" (defined to include IRAs) to the extent such person (i) exercises any discretionary authority or discretionary control with respect to management of such plan or exercises any authority or control with respect to management or disposition of its assets; (ii) *renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so*; or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.[7]

The Department proposes to expand part (ii) above of the statutory definition by re-interpreting what it means for a person to render "investment advice for a fee or other compensation" under ERISA and the Code. The Proposal provides that a person becomes a fiduciary when such person provides investment advice or makes a recommendation to a "retirement investor" (defined to include a plan, plan fiduciary, plan participant or beneficiary, and IRA and its owner and fiduciary) for a direct or indirect fee or other compensation, and one of the following is true:

(1) The person directly or indirectly (*i.e.*, through or together with any affiliate) has discretionary authority or control (whether or not pursuant to an agreement, arrangement, or understanding) with respect to purchasing or selling securities or other investment property for the retirement investor; OR

(2) The person:

- Directly or indirectly makes investment recommendations to investors on a regular basis as part of such person's business, and
- Provides a recommendation to a retirement investor under circumstances indicating that the recommendation:

  (i) is based on the particular needs or individual circumstances of the retirement investor, and

  (ii) may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest, OR

(3) The person making the recommendation represents and acknowledges that it is acting as a fiduciary when making investment recommendations.[8]

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[7] ERISA § 3(21)(A); *see also* Code, 26 U.S.C. § 4975(e)(3). [Emphasis added.]
[8] *See* Proposal, 29 C.F.R. § 2510.3-21(c)(1) (proposed), 88 *Fed. Reg.* at 75,977.

The Proposal would replace the current five-part test of the Department's regulations,[9] which the Department continues to believe allows a number of investment professionals, consultants, and advisers to be free of any obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules governing fiduciary conduct, although the Department has not cited to any such incidents in the preamble.[10] The proposed reworked definition, the Department argues, "better reflects the text and the purposes of the statute and better protects the interests of retirement investors."[11] The Proposal also would provide amendments to PTE 2020-02, which provides relief for certain compensation received by investment advice fiduciaries. The Proposal further would amend certain other related administrative exemptions designed to migrate retirement providers rendering investment advice from these other exemptions to PTE 2020-02 for appropriate administrative relief.

The Department states that these proposed changes collectively are "intended to protect the interests of retirement investors by requiring investment advice providers to adhere to stringent conduct standards and mitigate their conflicts of interest."[12] In doing so, the Department believes that the Proposal "fills an important gap in those advice relationships where advice is not currently required to be provided in the retirement investor's best interest, and the investor may not be aware of that fact."[13] We believe that the Proposal fails to achieve its stated goals and will, in practice, be harmful to retirement investors, and we must therefore respectfully disagree with the Department's assertions.

II. <u>General Concerns</u>.

Rather than adopting a targeted approach that concentrates on industry bad actors, the Fiduciary Proposal manifests an indiscriminate policy that would fundamentally reshape familiar, secure, and longstanding institutional and retail customer relationships, without attaining the Department's goal of financial protection for retirement investors. Moreover, the revamped regulatory structure would appear to allow little leeway for the establishment or continuation of traditional non-fiduciary retirement services and programs that under the Proposal likely would be labelled as "fiduciary." The result would be a dramatic restructuring of the banking and financial services business model that would be precariously founded on the implausible notion that customers will somehow retain the same level of access to investment information or education, and presumably at a substantially reduced cost and with added legal protection. The Proposal, however, does not account for the significant compliance burden placed on the

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[9] The Department's current regulation creates a five-part test for determining whether a person should be treated as a fiduciary by reason of rendering investment advice. *See* 29 C.F.R. § 2510.3-21(c). For advice to constitute "investment advice," an adviser who does not have discretionary authority or control with respect to the purchase or sale of securities or other property for the plan must – (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement, or understanding, with the plan or a plan fiduciary, that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. *See id.*

[10] Specifically, the Department believes that the elements of the five-part test "too often work to defeat legitimate retirement investor expectations of impartial advice and allow some advice relationships to occur where there is no best interest standard." Proposal, 88 *Fed. Reg.* at 75,899.

[11] Proposal, 88 *Fed. Reg.* at 75,890.

[12] *Id.* at 75,891.

[13] *Id.* at 75,890.

retirement services industry, along with its attendant increased liability exposure, labor, and costs. This will likely result in *less* availability of these services, and at a *greater* cost.

For example, it is not evident that the Department has fully considered the complexity of how the Proposal would apply to institutional investors that are responsible for managing multiple, significant pools of assets that comprise plan and non-plan assets, both those plan and non-plan pools that are separately managed as well as pools of combined plan and non-plan assets, such as those found in certain commingled funds. Indeed, if the Department takes the position that all financial or investment conversations with institutional investors that have any plan assets would subject the bank or adviser to ERISA fiduciary status with respect to the entire conversation, then the Department comes very close to supplanting the Securities and Exchange Commission and the federal banking agencies as the primary regulator of the financial markets and market participants, as the broad scope of the Proposal may result in the bank assuming that every conversation could result in the bank becoming a fiduciary, no matter how remote.

We are particularly concerned that the Fiduciary Proposal oversteps the bounds of agency interpretive rulemaking into regulatory legislation of new standards and requirements for providing IRA services. The Department not only is implementing these changes through the investment advice regulation -- which changes appear inconsistent with ERISA and applicable judicial precedent – but also through a series of amendments to a number of exemptions that are, on their face, "voluntary" but as a practical matter are mandatory. Such agency action can reasonably be viewed as expanding the Department's regulatory authority beyond congressional intent, a failing the Fifth Circuit Court of Appeals identified when it vacated the Department's 2016 fiduciary rulemaking.[14]

The Department points to its "experience in the current marketplace" as a basis for concluding that the Proposal is warranted.[15] We are not told what this "experience" is and how it culminated into a Proposal that drastically reshapes fiduciary status under Department regulations. The Department does not cite a single contemporary authoritative source or body of evidence that demonstrates systematic retirement investor abuse or which otherwise would support a sweeping revamp of retirement services operations. Accordingly, the Proposal fails to demonstrate compliance with the Executive Orders on agency rulemaking.[16] Lacking hard evidence for its far-reaching proposed amendments, the Department should withdraw the Fiduciary Proposal as described in our recommendation below.

III. ABA Recommendation: Withdraw Fiduciary Proposal.

The Department should withdraw the Fiduciary Proposal, seek broad public input on the necessity for revisions, and then (assuming there is sufficient justification) re-propose amendments to the current investment advice regulation, consistent with existing industry standards and retirement investor expectations.

[14] *See Chamber of Commerce of the United States of America v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018) (*Chamber*).
[15] *See* Proposal, 88 *Fed. Reg.* at 75,899.
[16] *See* Executive Orders 12866 and 13563, *supra*.

We believe that the Department does not need to take any regulatory or other agency action on the current investment advice regulation since the Department has not provided compelling evidence of any systemic failings or abuses of the current regulation or PTE 2020-02. We further believe that the Department already possesses the tools necessary to enforce PTE 2020-02's conditions and thereby address any such failings or abuses that may arise. Consequently, we believe that the Department should withdraw the Fiduciary Proposal in its entirety.

If the Department believes that amendments to the investment advice regulation, PTE 2020-02, or related PTEs are warranted, then it should withdraw the Fiduciary Proposal and undertake a comprehensive independent study and assessment of the investment advice regulation and related PTEs.[17] After this study is concluded, the Department would be better equipped to determine whether or not amendments would be necessary or appropriate.

If after review and evaluation of the completed study, the Department reasonably concludes that amendments to the investment advice regulation , PTE 2020-02, or related PTEs are warranted, then the Department should (i) first issue an Advance Notice of Proposed Rulemaking (ANPR) to provide full opportunity for public comment and subsequent public hearings that would assess the need for the proposed amendments, and (ii) after completion of the ANPR process, ensure that any subsequent proposed rulemaking provides specifically tailored and workable improvements to the investment advice regulation, PTE 2020-02, and/or related PTEs.

IV. ABA Recommendations for Issues Raised by the Fiduciary Proposal.

Without limiting the foregoing, we also wish to comment on specific portions of the Fiduciary Proposal that are of particular concern to our members and which the Department should consider fully in its evaluation of the Proposal, including any re-proposal in this area.

A. Definition of Investment Advice Fiduciary: "Recommendation."

Revise the Department's interpretation of "recommendation" to read "a communication that is a clear, affirmative statement of unqualified endorsement and support for the retirement investor to engage in or refrain from making a specific investment decision that is based on the individual needs of the retirement investor."

The Fiduciary Proposal's definition of a person who renders investment advice (and therefore becomes a "fiduciary" under the Proposal) hinges on the Department's use of the term "recommendation," which it interprets to mean a "communication that, based on its content, context, and presentation, would reasonably be viewed as a *suggestion* that the retirement investor engage in or refrain from taking a particular course of action."[18] The Department

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[17] This step should include a public hearing and roundtable discussions with stakeholders and interested parties to discuss the need for revisions (if any) to the current regulation on fiduciary investment advice that would be consistent with existing industry standards and retirement investor expectations, while appropriately achieving the Department's regulatory goal of filling any perceived gap(s) in the investment advice regulation.
[18] Proposal, 88 *Fed. Reg.* at 75,904. [Emphasis added.]

further states that "the determination of whether a recommendation has been made would be an objective rather than a subjective inquiry."[19]

Contrary to the Department's view, inclusion of the word "suggestion" within the definition of recommendation is inherently *subjective*, not objective, 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. Equating the words "recommendation" and "suggestion" in this way, when coupled with a strict liability prohibited transaction regime,[20] could actually harm retirement investors and is, we believe, unwarranted. Moreover, making a "suggestion" a basis for fiduciary responsibility is an unprecedented stretch of the term that belittles the concept of fiduciary duty while effectively stifling valued communication to retirement investors.[21]

The Department's inclusion of the word "suggestion" within the term "recommendation" would capture a vast swath of written and oral communications that are not intended as a recommendation. Banks are thereby placed in a precarious position to navigate numerous, repeated, and unanticipated situations in which a bank and its retirement customer may differ on whether a recommendation was in fact provided to the customer. This in turn will serve only to cut short or silence a retirement services provider's conversations with its retirement customers and potential customers, for fear that any such conversation could be deemed a "fiduciary" action.

The term "recommendation" can be sensibly narrowed and targeted to reach only those instances in which recommendations are actually intended and balanced with the potential penalties of becoming a fiduciary. To achieve this result, we recommend that the definition of "recommendation" be viewed as "a communication that is a *clear, affirmative statement of unqualified endorsement and support for* the retirement investor to engage in or refrain from making a specific investment decision that is based on the individual needs of the retirement investor." This would ensure that both the retirement services provider and the retirement investor would be able to know when a recommendation is genuinely taking place. It would also realize the Department's stated goal of establishing an objective (rather than subjective) test to ascertain whether investment advice is being rendered.

B. "Recommendation" Resulting from Aggregating Exempt Statements and Actions.

[19] *Id.*

[20] 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 meaning of "recommendation" must provide greater certainty in order for a finalized Fiduciary Proposal to function properly. As interpreted by the Department, it does not.

[21] The Department has indicated that its adoption of the operative term "suggestion" follows FINRA guidance in this area. *See* Proposal, 88 *Fed. Reg.* at 75,904. *See also* FINRA Letter to Department of Labor, Proposed Conflict of Interest Rule and Related Proposals, RIN-1210-AB32 (July 17, 2015). Although FINRA staff uses the word "suggestion" to flesh out the meaning of "recommendation" in the securities context, the FINRA regulatory regime is focused on the conduct of those persons and entities (*i.e.*, broker-dealers) who have knowingly submitted to that regime to engage specifically in the brokerage business. *See* Financial Industry Regulatory Authority (FINRA) Rule 2111 (Suitability); FINRA Regulatory Notice 11-02 (2011). This contrasts markedly from the Department casting an oversized net to capture conduct not currently subject to regulation for which regulation may not be appropriate. *See* Section IV. C., *infra.*

<u>Withdraw the Aggregation Policy from the preamble and refrain from using this policy as a metric for determining whether a "recommendation" has been made and replace with a general anti-evasion provision that better serves efficient and prudent administration of the Fiduciary Rule</u>.

In the preamble to the Fiduciary Proposal, the Department states that, with respect to determining whether or not a "recommendation" has been made:

> [A] series of actions, taken directly or indirectly (*e.g.*, through or together with an affiliate) that may not constitute a recommendation when each action is viewed individually may amount to a recommendation when considered in the aggregate.[22]

This language (Aggregation Policy), which was previously codified in the amended Fiduciary Rule that was finalized in 2016 before being overturned by the Fifth Circuit in 2018 (2016 Rule),[23] ostensibly is intended to prevent an unlawful evasion of the Fiduciary Rule. From a regulatory supervision as well as compliance standpoint, however, this is unworkable. In essence, multiple unrelated conversations, each of which separately is not a "recommendation" with individuals across the bank and its affiliates (which may include broker-dealers, insurance agencies, and other consumer finance service providers), could in retrospect be "aggregated" into a "recommendation." This could occur even in the example provided in the Proposal, where the Department assures us that a car dealer salesperson is not giving a recommendation, when in fact a non-fiduciary "missing piece" statement may unintentionally be provided by a representative of the car dealer's finance arm at the same location, which when aggregated with the salesperson's statement, becomes a recommendation that would trigger fiduciary status.[24] When employing the Aggregation Policy to determine whether a "recommendation" has been provided, there seem to be no limits and no nexus requirements to individual conversations and actions.

Rather than addressing the problem of evasion in measured fashion, the Department's reliance on the Aggregation Policy would result in an outsized, erratic, and unwieldy enforcement tool and regulatory club tied to strict liability. To underscore this concern, ABA conducted a survey in July 2017 (Survey), which focused on selected ABA working groups of member banks that service retirement investors.[25] The Survey highlighted the compliance problems that enforcement of the Aggregation Policy was creating for banks grappling with compliance with the 2016 Rule. Nearly all banks surveyed (98%) agreed that the Aggregation Policy "muddies the definition of 'recommendation' and is therefore not helpful."[26] 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)."[27]

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[22] Proposal, 88 *Fed. Reg.* at 75,904.
[23] *See* 2016 Rule, 29 C.F.R. § 2510.3-21(b)(1).
[24] *See* Proposal, 88 *Fed. Reg.* at 75,902.
[25] *See* ABA Survey (July 20, 2017), a copy of which previously has been provided to Department staff.
[26] *Id.*
[27] *Id.*

- 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'," [28]

- Nearly half (49%) of bank respondents agreed that the Aggregation Policy "[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." [29]

- More than seven out of ten respondents (71%) stated that the Aggregation Policy "[m]akes it virtually impossible to comply with the [2016] 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 [2016] Rule, notwithstanding that the program or activity was reasonably structured in good faith to operate outside the Rule." [30]

- More than seven out of ten respondents (71%) acknowledged that the Aggregation Policy would "increase liability risk as a result of being unable to always determine, in advance and with certainty, whether two or more non-recommendations will be aggregated into a recommendation," thus triggering fiduciary status under the 2016 Rule.[31]

Collectively, these responses underscore the inability of a bank, at the outset, to know or even anticipate that its *non*-fiduciary actions may later create an unforeseen *fiduciary* obligation simply as a result of its actions being combined with subsequent unrelated actions of the bank or an affiliate that are applied retroactively.[32] The Survey thus indicates that the Department's application of the Aggregation Policy to retirement service providers in a finalized Fiduciary Proposal not only would be unworkable but also would significantly and unnecessarily hamper the industry's compliance efforts while increasing liability risk. The Aggregation Policy further would interfere with the operations of routine banking activities and programs that should be well outside the Fiduciary Proposal's reach. This would serve only to drive up costs for the retirement investor.

We recommend, therefore, that the Department withdraw the Aggregation Policy from the preamble and refrain from using this policy as a metric for determining whether a "recommendation" has been made. If the Department wishes to address unlawful evasion concerns, then it can include in the finalized Fiduciary Proposal 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 unlawful evasion of the purposes of this regulation [*i.e.*, the Fiduciary Rule].

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] The Department's adoption of the Aggregation Policy thus would seem to raise due process concerns as a result of banks' incapacity to gauge, in advance, the potential regulatory compliance obligations and liability exposure from activities taken in the ordinary course of business.

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

C. Definition of Investment Advice Fiduciary: "Regular Basis."

Retain the current "regular basis" prong of the investment advice fiduciary definition and clarify with language consistent with ERISA and judicial precedent.

The Department's current investment advice regulation focuses on the five-part test, which includes that advice be rendered on a "regular basis." Within the past decade, the Department has repeatedly sought to revise or interpret the "regular basis" prong to be potentially triggered based on a single encounter involving a recommendation made to the retirement investor by the retirement services provider, usually involving a one-time rollover of the retirement investor's 401(k) assets into an IRA established with the provider's assistance.[34] In 2018, this approach was struck down by the Fifth Circuit.[35] In particular, the court held that the Department's inclusion of a one-time rollover or annuity sales transaction did not come within ERISA's concept of fiduciary investment advice since no relationship of trust and confidence was established between the purchaser and seller. Indeed, the court expressed doubt whether the Department has the jurisdictional authority to regulate IRAs in a manner comparable to ERISA-governed retirement plans.[36] More recently, a federal lower court struck down as arbitrary and capricious the Department's interpretation of when rollover recommendations can satisfy the "regular basis" prong.[37]

The Department continues to take the position that a one-time rollover transaction involving a recommendation should trigger fiduciary status under ERISA. Consequently, the Fiduciary Proposal would amend the meaning and scope of the "regular basis" prong to the five-part test so that any person who, directly or through affiliates, makes any investment recommendations to any investors on a regular basis as part of its business would satisfy this prong. If finalized as proposed, a one-time recommendation to a retirement investor would be covered under the revised regulation if the person providing the recommendation, or an affiliate of the person, is in the business of regularly providing investment advice. Since nearly all banks and other financial

[33] *See* FINRA Rule 2111 and FINRA Regulatory Notice 11-02, *supra*. *See also* SR-FINRA-2020-07 (2020) (most recent amendments to Rule 2111). We understand the Department's position articulated in the Aggregation Policy tracks similar FINRA guidance. 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 reflexively applies a monolithic standard without regard to the type or context of the particular recommendation.

[34] This position reversed the Department's policy on this issue as described in a prior advisory opinion. *See* DOL Advisory Opinion 2005-23A (2005). This Advisory Opinion was officially withdrawn by the Department as of June 29, 2020.

[35] *See Chamber, supra*.

[36] *See id*.

[37] *See American Securities Association v. United States Department of Labor*, 22-cv-00330-VMC (M.D. Fl. 2023).

institutions would be swept into this prong, the impact of this change would go well beyond rollover recommendations.[38]

Moreover, the Proposal as written appears to capture a range of *non*-fiduciary, *non*-financial persons and professions with established client relationships of trust and confidence and which include as part of their business financial counseling and education: real estate agents,[39] life coaches,[40] probation officers,[41] and divorce counselors.[42] Professionals in these lines of work could be viewed as making "investment recommendations to investors on a regular basis *as part of their business*."[43] As a result, these non-fiduciary professionals could, without their knowledge, be subject to the compliance requirements and liability risks under ERISA and the Code if they are deemed to make a "recommendation" on retirement plan or IRA investments, IRA rollovers, or plan distributions.[44] Unfortunately, these professionals and their organizations would *not* be permitted to rely on PTE 2020-02 or any other exemption under ERISA, thereby leaving them exposed to civil and monetary penalties and liability claims.[45] The amended regular basis prong clearly would sweep well beyond both its intended reach and the anticipated consequences.

We believe, therefore, that the proposed "regular basis" language is significantly overbroad and involves unwarranted regulatory overreach. Notwithstanding the Department's assertions to the contrary, a retirement service provider's one-time recommendation to a retirement investor to engage in a rollover transaction does not, by itself, meet the "trust and confidence" relationship cited by the Fifth Circuit. The Department's position also does not align with the statutory language – ERISA's use of the term "investment advice" does not permit the Department to shoehorn a single-sales transaction (*i.e.*, rollover) into the definition. We recognize the

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[38] This proposed change also would capture activities of insurance companies that are engaged in providing rollovers to annuity contracts.

[39] Real estate agents assist buyers and sellers in real estate transactions, including the negotiations, paperwork, and financing. Real estate transactions, especially those involving real estate investments, may be financed through an IRA. Buyers may ask their real estate agent how they can finance their mortgage through an IRA, which may involve the agent suggesting a rollover of funds or a distribution from a buyer's 401(k) into the IRA to help fund the mortgage.

[40] Life coaches counsel clients in personal and professional areas. This means career, personal development, relationships, nutrition, and even financial wellness. *See* "What Life Coaching Is, and What It Isn't," *Better Up* (May 19, 2022). The life coach could be reviewing the condition of the client's personal health and finances and suggest ways for the client to improve management of medical expenses by opening an HSA from assets rolled out of a 401(k) or IRA.

[41] Probation officers assist ex-offenders with personal money management and suggest ways to handle expenses and income to reduce debt and stay on budget. For example, the officer may work with the ex-offender to access needed cash with a distribution of assets from a previous employer's 401(k).

[42] Divorce counselors teach coping skills, including those arising from financial and money management conflicts during the separation, divorce, and custody process. The divorce counselor may be working with separated persons to marshal their assets and protect them from the estranged spouse, or to get ahold of some needed cash for sudden, unexpected expenses. This could include the counselor suggesting that the separated person/client tap assets from his or her 401(k) or IRA to meet unanticipated expenses.

[43] Proposal, 29 C.F.R. § 2510.3-21(c)(1)(ii) (proposed regular basis prong), 88 *Fed. Reg.* at 75,977. [Emphasis added.]

[44] The proposed definition of "recommendation of any securities transaction" is so broadly defined as to capture any of these possible scenarios. *See* Proposal, 29 C.F.R. 2510.3-21(f)(10) (proposed), 88 *Fed. Reg.* at 75,978.

[45] Only "Financial Institutions" and "Investment Professionals" may rely on PTE 2020-02. *See* PTE 2020-02 Section 1(b).

Department's strong desire to sweep into the Fiduciary Rule's coverage a one-time investment sales transaction that it believes rises to the level of fiduciary activity. However, the Department is not empowered to rewrite ERISA simply to suit its policy preferences.[46] That is the task of Congress.

The Department further has adopted the view that an institution with investment discretion over a plan's assets (*e.g.*, through a separately managed account or bank collective investment fund) or *non*-retirement assets of an IRA owner or plan fiduciary would presumptively cause all communications made by that institution or its affiliates to the plan or IRA owner to automatically be considered a "recommendation" that would trigger fiduciary status.[47] We do not agree with the Department's position that a bank or other institution's management of assets outside the plan or IRA necessarily confers a relationship of trust and confidence with the retirement investor with respect to plan assets or IRA assets. Indeed, this view appears to conflict with the statement of the Department in the preamble that "fiduciary status is determined on a transactional basis," and "the [Proposal], like the statute, applies fiduciary status on a transaction-by-transaction basis."[48] The Department may not place its thumb on the scale by arrogating other retirement investor relationships to conclude that a fiduciary relationship has been established.

We recommend, therefore, that the Department refrain from adopting these positions – which are inconsistent with ERISA and court decisions – and retain the current "regular basis" prong of the investment advice fiduciary definition and, as necessary and appropriate, clarify with language consistent with ERISA and judicial precedent.

D. Institutional Retirement Investors.

Amend the Fiduciary Proposal to expressly exempt institutional investors from its coverage.

Unlike the 2016 Rule, which contained an exemption from fiduciary status for investment advice provided to institutional investor advice recipients,[49] the Fiduciary Proposal makes no such provision. In doing so, the Fiduciary Proposal states that:

> The Department is unaware, however, of compelling evidence that wealth and income are strong proxies for financial sophistication or inconsistent with a relationship of trust and confidence. Moreover, and independently, nothing in the statute's text suggests that Congress intended to categorically deny fiduciary protection to "sophisticated investors."[50]

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[46] *See Chamber, supra.*
[47] *See* Proposal, 88 *Fed. Reg.* at 75,901.
[48] *Id.*
[49] Specifically, the 2016 Rule provided that, subject to specified conditions, certain transactions with independent fiduciaries with financial expertise would not constitute fiduciary investment advice. *See* U.S. Department of Labor, Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 81 *Fed. Reg.* 20,946, 20,980 (2016).
[50] Proposal, 88 *Fed. Reg. at* 75,907.

The Department previously has expressed concerns that most retirement investors and many small plan sponsors "are unable effectively to assess the quality of the advice they receive."[51] In the Fiduciary Proposal, however, the Department has determined that *every* retirement investor must be swept into coverage. Thus, for example, the Fiduciary Proposal "would apply broadly to recommendations to plan and IRA fiduciaries acting on behalf of plans and IRAs."[52]

The Department's position, however, does not account for the fact that the great majority of institutional investors *are* readily able to assess the quality of investment communications and routinely make retirement investment decisions based on such assessments. Institutional investors, moreover, typically are well-versed in the functioning of financial markets, the parameters of investment decision-making, and the availability of investment choices. They are also capable of making independent decisions regarding investment services and products and how legal risks should be allocated among the parties. There is simply no evidence to conclude that institutional plan fiduciaries are being systematically misled, disadvantaged, or harmed by the current definition of an investment advice fiduciary as they seek market information or viewpoints for their consideration in making their own investment decisions. These considerations reflect the approach taken by Congress in enacting section 913 of the Dodd-Frank Act, which focuses on the protection of retail investors, and by the Securities and Exchange Commission in its promulgation of Regulation Best Interest, which does not apply to institutional investors.[53] The Department's one-size-fits-all approach to all potential advice providers ignores the fundamental fact that plan fiduciaries are obligated to understand the environment in which they operate and the transactions that they undertake.

Therefore, we recommend that the Department exclude advice to institutional investors from the scope of the Fiduciary Proposal. Like similar rules of the Securities and Exchange Commission to which the Department is seeking to align for consistency, the Department could propose financial worth/investment assets thresholds that would exclude entities that meet or exceed those thresholds. In that regard, we strongly urge the Department to consider financial worth/investment asset thresholds that have been adopted by other financial regulators as proxies for sophistication and the ability to look out for one's own interests, such as the "accredited investor" definition adopted under Regulation D under the Securities Act of 1933 (ERISA or governmental plan that "has total assets in excess of $5,000,000"),[54]the "qualified purchaser" definition under the Investment Company Act (person who "owns and invests on a discretionary basis . . . not less than $25,000,000 in investments"),[55] or the "qualified institutional buyer" definition adopted under implementing SEC regulations (ERISA or governmental plan that "owns and invests on a discretionary basis at least $100 million in securities").[56] Moreover,

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[51] U.S. Department of Labor, Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 80 *Fed. Reg.* 21,928, 21,942 (2015) (2016 Rule Proposal).
[52] Proposal, 88 *Fed. Reg. at* 75,907.
[53] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 913 (authorizing the SEC to promulgate rules focusing on the protection of retail investors; SEC, Regulation Best Interest, 17 C.F.R. § 240.15l-1 (2023).
[54] *See* 17 C.F.R. § 230.501(a) (definition of "accredited investor").
[55] *See* 15 U.S.C. § 80a-2(a)(51) (definition of "qualified purchaser").
[56] *See* 17 C.F.R. § 230.144A(a)(1) (definition of "qualified institutional buyer"). We note that the Department has used similar thresholds in describing exemptive relief available to institutional investors. *See, e.g.,* PTE 84-14, PTE 96-23. We also believe that financially sophisticated *retail* investors are fully capable of evaluating the quality of investment advice and to make investment decisions based on such evaluation, and therefore, we urge DOL to

advice provided to a financial institution that acts as a plan or IRA fiduciary should be entirely out of scope of this rulemaking.

E. Requests for Proposals (RFPs).

Clarify that when a bank or other entity is responding to an RFP and the bank (i) provides investment or portfolio information, or (ii) offers itself or an affiliate to provide additional services to the retirement plan, that this action would not be considered "investment advice" under the Fiduciary Proposal.

The Fiduciary Proposal is unclear as to whether, and the conditions under which, a response to an RFP would be treated as a fiduciary activity. Many plans and their consultants and advisers will issue an RFP as part of the process of identifying potential investment managers and other service providers, and of obtaining sufficient information from those potential investment managers and service providers that enable the plan fiduciaries to make an informed decision related to the best provider for services, but not to provide specific instructions on investments. These RFPs frequently request a potential investment manager to provide information regarding services which may be beneficial to a prospective client in managing its plan assets or specific investment portfolios that may identify potential investment line-ups or models before the manager has any particular plan guidelines or other information about the plan that would enable it to satisfy its obligations under section 404 of ERISA.

Yet, by directing an answer to the plan fiduciary with the understanding that the plan fiduciary may consider the response to be a recommendation (such as a "recommendation" that the plan fiduciary retain the prospective investment manager), the prospective investment manager may not be able to be hired for compensation under the terms of the Fiduciary Proposal. How can a plan sponsor or administrator retain an investment manager if the prospective investment manager's response to questions from the plan may make the prospective investment manager an investment advice "fiduciary" *before* the manager is actually retained (and therefore, make it a violation of ERISA for the prospective manager to receive a fee for investment management services)? As the Department previously has noted in the context of counterparty transactions, the Department should "avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of proposed deals."[57]

We recommend, therefore, that the Department clarify that when a bank (or other entity) is responding to an RFP or to an existing customer's inquiry about the bank's offerings and the bank (i) provides investment or portfolio information, or (ii) offers itself or an affiliate to provide additional services to the retirement investor, that this action would not be considered a "recommendation" or "investment advice" under the Fiduciary Proposal. This would help ensure that the bank, in assisting a current or prospective customer, would avoid being

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consider an exclusion for such retail investors, based on financial worth/investment asset thresholds such as the accredited investor or qualified purchaser tests. *See* n.49, *supra*. *See also* Investment Company Act of 1940, as amended, 15 U.S.C. § 80a-2(a)(51) (definition of "qualified purchaser").

[57] 2016 Rule Proposal, 80 *Fed. Reg.* at 21,941.

unintentionally designated as a fiduciary with respect to its sales pitch. Again, there is no evidence that institutional plan fiduciaries and sophisticated investors are being misled about the role a bank is playing when the bank responds to the plan fiduciary's RFP or provides other information to the plan fiduciary as part of the process of selling the bank's services.

F. "Hire Me" Exclusion.

Clarify that bidding for a discretionary manager role comes within the "hire me" exclusion and does not constitute "investment advice" under the Fiduciary Rule.

The Department has 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.[58] While the 2016 Rule was in effect, this was commonly known as the "hire me" exception to the Fiduciary Rule, in which "a person or firm could 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."[59] In fashioning this exclusion, the Department has emphasized that one should not be deemed a "fiduciary" under the investment adviser regulation, "merely by engaging in the normal activity of marketing themselves as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation."[60]

Like other market participants, banks found the "hire me" exception difficult to employ when the 2016 Rule was in effect, due to uncertainty regarding its parameters. For example, a bank may be pitching business to a customer relying on the "hire me" exception but would be challenged to know whether the "hire me" exception would cover 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. Moreover, the Department has stated that "when a recommendation to 'hire me' effectively includes a recommendation on how to invest or manage plan or IRA assets . . . , that recommendation would need to be evaluated separately under the provisions of the [Proposal]."[61] As a result of this uncertainty, many banks may feel that they would need to reduce pitches for customer business to a one-way declaration that the bank simply be hired on faith, which would eliminate routine dialogue and customer-specific question-and-answer sessions. Nevertheless, these pre-hire conversations, which clearly are not intended or reasonably understood to result in fiduciary status, would be critical to helping the customer decide whether to use the bank's services.

We recommend that the Department confirm that bidding for a discretionary manager role comes within the "hire me" exclusion and would not constitute "investment advice" under the Fiduciary Proposal, for the following reasons. First, in the bidding process, when the winning bidder has not yet been selected, no bidder can know that it is acting as a fiduciary. Second, no fee is being paid for the discretionary-management sales pitch. Instead, the fees to be paid would be for the

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[58] Proposal, 88 *Fed. Reg.* at 75,906.
[59] 2016 Rule, 81 *Fed. Reg.* at 20,968.
[60] Proposal, 88 *Fed. Reg.* at 75,906.
[61] 2016 Rule, 81 *Fed. Reg.* at 20,968.

actual discretionary management services provided afterward, which, rather than PTE 2020-02, would more appropriately come within section 408(b)(2) (and for the subsequent exercise of investment discretion, an available exemption such as PTE 77-4). Third, a discretionary manager makes no "recommendation" how to invest plan assets but rather indicates how the manager itself would invest. We believe this clarification would provide added assurance for banks and other entities seeking to rely on the "hire me" exception.

G. Foreign Exchange (FX) Transactions.

Confirm that FX transactions conducted in accordance with section 408(b)(18) of ERISA (or the conditions of another applicable prohibited transaction exemption) would not be treated under the Fiduciary Proposal as constituting investment advice.

The Fiduciary Proposal is unclear on whether, and under what conditions, an FX transaction would implicate fiduciary status. A number of banks conduct FX transactions on behalf of their plan customers. Banks typically rely on a variety of exemptions, including PTE 84-14, PTE 91-38, and sections 408(b)(17) and 408(b)(18) of ERISA to conduct FX transactions for their plan clients without running afoul of the prohibited transactions provisions of section 406. Importantly, in order to rely on these exemptions, a bank and its affiliates may not provide investment advice with respect to the FX transaction.[62] It appears from the language of the Proposal, however, that discussions regarding FX programs and options could constitute a "recommendation" and fiduciary advice that could render unavailable reliance on section 408(b)(18) or on any other applicable exemption.

We recommend that the Department confirm that FX transactions conducted in accordance with the requirements of section 408(b)(18) of ERISA (or the conditions of another applicable prohibited transaction exemption) would not be treated as constituting fiduciary investment advice under the Fiduciary Proposal's expanded definition.

H. Securities Lending.

Confirm that marketing, offering, or otherwise making available a securities lending service or strategy is not a "recommendation," and therefore, not investment advice under the Fiduciary Proposal.

The Fiduciary Proposal is unclear on its treatment of securities lending activity. Securities lending is a transaction in which the owner of securities (lender) agrees to lend its securities to a borrower in exchange for collateral (cash or cash equivalents). Pension funds are among those entities that commonly act as a lender of securities. As custodians to these assets, banks, as agent for their retirement investor customers, may lend securities to borrowers, which are typically large broker-dealers and banks. A securities lending agreement is usually short term (30 to 270 days), at the end of which the borrower can ask for return of the collateral, though lending agreements tend to "roll over" or renew. The objective is to generate incremental income from fully collateralized securities loans while maintaining safety of principal.

[62] *See* ERISA § 408(b)(18)(D).

Incremental income is generated for the lender/client by investing cash collateral in high-quality, short-term investments. The incremental income generated is split between the lender/client and the securities lending agent.

When marketing its securities lending services, a securities lending agent may market its securities lending strategy either to the lender or custodian (as agent to the lender). This strategy is simply intended to show how the securities lending arrangement works and the expected incremental income to be received. It is not intended to be a "recommendation" on how the assets would be invested, nor is the securities lending strategy intended to be individualized to the needs of the customer since the objective in every case, regardless of the customer's financial standing or investment goals, is to generate competitive returns on incremental income while balancing returns, risks, and costs. Therefore, we recommend that the Department confirm that marketing, offering, or otherwise making available a securities lending service or strategy does not amount to a "recommendation" under the Fiduciary Proposal.

I. Health Savings Accounts (HSAs).

Exclude HSAs from the Fiduciary Proposal's definition of IRA and clarify in the preamble that HSAs are exempt from the Fiduciary Proposal's coverage.

The Fiduciary Proposal's definition of IRA expressly includes HSAs.[63] In making this determination, the Department has pointed out that HSAs (similar to IRAs) are given tax preferences under the Code, are subject to the Code's prohibited transaction rules, and can be used as long-term savings accounts for retiree health care expenses.[64]

An HSA, however, is a health savings vehicle and not a retirement account. HSAs differ significantly from IRAs in that an HSA (i) is established on a pre-tax basis specifically to pay for qualified medical expenses, (ii) generally holds substantially fewer assets than IRAs, and (iii) has a more time-limited investment horizon, calibrated to ensure the availability of funds for medical expenses as they arise. Moreover, an HSA owner's reliance on and use of HSA funds is intended to occur immediately, regularly, and well before retirement age.

If included within the Fiduciary Proposal, there is significant, justified concern that HSAs likely would lose many of the institutions that currently provide HSA services due to the small size of the accounts, when weighed against the cost to service such type of account under the Proposal. This would diminish both the attractiveness and the use of HSAs. For these reasons, we recommend that the Department exclude HSAs from the Fiduciary Proposal's coverage[65] and further limit the Proposal's applicability only to those accounts whose primary purpose is for retirement savings.[66]

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[63] *See* Proposal, 29 C.F.R. § 2510.3-21(f)(3) (proposed) ("The term 'IRA' means . . . an individual retirement account . . . and a health savings account"). Proposal, 88 *Fed. Reg.* at 75,978.
[64] *See* 2016 Rule, 80 *Fed. Reg.* at 21,947.
[65] *See* ABA HSA Council comment letter to the Department (January 2, 2024) for a detailed discussion on the application of the Fiduciary Proposal to HSAs.
[66] Specifically, the Proposal should apply only to those accounts described in section 4975(e)(1)-(3) of the Code. *See* 26 U.S.C. § 4975(e)(1)-(3).

J. <u>Investment Education</u>.

The Department should (i) retain Interpretive Bulletin 96-1 in its current form and (ii) clarify that as part of investment education, a retirement provider may reference specific investments to a retirement investor without triggering fiduciary status under the Proposal.

Investment education is described in the Department's Interpretive Bulletin 96-1 (IB 96-1).[67] Under IB 96-1, a retirement provider may furnish to a plan participant or beneficiary in a participant-directed individual account pension plan the following categories of information and materials, without being deemed to have rendered investment advice: (i) plan information, (ii) general financial and investment information, (iii) asset allocation models, and (iv) interactive investment materials.[68] IB 96-1 further states that there may be many other examples of information, materials, and educational services provided to participants and beneficiaries that would not constitute investment advice. The Department states in the preamble to the Proposal that, for purposes of the Proposal, IB 96-1 (i) "would continue to correctly describe the types of educational information and materials that should not be treated as 'recommendations' subject to the fiduciary advice definition," and (ii) "believes that the analysis it presents is valid regardless of whether the retirement investor is a plan participant, beneficiary, IRA owner, IRA beneficiary, or fiduciary."[69]

We agree with the Department that IB 96-1 continues to provide accurate and helpful guidance to retirement providers and investors. We recommend that the Department retain IB 96-1 in its entirety. We recommend further that the Department clarify that a retirement provider, consistent with IB 96-1's requirements, may reference specific investments to a retirement investor without triggering fiduciary status under the Proposal because references to specific investment options available under a plan make educational materials clearer and more helpful to plan participants and beneficiaries. We note in particular that section (d)(3) of IB 96-1 (asset allocation models) expressly allows for identification of a specific investment alternative under the plan, provided that the model is accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan and identifying where information on those investment alternatives may be obtained.[70] Likewise, we believe the Department should clarify that in the course of providing investment education, a retirement provider's reference to a specific investment accompanied by the same or similar disclosure effectively would serve to clarify that no recommendation is being made and therefore no investment advice has been rendered.

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[67] *See* Interpretive bulletin relating to participant investment education, 29 C.F.R. § 2509.96-1. IB 96-1 had been removed as part of the Department's adoption of the 2016 Fiduciary Rule. After the 2016 Fiduciary Rule was overturned in *Chamber*, IB 96-1 was reinstated in 2020. *See* 85 *Fed. Reg.* 40,590 (2020).
[68] *See* IB 96-1, 29 C.F.R. § 2509-96-1(d)(1)-(4).
[69] Proposal, 88 *Fed. Reg.* at 75,911.
[70] *See* IB 96-1, 29 C.F.R. § 2509.96-1(d)(3).

K. PTE 2020-02: Eligibility.

1. Focus a fiduciary's ineligibility to rely on PTE 2020-02 on criminal conduct that involves the investment advice regarding and management of retirement assets and that involves only (I) the fiduciary and (II) an affiliate that the fiduciary controls or over which the fiduciary exercises a controlling influence.

PTE 2020-02 contains eligibility provisions under which a fiduciary may be disqualified from relying on the PTE for prohibited transactions. PTE 2020-02 currently focuses fiduciary ineligibility generally on (i) crimes identified or described in ERISA section 411, (ii) intentional or systematic violations of the exemption, and (iii) providing materially misleading information to the Department in connection with the conditions of the exemption.[71] Contrary to the Department's assertion that it "is proposing minor changes and clarifications to the scope" of PTE 2020-02,[72] the Fiduciary Proposal's proposed changes to the eligibility provisions of the exemption could greatly alter the ability of fiduciaries to reasonably rely on PTE 2020-02.

The Proposal, in fact, would greatly broaden the conditions under which a fiduciary would be ineligible for reliance on PTE 2020-02. Specifically, the Fiduciary Proposal provides for fiduciary ineligibility for an expanded list of criminal convictions that go well beyond the fiduciary's investment management of retirement assets. This could result in a fiduciary's ineligibility to rely on PTE 2020-02 as a result of the conviction of an employee of the fiduciary who works in a department, division, or location entirely unrelated to those personnel involved in the fiduciary's retirement business.[73]

Moreover, the Proposal expands the conditions for ineligibility to encompass not only the fiduciary, but also any affiliate, regardless of that affiliate's relationship with the fiduciary or its activity. This can lead to the anomalous result of a fiduciary's ineligibility resulting from the criminal conduct of a foreign affiliate that has no contact or relationship with the fiduciary and which may be engaged in activities that are wholly unrelated to the investment management of retirement assets (*e.g.*, foreign real estate brokerage, human resources support). Furthermore, these may be activities in which the fiduciary has not participated and about which it has no knowledge. We believe that including every fiduciary affiliate's actions as a possible basis for fiduciary ineligibility, regardless of its activity or level of contact with the fiduciary, is regulatory overreach and unnecessarily exposes every fiduciary to an additional layer of compliance risk. Rather, the determination for ineligibility should be concentrated exclusively on the activities of the fiduciary itself and on any entity that is controlled by the fiduciary.[74]

We recommend, therefore, that the Fiduciary Proposal's eligibility provisions of PTE 2020-02 be amended to focus a fiduciary's ineligibility on criminal conduct that involves the investment

[71] *See* PTE 2020-02 § III(a)(2).
[72] Proposal, 88 *Fed. Reg.* at 75,980.
[73] This is especially concerning for large and/or global organizations with multiple affiliates that collectively have thousands, or tens of thousands of individuals, employed by the organization.
[74] *Cf.* OCC, Fiduciary Activities of National Banks, 12 C.F.R. § 9.17(b) (Surrender or Revocation of Fiduciary Powers) (OCC authorized to revoke the fiduciary powers of a national bank only where the bank *itself* has engaged in unlawful or unsound exercise of such powers).

management of retirement assets and which exclusively involves (i) the fiduciary and (ii) any affiliate that the fiduciary controls or over which the fiduciary exercises a controlling influence.

2. Amend the "substantially equivalent" standard for foreign criminal convictions to apply only where the factual record of such conviction, when applied to United States federal criminal law, would highly likely lead to a criminal conviction in the United States.

The Proposal would include within the newly added criminal conviction provision a fiduciary's ineligibility for foreign criminal convictions (*i.e.*, a criminal conviction by a foreign court of competent jurisdiction) for crimes that are "substantially equivalent to" one of the U.S. federal or state crimes identified in PTE 2020-02.[75] We agree with the Department's position that investment transactions that include retirement assets are increasingly likely to involve entities that may reside or operate in jurisdictions outside the U.S. and that reliance on PTE 2020-02 therefore must appropriately be tailored to address criminal activity, whether occurring in the U.S. or in a foreign jurisdiction.

We believe, however, that the Department's proposed "substantially equivalent" standard fails to account for basic due process protections. It is not credible to assume that the judicial systems of certain countries, such as China or Russia, uniformly will interpret and apply the subject crimes listed in PTE 2020-02 in the same impartial manner and with "substantially equivalent" criminal procedures and due process safeguards as U.S. federal and state courts.[76] Moreover, since the foreign courts of certain countries directly or indirectly may be subject to the control or influence of that country's governing body, it is possible that a fiduciary or its affiliate may be subjected to illicit or inappropriate coercion from the foreign government (*e.g.*, pressure to lend to or invest in foreign government-owned funds or enterprises) in exchange for the government withholding criminal prosecution against the fiduciary (or more likely, an affiliate doing business in the foreign country) in order for the fiduciary to continue relying on PTE 2020-02.[77]

We recommend, therefore, that the Proposal's foreign crime "substantially equivalent" standard be amended so that PTE 2020-02's penalties for a foreign criminal conviction apply *only* when the factual record of such conviction, when applied to United States federal criminal law, would highly likely lead also to a criminal conviction in the U.S., as determined under appropriate regulatory authority by the Department's Office of the Solicitor.[78]

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[75] *See* PTE 2020-02 Section III(a)(1). The list of crimes are identified in section (a)(1)(A) and generally include felonies of financial and financial-related criminal activity (*e.g.*, embezzlement, forgery, counterfeiting, and misappropriation of funds or securities, including conspiracy or attempt to commit such crimes).

[76] *See, e.g.,* "China strips license of lawyer for Hong Kong activist," The Asahi Shimban (Jan. 18, 2021), *available at* www.asahi.com/ajw/articles/14116054 (China requires lawyers "to swear an oath of loyalty to the ruling Communist Party.").

[77] *See id.* ("Lawyers [in China] have been stripped of their licenses for representing defendants in politically sensitive cases. Some have been imprisoned.").

[78] The language further should state that the Office of the Solicitor's decision would be subject to judicial review by a U.S. federal court to ensure that the Department's interest in the case does not impact the impartial application of the factual record to U.S. law.

3. Confirm that the disqualification triggers from eligibility do not commence until the compliance date of a finalized Proposal.

In the preamble, the Department states that "no party would be required to comply with the amended conditions for a transaction that occurred before the effective date of the final amended exemption."[79] This statement may be read to include actions and conduct involving disqualification from eligibility that precede the effective date of the amendments to PTE 2020-02. To provide clarity and to align with the Proposal's compliance date, we recommend that the Department expressly confirm that the Proposal's amendments do not apply to crimes or other prohibited acts or conduct (*i.e.*, actions that are identified and described in Section III(a)(1) and (a)(2) of PTE 2020-02) that occur prior to the finalized Proposal's compliance date.[80]

L. PTE 2020-02: Disclosures, Documentation, Reporting, and Recordkeeping.

1. Eliminate the proposed required disclosures on costs, fees, and compensation related to recommended transactions.

The Proposal states that "[t]he Department is proposing minor changes and clarifications to the scope" of PTE 2020-02.[81] Additional disclosures are being proposed "to ensure that [r]etirement [i]nvestors have sufficient information to make informed decisions about the costs of the investment advice transaction and about the significance and severity of the investment advice fiduciary's [c]onflicts of [i]interest."[82] The Department further "is considering amending the recordkeeping provisions in Section IV to allow more parties to review the records necessary to determine whether the exemption is satisfied."[83]

The proposed disclosure requirements, among other things, would obligate the fiduciary to (i) supplement the fiduciary acknowledgment with a written statement of the "Best Interest" standard of care owed to the retirement investor, (ii) provide retirement investors upon request with specific and granular information on the costs, fees, and compensation related to recommended transactions, and (iii) provide a statement on whether the retirement investor will pay for the services provided (including third-party payments, which must be written in plain English and take into account the investor's level of financial experience).[84] If adopted, the reporting requirements presumably would allow plan participants and beneficiaries and their authorized representatives to access the fiduciary's records for examination to ascertain compliance with the conditions of PTE 2020-02, similar to the requirement proposed in PTE 86-128.[85]

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[79] Proposal, 88 *Fed. Reg.* at 75,980.
[80] *See* Section IV. Part O, *infra*.
[81] Proposal, 88 *Fed. Reg.* at 75,980.
[82] *Id.*
[83] *Id. See* Proposal, 88 *Fed. Reg.* at 76,044 (PTE 86-128 would be amended to allow plan participants and beneficiaries and their authorized representatives to review and examine the fiduciary's records to determine whether the conditions of the exemption are being met).
[84] PTE 2020-02 Section II(b)(2)-(4) (proposed), 88 *Fed. Reg.* at 76,000.
[85] *See* discussion on PTE 86-128, *infra*.

The Department's proposed additions are not "minor changes and clarifications." These disclosures are intended among other things to ascertain "the significance and severity" of the fiduciary's conflicts of interest. We note further that the Department is considering whether to require fiduciaries "to maintain a public website containing the pre-transaction disclosure, a description of the [fiduciary's] business model, associated [c]onflicts of [i]nterest (including arrangements that provide [t]hird [p]arty payments), and a schedule of typical fees."[86] The Department believes, without citing evidence or statistics, that retirement investors would seek out, analyze, and evaluate this raft of information, despite having been provided information on costs, fees, and compensation at the inception of the advisory relationship. In actuality, the proposed disclosure standards are circular, vague, and boundless which, when coupled with the proposed recordkeeping requirements, would allow Department examiners to easily claim "gotcha" regulatory violations while equipping the plaintiff's bar with a roadmap for class action litigation for breach of these standards.

We recommend that the Department exclude each of these proposed disclosure and reporting requirements from the Proposal and instead allow fiduciaries to provide retirement investors relevant information upon request, consistent with their fiduciary responsibilities.

2. **Eliminate the proposed rollover documentation and disclosure.**

Similar to the proposal on costs, fees, and compensation, the Department proposes to require fiduciaries to generate extensive documentation and provide such information to retirement investors with respect to rollover transactions or post-rollover investment of assets. This would include, but not be limited to, consideration of the following factors: (i) alternatives to a rollover, (ii) fees and expenses associated with the plan and the recommended investment or account, (iii) whether an employer or other party pays for some or all of the plan's administrative expenses, and (iv) the different levels of services and investments available under the plan and the recommended investment or account.[87]

Investment advice fiduciaries have had significant challenges obtaining the required information in a complete and timely fashion, particularly information from the plan from which the retirement investor intends to roll over the assets into an IRA or other alternative vehicle. Moreover, such information, even when obtained, seldom allows for an "apples-to-apples" comparison of fees, expenses, and services between the plan and the IRA (or other vehicle into which assets are being rolled over).

More generally, as part of the rollover transaction, the Proposal would require documentation on why the rollover is in the retirement investor's best interest.[88] This requirement, however, does not account for unsolicited rollovers. Specifically, when a retirement services provider accepts a retirement investor's unsolicited request to roll over or transfer assets from an ERISA-covered

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[86] Proposal, 88 *Fed. Reg.* at 75,986.
[87] PTE 2020-02 Section II(b)(5) (proposed), 88 *Fed, Reg.* at 76,000. The language of this proposed section is taken from Question 15 of the Department's FAQ on PTE 2020-02 compliance. *See* New Fiduciary Advice Exception: PTE 2020-02, Improving Investment Advice for Workers & Retirees, Frequently Asked Questions (April 2021) (PTE 2020-02 FAQ).
[88] *See id.*

plan into the receiving institution's managed IRA, there has been no "recommendation" since the retirement investor independently made the decision to roll over or transfer the assets, with no solicitation from the receiving institution. Currently in such cases, institutions have been exempt from the requirement under PTE 2020-02 to prepare the prudent analysis documenting why the rollover or transfer is in the retirement investor's best interest. We believe that such an approach is consistent with the spirit and mandate of the class exemption. We are concerned that the Proposal's all-embracing interpretation of the term "rollover" would label the above-described activity as a "recommendation," which would in turn trigger the prudent analysis requirement, even though no advice or recommendation had been given or even requested.

We recommend, therefore, that the Department eliminate the proposed rollover documentation and disclosure requirement and require instead that the investment advice fiduciary document the determination that the rollover was prudent based on sufficient information that is readily available upon which a comparison can be made at the time of the rollover transaction.[89]

3. Do not amend the recordkeeping requirements that among other things would authorize other fiduciaries and individuals to access a financial institution's records.

The Department is considering whether to amend the recordkeeping provisions of PTE 2020-02 to authorize additional parties (*e.g.,* fiduciaries, plan participants, beneficiaries, and IRA account owners) to review the records of the fiduciary, presumably in order to determine whether the fiduciary is complying with the exemption's requirements.[90] Specifically, the proposed recordkeeping requirement would be expanded to permit the sharing of information to additional federal and state regulatory agencies and to private individuals, including those who may be marginally affected by a transaction as well as other financial institutions and professionals that act as plan fiduciaries. The proposed recordkeeping requirement thus would work to limit and infringe on the fiduciary's property rights, intellectual property, and trade secrets, and to imperil the preservation of confidential information (including personal information of retirement investors).

ERISA permits the U.S. Secretary of Labor to obtain information from a plan, its fiduciaries, or financial institutions by issuing a subpoena or voluntarily from the requested party.[91] The issuance of a subpoena alerts the bank or other financial institution that an inquiry exists and permits the bank or other financial institution to adequately respond. By expanding the persons that may obtain information, (*i.e.*, to the plan fiduciary, plan participants and beneficiaries, contributing employers, the IRS, etc.), the Department is sidestepping an important legal safeguard. Moreover, it is making it easier for any person, no matter how they may have been affected by a transaction, to obtain and share information. Such an expansion is beyond the Department's legal authority.

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[89] For example, plan fee information is made available to plan participants under Rule 404a-5. *See* Fiduciary requirements for disclosure in participant-directed individual account plans, 29 C.F.R. § 2550.404a-5.
[90] *See* Proposal, 88 *Fed. Reg.* at 75,990.
[91] *See* 29 U.S.C. § 504(a) (Department investigative authority).

Similarly, the proposed recordkeeping requirements would require a bank or other financial institution involved in the transaction to provide any and all information requested and would merely offer an exception for information that is privileged. However, the proposed requirement would not permit an exception for information that is confidential or that is a trade secret or otherwise protected under federal property rights. Such an exclusion of confidential information places in jeopardy the bank's or other financial institution's rights and potentially exposes the person obtaining the information to collusion from competitors or other illicit conduct. Specifically, once the information is readily shared with the Department or the IRS, the information may be requested by the public through the Department's Freedom of Information Act (FOIA) process. The Department always has acknowledged and secured confidential information and permitted a person to prevent its distribution to the public.[92] Removing such a requirement would improperly harm the bank or other financial institution involved. Additionally, once the information is shared with a fiduciary, plan participant, beneficiary, or an IRA account owner, there are no confidentiality protections or limits on the use and distribution of the information. We recommend, therefore, that the Department refrain from adopting its proposed expansion of PTE 2020-02's recordkeeping requirements.

M. PTE 2020-02: Policies and Procedures.

1. Delete the proposed language on incentive compensation in the policies and procedures section.

As part of a fiduciary's policies and procedures on compliance with PTE 2020-02, the Proposal would require that fiduciaries "not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended . . . to result in recommendations that are not in [r]etirement [i]nvestors' [b]est [i]interest."[93] By expressly incorporating language regarding incentive compensation directly into PTE 2020-02, the Department appears to be departing from a flexible, principles-based approach and installing a more rigid, prescriptive standard. This position appears to be at odds with the Department's current position that the exemption is intended to preserve differential compensation offerings (*e.g.*, full-service brokerage) consistent with the requirements of PTE 2020-02 and the SEC's Regulation Best Interest, with which the Department intends the Proposal to be aligned).[94] We recommend, therefore, that the Department delete the proposed amended language on incentive compensation.

2. Delete the requirement that fiduciaries provide to the Department the fiduciary's policies and procedures within 10 business days of request.

The Department is proposing that fiduciaries complying with PTE 2020-02 provide "their complete policies and procedures to the Department upon request within 10 business days of

[92] Any information disclosed to the Department may be requested through a FOIA request unless there is a confidential notice that gives the party involved the right to prevent its distribution through notification from the Department. *See* Department of Labor, Freedom of Information Act, *available at https://www.dol.gov/general/foia*.
[93] Proposal, PTE 2020-02 Section II(c)(2) (proposed), 88 *Fed. Reg.* at 76,001.
[94] *See* PTE 2020-02 FAQ, Questions 16 and 17. *See also* SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest (Aug. 2022).

request."[95] The Department provides no regulatory purpose or policy discussion or rationale for this requirement nor cites to any retirement industry problems or issues that would prompt this additional regulatory burden. Moreover, for a number of fiduciaries, it is unlikely that the "complete" policies and procedures implicated in complying with the requirements of exemption – which may be located across multiple divisions, departments, and offices throughout the US and abroad and which are under regular review and revision – would be consolidated or otherwise organized for the sole purpose of compliance with the exemption and available in a manner that could be submitted to the Department in any meaningful way. Additionally, it is unreasonable for the Department to require production in 10 days where a failure to do so would appear to be a *per se* violation of the exemption that could instantly cause an untold number of transactions to be non-exempt prohibited transactions. We recommend that the Department delete this proposed requirement and instead maintain review and examination of fiduciary policies and procedures as part of the supervision process.

N. PTE 86-128: Reliance on Exemption and Recordkeeping Requirements.

1. Retain section IV(a) of PTE 86-128 which exempts discretionary fiduciaries to IRAs from the requirements of section III (Conditions).

The Department is proposing certain amendments to PTE 86-128 that do not directly concern the provision of fiduciary investment advice. Among them is the Department's elimination of an exclusion from the conditions of the exemption applicable to IRAs.[96] As a result, the proposed amendment would subject *discretionary* fiduciaries to the exemption's conditions in section III. This section contains a lengthy list of consent, notice, and recordkeeping requirements, all of which must be met, in order to rely on PTE 86-128, including: (i) advance written consent of the IRA owner for the fiduciary to conduct securities transactions that are subject to the exemption, (ii) information provided to the IRA owner within three months prior to the advance written consent, (iii) transaction-based, periodic, and annual reporting on the securities transactions effected, including portfolio turnover ratios, (iv) the aggregate brokerage commissions, expressed in dollars, and (v) the average brokerage commissions, expressed as cents per share.[97]

This proposed amendment amounts to a gratuitous and unwarranted intrusion into an established fiduciary relationship between the fiduciary institution and IRA owner. The Department states that this amendment would "increase the safeguards available" to IRA owners."[98] The Department, however, apparently has not considered the disruption to an established fiduciary service upon which discretionary fiduciaries have long-relied and the additional costs imposed by this proposed elimination of section IV(a). Further, the Department has not explained how a retail investor would possibly be able to benefit from, or understand, complex, and potentially confusing disclosures that are intended for institutional, sophisticated plan fiduciaries. Note that in 1986, when this exemption was promulgated, the vast majority of Americans' retirement

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[95] Proposal, PTE 2020-02 Section II(c)(3) (proposed), 88 *Fed. Reg.* at 76,001.
[96] *See* Proposal, 88 *Fed. Reg.* at 76,035. The exclusion for IRAs applies also to Keogh plans. *See id.*
[97] *See* PTE 86-128 Section III. Specifically, these are commissions paid by the IRA to brokerage firms affiliated and unaffiliated with the discretionary fiduciary.
[98] *See* Proposal, 88 *Fed. Reg.* at 76,035.

assets were held in defined benefit pension plans overseen by trustees and investment consultants who understood the meaning of a portfolio turnover ratio and the other required disclosures.

Discretionary fiduciaries already are subject to fiduciary responsibilities to the IRA and its owner and should not be subject to additional, prescriptive requirements that would serve only to reduce the availability of fiduciary services and the efficiencies of IRA account administration while driving up costs for retirement investors. Moreover, the proposed amendment does not provide any guidance on how to come into compliance with these changes with respect to existing IRA accounts nor provide any meaningful transition period. We recommend, therefore, that the Department retain section IV(a) in order to continue authorizing discretionary fiduciaries to rely on PTE 86-128 in providing services to IRAs without being subjected to these additional conditions.

2. **Delete the proposed requirement making available to retirement investors and their authorized representatives the fiduciary's records that demonstrate compliance with PTE 86-128, since this requirement does not add materially to the protective provisions already in place and unnecessarily increases regulatory compliance costs.**

Notwithstanding the Department's proposed removal of reliance on PTE 86-128 in instances where investment advice may be rendered, certain of our bank members may continue to rely on the exemption in connection with their discretionary investment activities. The Fiduciary Proposal provides that under the exemption, specified parties be permitted to review the fiduciary's records demonstrating compliance with PTE 86-128.[99] These parties include the participants and beneficiaries (and their authorized representatives) of a retirement plan in which the fiduciary has engaged in a covered transaction.[100] The Department provides no explanation for this authorization or its purpose.[101] In the absence of such explanation or public policy rationale, we do not believe it is necessary to make the fiduciary's records available to these parties. We recommend, therefore, that the Department delete the proposed language that would allow retirement investors and their authorized representatives direct access to the records of fiduciaries relying on PTE 86-128.

O. Effective Date and Compliance Date.

If the Proposal is finalized, extend the Proposal's effective date by at least 12 months and (assuming an effective date 12 months after the Proposal is finalized) provide a compliance date that is at least 12 months from the effective date.

[99] *See* Proposal, PTE 86-128 Section VII (proposed), 88 *Fed. Reg.* at 76,044-76,045.
[100] *See id.* Section VII(b)(1)(D) (proposed).
[101] Retirement investors presumably already have access to their account information, including investment transactions and holdings. It is unclear why a retirement investor would want to review additional records of the fiduciary except in anticipation of possible litigation against the fiduciary or an affiliate.

The Proposal states that a final rule would be effective 60 days after publication in the *Federal Register* (Effective Date).[102] Given the sheer volume, complexity, and uncertainties of the Proposal, and its ambitious reordering and restructuring of the retirement services industry, this is an unrealistic and unworkable deadline, likely to reduce availability of services to retirement investors where inadequate time is available for designing and building out compliance regimes.

In order to comply with the Proposal as written, impacted banks would need to (i) make business decisions that affect their entire line of retirement services, (ii) restructure that business, (iii) renegotiate and revise compensation packages and structures, (iv) renegotiate fee and service arrangements with third parties, (v) create, amend, and implement bank policies and procedures, (vi) create and modify software and other technology systems to generate, record, produce, and store significant amounts of new data, (vii) draft new contracts for IRA customers, and (viii) enter into contracts with all existing retirement customers, both institutional and retail. Moreover, every current customer account would need to be reviewed, assessed, evaluated, and revised as necessary to take account of the Proposal's requirements. All of this further would need to be consistent with current bank legal and regulatory requirements to which banks are subject.

In light of the paradigmatic shift that the Proposal would impose on the availability and delivery of retirement services, we recommend that the Department extend the Effective Date by at least 12 months following finalization of the Proposal, followed by at least an additional 12 months for compliance (compliance date) with the Proposal's requirements.

P. Stay on Enforcement.

The Department should provide for a stay on enforcement for at least 24 months from the Effective Date.

As noted above, the Proposal presents enormous challenges for achieving compliance. We estimate that it would take at least 24 months for banks to make all the necessary changes in order to ensure uninterrupted service to investors. We recommend therefore that the Department issue a stay on enforcement of the Proposal for at least 24 months from the Effective Date (which should extend to the Internal Revenue Service as well for purposes of the Code section 4975).[103] Given the liability risks for noncompliance under ERISA and the Code, the absence of any stay from enforcement likely would prompt a number of banks to consider partial or complete withdrawal from the retirement services market.

V. Conclusion.

The Department has sought earnestly to recast the definition of fiduciary investment advice so that the interests of retirement investors may be protected and preserved. We appreciate and

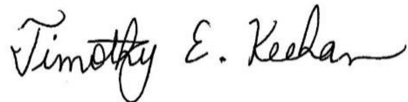
[102] *See* Proposal, 88 *Fed. Reg.* at 75,912.
[103] While a stay on enforcement would accommodate ongoing compliance efforts, we understand that agency enforcement relief does not fully address the consequences of engaging in prohibited transactions (*e.g.*, the possible imposition of excise taxes, PTE eligibility impacted by disqualification triggers, private enforcement of the prohibited transaction rules).

share the Department's objective to provide plans and individuals with the ability and means to maximize their retirement investment opportunities, options, and returns. We believe, however, that the Fiduciary Proposal's wholesale restructuring of the marketing, products, services, compensation, administration, and eligibility of the retirement services industry is a misguided approach fraught with serious risks, costs, and uncertainties for retirement investors and for the banks and other organizations that supply their services.

We would be glad to work with the Department as it evaluates whether to act on and how to improve the Fiduciary Proposal, consistent with the federal government's priority that the rulemaking responds to a compelling need and offers the least burdensome tools to accomplish the promotion of retirement savings.

Thank you for your consideration of our views and recommendations. If you have any questions or require any additional information, please do not hesitate to contact the undersigned at 202-663-5479 (tkeehan@aba.com).

Sincerely,



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