American Bankers Association
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Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW, Room N-5655
Washington, D.C. 20210

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

Dear Mr. Canary:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on the proposed rule (Proposal) regarding the expanded circumstances under which a person is considered to be a "fiduciary" under the Employee Retirement Income Security Act of 1974 (ERISA) or the Internal Revenue Code (Code). The Proposal is a revised and expanded version of the Department's original proposed rule from 2010, which would have broadly expanded the definition of "fiduciary" under ERISA.

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. Banks, when acting in their capacity as fiduciaries, have always sought the best interest of their 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 in their capacity as fiduciaries, should act in the best interest of customers and that such customers deserve to be protected from financial abuse. We also believe that regulations should be careful to meet their goals without unintentionally stifling the delivery of retirement products and services to customers, or capturing communications or relationships that are not appropriately regarded as fiduciary in nature.

[1] The American Bankers Association is the voice of the nation's $15 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $11 trillion in deposits, and extend more than $8 trillion in loans. Many of these banks are plan service providers, providing trust, custody, routine deposit/cash management, and other services for institutional clients, including employee benefit plans covered by the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code. Our member banks also routinely provide services for retail clients through individual retirement accounts and similar accounts that are covered by the Code. Learn more at www.aba.com.

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 agency rulemaking, since "[g]overnment actions can be unintentionally harmful, and even useful regulations can impede market efficiency."[2] 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).[3]

We believe that the Proposal neither demonstrates a compelling need to undertake a wholesale regulatory change 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 many a person who provides valuable services to plans and plan fiduciaries 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 plan participants, beneficiaries, and IRA account owners that the Department is seeking to protect by making it extremely difficult, complex, and costly – and in some cases, impossible – for banks to make available 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 individuals will be significantly reduced, or eliminated altogether.

Furthermore, we note that the Department has focused much attention and much of its regulatory analysis on retail consumers and the retail IRA marketplace, and we question whether the Department has adequately analyzed the need for the Proposal and the cost of the Proposal in the *institutional* marketplace. We believe the Proposal could cause a massive disruption to the institutional marketplace, particularly by eliminating the requirement that investment advice be the result of a "mutual understanding" between the provider and recipient of the advice, and that the advice form a "primary basis" for investment decisions. We further believe that the Department has not presented sufficient evidence of the need for such a monumental shift in the investment management and institutional plan relationship.

Therefore, consistent with agency rulemaking standards, we respectfully request that the Department withdraw the Proposal, further 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.

Without limiting the primacy of the foregoing request, we also wish to comment on several specific portions of the Proposal that are of particular concern to our members and which the Department should consider fully in its evaluation of the Proposal. While they will not cure the concerns expressed above, these comments are aimed at minimizing disruptions to retirement plan administrative and operational services while maintaining sufficient protections for plan participants and IRA account owners. We further wish to reserve the opportunity to comment further after we have carefully reviewed the record and the testimony presented in the upcoming hearings on the Proposal.

[2] OMB Circular A-4 (Sept. 17, 2003).
[3] Executive Order 13563 (Jan. 18, 2011).

## I. Overview of the 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.[4]

In the Proposal, the Department proposes to expand part (ii) above of the fiduciary 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 –

(1) provides investment or investment management recommendations or appraisals to an employee benefit plan, a plan fiduciary, participant, or beneficiary, or to an IRA owner or fiduciary; and

(2) *either* (a) acknowledges the fiduciary nature of the advice, *or* (b) acts pursuant to an agreement, arrangement, or understanding with the advice recipient that the advice is individualized to, or specifically directed to, the recipient for consideration in making investment or management decisions regarding plan assets.[5]

The Proposal would replace the current five-part test of the Department's regulations,[6] which the Department believes allows many 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. The proposed re-definition, the Department argues, "better reflects the broad scope of the statutory text and its purposes and better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty."[7]

The Proposal includes a series of exclusions or "carve-outs" from the general definition of investment advice intended to exclude activities that "should not be treated as fiduciary

[4] ERISA § 3(21)(A); *see also* Code § 4975(e)(3). [Emphasis added.]
[5] Proposal § 2510.3-21(a), 80 *Fed. Reg.* 21,928, 21,929 (2015). [Emphasis added.]
[6] 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.*
[7] *Id.* at 21,929.

investment advice."[8] Furthermore, in order to preserve "beneficial business models" for delivery of investment advice, the Department also has separately proposed new exemptions from ERISA's prohibited transaction rules "that would broadly permit firms to continue common fee and compensation practices, as long as they are willing to adhere to basic standards aimed at ensuring that their advice is in the best interest of their customers."[9] Thus, the Department believes that it has struck an appropriate balance, putting forth a "broad regulatory package" that "aims to enable advisers and their firms to give advice that is in the best interest of their customers, without disrupting common compensation arrangements under conditions designed to ensure the adviser is acting in the best interest of the advice recipient."[10] 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 reflecting a targeted approach focused on industry bad actors, the Proposal manifests an indiscriminate policy that would fundamentally reshape familiar, secure, and longstanding business and customer relationships without achieving the Department's goal of financial customer protection. The result would be a dramatically restructured advisory scheme precariously founded on the implausible notion that customers will somehow nevertheless retain the same level of access to investment advice, and presumably at a substantially reduced cost and with added legal protection. The Proposal, however, does not account for the tremendous compliance burden placed on the retirement services industry, with its attendant increased liability exposure, labor, and costs, or the potential ramifications of fundamentally rewriting how the fiduciary prohibited transaction rules will apply. This will likely result in *less* availability of these services, and at a *greater* cost, because the pricing necessary to sustain this new compliance model – with its accompanying risks and uncertainties – will likely far exceed the revenue currently generated from servicing retirement accounts. The Proposal, in the end, may be no more than a tax levied on the retirement system in exchange, ironically, for reduced availability and choice for retirement investors.

Throughout the Proposal, the Department reports that there is substantial and widespread industry abuse of retirement investors, particularly IRA owners, due to conflicted advice, and that investment returns are compromised as a result. The Department, however, does not cite or reference empirical evidence of widespread "conflicted" advisers who are systematically abusing plans or their participants, or IRAs or their owners.

The restructuring of the retirement services industry as contained in the Proposal also has a reverberating affect across the entire financial services industry (an industry where the Department is not one of the primary regulators). As noted by one legal commentator:

> Indeed, the unstated but fundamental premise of the reproposal is that the primary regulation of investment markets – by Congress, state legislatures, the OCC, SEC, FINRA, and other federal or state insurance and securities regulators – is

[8] *Id.* at 21,941.
[9] *Id.* at 21,929.
[10] *Id.*

> inadequately protecting the interests of at least 'retail' retirement plan investors. Thus, the *banking, insurance, and securities industries*, as they participate in the retirement market, are to be restructured by the *Labor Department* under the auspices of the *federal pension law*, rather than by the authorities with the direct responsibility and the competence for those industries. And since DOL's mission under ERISA includes no expertise in or responsibility for the health of those industries or the functioning of the distribution systems that support them, an ERISA regulatory proposal proceeding from that fundamental premise will inevitably lack balance.[11]

The Department's wide reach under the Proposal can be seen in the Best Interest Contract Exemption (BICE), the Prohibited Transaction Exemption (PTE) to which most banks that wish to preserve their current business relationships with respect to retail retirement investors must conform. Under the BICE, the Department would be positioned to request banks to produce a wealth of data, including information on securities transactions, the amount of revenue received by the bank, and sales information. Furthermore, the Department reserves the right to disclose this information *publicly*, presumably without the permission of the bank's primary regulatory authority. This may force banks to choose between conflicting legal and regulatory obligations involving the requirements of the Proposal versus the obligation to refrain from providing certain types of information to sources other than the bank's primary supervisor, particularly when such information is potentially exposed to public disclosure.

We are concerned that the Proposal, and specifically the BICE and the amendments to the other exemptions, departs significantly from the statutory program governing IRAs by interposing a new federal standard of care. The BICE imports ERISA prudence and loyalty principles to IRAs and further provides a private right of action for IRA owners by contract, including class action relief. The Department is doing what Congress specifically did not do when enacting ERISA. Unlike the statutory regime established to govern ERISA plans, Congress refrained from providing a federal fiduciary standard of care or statutory remedy for IRA owners, and it is doubtful that the Department has the authority to do so in the absence of a legislative mandate. In fact, contrary to the implication of various statements in connection with the release of the Proposal, IRA owners are not without remedies – they are protected by federal securities laws, state securities laws, and state fiduciary laws, in addition to supervisory tools at the disposal of bank regulators. We are, therefore, concerned that the Proposal oversteps the bounds from agency interpretive rulemaking into regulatory legislation of new standards and requirements for IRA services. Recognizing that the Department is implementing these changes through a number of exemptions that are, on their face, "voluntary" but as a practical matter are mandatory, the Department can be viewed as expanding its regulatory authority beyond congressional intent.

We do not necessarily object to the Department's determination to eliminate the "regular basis" requirement of the current regulation, or to include the selection of investment managers or other plan managers as "advice." We emphatically believe, however, that the Proposal, insofar as it

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[11] "DOL Reproposes Expanded ERISA Fiduciary Definition and Revised Complex of Exemptions," *Sutherland Legal Alert* (April 21, 2015). While we recognize that the Department has consulted with SEC staff, it does not appear from the Proposal's contents that there has been comprehensive coordination between the Department and the SEC, or between the Department and the federal banking regulators.

would eliminate the "mutual understanding" and "primary basis" requirements of the current regulation with respect to institutional (or more sophisticated) plans and investment advisers and investment managers, represents a major change in current law for which the Department has presented no evidence of the need, nor understanding of how these changes would ripple through the $17.5 trillion retirement market.

Moreover, it is one thing to assert that unsophisticated retirement investors may in isolated instances be confused, or even misled, into believing that a broker's sales pitches and general discussions of investment markets are intended to be relied upon as fiduciary advice. It strains credulity, however, to assert that institutions, investment consultants, and professional and sophisticated IRA owners who may manage or oversee millions of dollars of assets are routinely misled into believing (or should be viewed, as a policy matter, as being capable of being so easily misled) that a service provider –including a broker or investment adviser – is acting as a fiduciary to their plan *before* the service provider's services are retained through a written agreement. As common business practices dictate, institutions and sophisticated investors recognize that they need to have an understanding in place with their service provider regarding the terms of the service provider's retention (including compensation, reporting, investment guidelines, scope of authority and responsibilities, and myriad other matters) before they can appropriately rely on the provider's investment advice as being subject to fiduciary standards. The Department has not provided any evidence to support its fundamental restructuring of these common business relationships with service providers.

The "mutual understanding" requirement of the existing regulation also helps to address several matters the Department has not dealt with in the Proposal; namely, *when* does a service provider's fiduciary status end, and *what* is required of the service provider during the period that the person is a fiduciary? If a service provider's merely directing of an investment idea to the fiduciary of a retirement plan (with the expectation of compensation if the fiduciary acts on the idea) is enough to make the provider an investment advice fiduciary, when does that fiduciary relationship terminate? What is the scope of that fiduciary relationship? What are the duties of the investment advice fiduciary (having no understanding with the plan fiduciary as to the existence or scope of the relationship)? The Proposal provides no answers or guidance, but instead appears to leave this up to the courts to sort out. We believe that this is the wrong approach.

The Department has a duty to the public to set forth its views on how the elimination of the "mutual understanding" component of current law will affect the rights and obligations of affected institutions. This question goes well beyond the requirement that a fiduciary act in the best interest of the plan. In assessing the risks of providing services to plans and IRAs, those participating in the retirement services industry need to understand what terms the Department believes are being substituted for the "mutual understanding" of the parties, particularly in the institutional and sophisticated investor marketplace.

In addition, we believe the Department has not explained why it believes that plan fiduciaries who want to obtain particular information about the securities or commodities markets that they may "consider" in making their own investment decisions may do so *only* from a person who would be required to become an investment advice fiduciary with respect to such information.

Common sense suggests otherwise, especially with respect to institutions, consultants, and sophisticated investors. Sophisticated plan fiduciaries may consider many pieces of information and viewpoints from multiple sources in making their investment decisions, and should be free to define, in agreement with their service provider, the terms and conditions under which they receive "investment advice," "investment education," or just data points. Many individuals will do the same sort of diverse research and have the same rational expectations regarding their secondary information sources. Indeed, sophisticated plan fiduciaries often seek information, market "color," and pricing data in casual conversations that neither the recipient nor provider currently expect will rise to the level of creating a fiduciary relationship with respect to such conversation.

To expect the providers of small nuggets of information that may be "considered" by a plan fiduciary, but that clearly will not serve as a "primary basis" for investment decisions, to satisfy all of the requirements of sections 404 and 406 of ERISA will make it much more difficult, time-consuming, and expensive for institutional and sophisticated plan fiduciaries to obtain the information they would like to receive from a wide variety of sources. There is simply no evidence to believe that institutional plan fiduciaries and sophisticated investors 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. The Department's one-size-fits-all approach to applying strict liability prohibitions to all potential advice providers ignores the fundamental fact that plan fiduciaries, and not the service providers, are personally obligated to understand the environment in which they operate and the transactions that they undertake.

The Department also needs to provide further guidance on when a bank or other market participant would become an investment advice fiduciary in connection with the provision of information or "advice" to an individual who may own, or may make investment decisions for, multiple investment portfolios. For example, a corporate executive or wealthy individual may be responsible for investing his individual (non-plan) assets, certain corporate assets, the corporation's retirement plan assets, assets of a charitable or family foundation, his personal plan account within the corporate retirement plan, and his IRA assets. If a bank provides investment information to him, which information the individual (in his own mind) may consider for investment by any of the multiple investment pools for which he is responsible, when does the bank become an investment advice fiduciary where the information is ultimately used for a plan or IRA account? Can the bank avoid fiduciary status under ERISA or the Code by simply informing or contractually restricting the individual from using the investment information for his IRA or plan accounts? If he actually does use the information for his IRA or a plan account, does the bank need to assert a breach of contract claim to protect the bank from becoming an inadvertent fiduciary to the plan or IRA? How in practice will this work?

Again, it is not evident that the Department has fully considered the complexity of how the Proposal would apply to sophisticated individuals who are responsible for managing multiple, significant pools of assets that include both plan and non-plan assets. Indeed, if the Department takes the position that all financial or investment conversations with individuals who have any plan assets would subject the bank or investment 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 banking regulators 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.

Based on the foregoing, it is clear that the Proposal, on its face, is an unfinished and incomplete work. It contains significant gaps and vague or undefined terms that make it difficult to analyze, evaluate, and determine precisely how it will impact banks and other retirement service providers. Perhaps recognizing this, the Department has requested that interested parties provide detailed comments and proposed language, presumably to address these gaps and terms so that the Department can rework the Proposal into a coherent, viable regulation. We are happy and eager to engage with the Department in such a consideration. The results of that work, however, should then be published for further comment, since it will likely include many important details that the Department has not yet exposed to public review. That is to say, that the Department's solicitation of major public input to fill in gaps in the Department's presentation does not solve the problem of commenting on an unfinished and incomplete rulemaking offered as a last stage in the rulemaking process.

Conceptually, the Proposal reads more like an Advance Notice of Proposed Rulemaking (ANPR), and the Department should treat it as such, for the benefit of retirement investors, those who serve them, and the Department's role in promoting those interests. The Department's response to the Proposal's discrepancies, however resolved, either will leave the Proposal deficient or will substantially change the content and applicability of the Proposal which, if then finalized, would not provide the public with an opportunity to review and comment on a significantly altered Proposal. Consequently, we believe the only reasonable course of action is to withdraw the Proposal (*i.e.*, consider it as a further important ANPR exercise), followed by an opportunity for the public to review and respond to an amended, completed, and wholly functional Proposal.

## III. Specific Issues.

### A. Proposed Exclusions from the Proposal's Coverage.

#### 1. Bank Deposit Products.

The Proposal is not clear on its applicability to, or treatment of, bank savings accounts, certificates of deposit, or other deposit products offered by a bank. Section 408(b)(4) of ERISA provides that the prohibited transaction provisions of section 406 do not apply to any investment in bank deposit products, provided the conditions of the exemption are met.[12] Banks typically provide their IRA customers who are interested in making an investment with a list of the products offered by the bank, with their investment yield, and may answer questions about how the products work. Bank branch personnel, however, do not provide investment recommendations or discuss the customer's retirement needs, but instead allow the customer to make the investment decision.

[12] ERISA § 408(b)(4); Code § 4975(d)(4) (parallel provision).

The Department should confirm that a bank's disclosures and communications in connection with deposit products (*e.g.*, savings account, certificates of deposit) offered by the bank to its IRA and other customers are within the scope of section 408(b)(4) of ERISA and, provided the conditions of that section are met, are excluded from the scope of the Proposal. For example, if a customer would like to consider investment options for an IRA that would include a bank's savings account or certificates of deposit, a bank offering these products should be able to provide the customer with a list of these products for IRA accounts (and applicable interest rates) and, at the customer's express direction, invest the customer's IRA funds in such products, without triggering the definition of "advice" under the Proposal. Treating banks and their employees who have conversations with IRA customers as providing "fiduciary advice" not covered by section 408(b)(4) may force banks to eliminate IRA custody and trust services, which entail a relatively modest fee (*e.g.*, $25 annual fee), and replace these services with an investment management account charging higher fees, in order to pay for the increased costs of compliance, record keeping, and systems administration, as well as for increased litigation risk.

Similarly, banks typically provide their corporate and other business clients a product suite of bank deposit-related products often referred to as "treasury services" or "treasury management." Included in this product suite are products designed to assist these business clients in more efficiently managing their liquidity needs. In addition to interest-bearing bank deposits (some of which have withdrawal and other transactional restrictions), these products would include overnight investment sweeps into a number of options (such as money market mutual funds, commercial paper, overnight repurchases of government or agency securities, etc.) which continue to maintain the client's ready access to cash while offering more alternatives to earn a reasonable short-term rate of return. If such products are not also carved out from triggering fiduciary status under the Proposal, then employee benefit plans may well end up with a restricted, narrow set of liquidity alternatives with potentially less favorable short-term rates than those available to other corporate clients (including the corporate sponsor's own non-ERISA accounts).

### 2. **Sales and Other Conversations and Communications with Customers.**

The Proposal further is unclear as to whether, and to what extent, retirement service provider conversations with customers and prospective customers would trigger fiduciary status under ERISA or the Code. This is a critical omission, because the Proposal could be interpreted as capturing within the "investment advice" definition virtually any and every conversation – including and especially sales conversations – in which a bank describes its products and services to a participant, beneficiary, plan fiduciary, or IRA owner. This stands in marked contrast with the current rule, in which sales activities routinely are excluded from fiduciary activity.

Therefore, the Department should revise the Proposal to exclude from investment advice routine conversations between a retirement service provider and plans, participants, and IRA owners regarding the products and services offered by the service provider. Not every conversation or sales pitch about the service provider's offerings should be a "recommendation" (see section III.B.1.a., below). Failure to exclude such sales conversations would inhibit the retirement customer's ability to obtain and understand investment information, promote awkward and

truncated conversations between provider and customer, and possibly lead to *reduced* customer trust in the retirement provider's ability to respond to the customer's investment needs and objectives.

### a. **Requests for Proposals**.

The Proposal, for example, is ambiguous as to whether, and the conditions under which, a response to a request for proposal (RFP) would be treated as a fiduciary activity. Many plans and their consultants and advisers (including plans with fewer than 100 participants or less than $100 million in assets) 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. These RFPs frequently request a potential investment manager to provide information regarding how it might manage the plan's portfolio, including by identifying a potential investment portfolio or a sample portfolio line-up, 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 (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 Proposal. How can a plan 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 noted in the context of the carve-out for 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."[13]

We request 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 plan, that this action would not be considered "investment advice" under the Proposal. This would help ensure that the bank, in assisting a current or prospective customer, would avoid being unintentionally designated as a fiduciary under the Proposal. 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.

### b. **Corporate and Business Clients**.

In addition, banks often discuss with their corporate and other business clients such clients' deposit/cash management affairs in broad terms and may not even be aware (or be informed by

[13] 80 *Fed. Reg.* at 21,941.

the client) that some of the assets or accounts involved in the discussion belong to employee benefit plans. Indeed, this lack of knowledge could very well persist until the relevant business is in the process of implementation (*e.g.*, account opening). It seems patently unfair for an entity to be deemed a "fiduciary" – regardless of the activity involved – where it simply does not know that it is dealing with a plan or a plan's assets. Accordingly, the Department should provide a safe harbor for providers having discussions with corporate and other business clients about those clients' deposit/cash management business generally, if they otherwise have no actual knowledge that the subject matter of those discussions includes employee benefit plans or plan assets.

#### c. **Qualified Accredited or Sophisticated Investors**.

The Department has expressed concerns that most retirement investors and many small plan sponsors "are unable effectively to assess the quality of the advice they receive."[14] Consequently, the Proposal does not permit a so-called "seller's exception" for retail investors and small plan sponsors. This position, however, does not account for the fact that a number of financially sophisticated retail investors/small plan sponsors *are* able to assess the quality of investment advice and routinely make retirement investment decisions based on such assessments. These retail investors might be high-net worth individuals or otherwise possess sophisticated financial knowledge enabling them to make determinations regarding their IRA. Similarly, a number of small plan sponsors typically *are* familiar with defined contribution plan investment objectives and available investment choices. Coverage under the Proposal would likely restrict the availability and choice of investments and investment managers for such persons/entities.

Therefore, the Department should exclude such qualified accredited investors from the scope of the Proposal, or at the least, from the scope of limitations applicable through the definition of "Assets" under the BICE and the new Principal Trade Exemption. Like similar rules of the Securities and Exchange Commission, the Department could propose financial worth/investment assets thresholds that would exclude persons/entities who 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,[15] or the "qualified purchaser" test adopted under the Investment Company Act of 1940.[16]

#### d. **Bank Employee Referrals**.

The Proposal provides that investment advice includes "a recommendation of a person [providing any of the other defined types of advice.]"[17] This provision may not permit employees of banks to do a "handoff" or to refer a colleague in another division of the bank (or to an affiliate), without potentially becoming an investment advice fiduciary solely by virtue of such

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[14] 80 *Fed. Reg.* at 21,942.
[15] *See* Regulation D, 17 C.F.R. § 230.501 *et seq.*
[16] *See* Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(51).
[17] Proposal § 2510.3-21(a)(1)(iv), 80 *Fed. Reg.* at 21,957.

referral. For example, under the Gramm-Leach-Bliley Act (GLBA) and implementing federal banking and securities regulations, bank employees are expressly permitted to receive a fee for referring bank customers to the bank's brokerage unit or unaffiliated third party. They are also permitted to receive discretionary bonuses where brokerage business can be a factor or variable in the discretionary decision-making process (as long as such business is one of multiple other non-brokerage factors or variables).[18] Under the Proposal, however, such employee could be deemed a "fiduciary," and therefore, subject to the prohibited transaction provisions of ERISA and the Code, regardless of whether a referral fee is received.

It would be inconsistent to have an expressly authorized activity under the federal banking laws trigger potential liability under ERISA. Consequently, this section of the Proposal should be clarified to permit referrals (with or without a fee), whether under Rule 700 Referrals or where elsewhere permitted under applicable federal banking and securities regulations. Otherwise, retirement investors would be unable to know that their bank possesses the services that can assist the customer with retirement planning.

### 3. Foreign Exchange Transactions.

The Proposal is unclear on whether, and under what conditions, a foreign exchange (FX) transaction would implicate fiduciary status. A number of banks conduct FX transactions on behalf of their plan customers. Banks typically rely on section 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 the exemption, a bank and its affiliates may not provide investment advice with respect to the FX transaction.[19] The Department, therefore, should 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 Proposal's expanded definition.

### 4. Statements of Value.

#### a. Statements of Value Not Deemed Investment Advice.

As trustees and custodians of plans and IRAs, banks provide safekeeping and recordkeeping services. These services include providing a general statement to the plan, plan participant, or IRA owner, reflecting the value of the account's assets and investments. Under the Proposal, "investment advice" includes "an appraisal, fairness opinion, *or similar statement* whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA."[20] Thus, it would appear that the routine provision of statements of value (*i.e.*, not in connection with a transaction) would be exempt from the term "investment advice." Despite the carve-out language, we continue to believe that

[18] *See* Regulation R, 17 C.F.R. § 247.700 (Rule 700 Referrals).
[19] *See* ERISA § 408(b)(18)(D).
[20] Proposal § 2510.3-21(a)(1)(iii), 80 *Fed. Reg.* at 21,957. [Emphasis added.]

valuation services should not be deemed "advice" as no recommendation is involved in providing any such service.

Under the Proposal, the question raised is what would be considered a "transaction" that triggers coverage under the valuation part of the definition. A plan fiduciary may receive a trust accounting statement listing the current values of the plan's holdings and decide to buy or sell particular securities based on the information in that statement. Similarly, a plan participant or beneficiary may, unbeknownst to the bank, decide to enter into a transaction, such as an investment option transfer or a distribution, based on valuation information provided in the normal course – such as a benefit statement, on a plan website, or in response to a phone inquiry regarding current account values. As such values are provided as factual information regarding the plan's or participant's account and are not intended as recommendations as to whether to proceed with a particular transaction, they should not be treated as fiduciary "investment advice" for purposes of the Proposal.

The potentially broad impact of this definition is mitigated in part by a carve-out, which states that an appraisal, fairness opinion, and statement of value are not considered "investment advice" if, among other things, it is provided "solely for compliance with the reporting and disclosure provisions" under ERISA or the Code, or under "any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization rule or regulation."[21] However, security or investment option values provided in the manners described in the preceding paragraph are not pursuant to a reporting or disclosure requirement, and thus would not be within the scope of the carve-out.[22]

An approach that would be better for the plans and retirement investors would be to treat these types of statements of value as falling outside the ambit of the definition of investment advice altogether. This would include, for example, statements of value issued in connection with – (i) participant-level transactions based on unit value net asset values (NAVs) regardless of whether the NAVs are provided as part of an account statement, through a call center, on a website, or other means; (ii) calculation of daily NAV for single plan unitized investment pools within participant-directed plans; and (iii) master trust plan accounting services. Such an interpretation is especially critical, given the need for valuation to be provided separate and apart from any advice or recommendation. Plans and IRA owners need to know the value of investments in the account for various reasons, including required annual tax reporting and required minimum distributions. This valuation information in and of itself should not trigger fiduciary status simply because it relates to the investment or the possibility that, outside of the control or intent of the provider of factual information based on plan or accounting records, it may be considered in making a particular transaction decision.

This interpretation would make sense, as it is common for banks to prepare and provide reports and statements more frequently than required under federal or state law. For example, many

[21] Proposal § 2510.3-21(b)(5)(iii), 80 *Fed. Reg.* at 21,958.
[22] While ERISA § 105(a) requires that plan participants be provided with benefit statements, which arguably might fit into the scope of the carve-out (although this is not clear, since that provision does not specifically require that the benefit statement include a statement of the value of each individual account investment), there is no requirement to provide valuation information through a call center or website, so these would not be covered by the carve-out.

custodians, trustees, and recordkeepers, in addition to providing periodic (*e.g.*, monthly or quarterly) statements, calculate daily net asset values for investment funds and make available continuous access online to current information regarding plan investments. Providing such periodic statements and online access and information is a purely administrative function and should not be considered a fiduciary act. Therefore, the Department should revise the Proposal to exclude from its coverage any statement of value that is not intended as investment advice.

**b. Valuation of Collective Investment Funds and Other Plan Asset Vehicles with One Plan Investor.**

The Proposal carves out from the definition of investment advice a statement of value of an "investment fund such as a collective investment fund . . . in which more than one unaffiliated plan has an investment, or which holds plan assets of more than one unaffiliated plan."[23] The Proposal, however, omits from the carve-out any investment fund, including unitized funds and separately managed accounts (such as a custom target-date fund) (collectively, Funds) that has only one plan investor. Banks administering these Funds, however, may have only one plan investor in a particular Fund for a variety of reasons, such as when the Fund is a start-up fund, when the Fund is winding down and has only one investor remaining, or when the Fund is a plan asset vehicle with a single plan investor that holds an interest exceeding twenty-five percent. A bank should not be penalized for providing valuations in connection with the establishment or and termination of a Fund, or in other valid instances in which only one plan investor is in the Fund. The Proposal, therefore, should delete the above-quoted language to accommodate Funds in this relatively common situation.

**5. Disclosures and Other Account Information (*e.g.*, Analytics Reports).**

The Department should further clarify that the provision of disclosures and other account information (*e.g.*, performance reports, account statements, transaction reports, confirmations, etc.) does not constitute investment advice. For example, analytics reports regarding (i) plan performance, (ii) an investment manager's performance, (iii) an investment manager's compliance with investment guidelines, or (iv) collateral management optimization, are informational only and do not involve rendering investment advice. Banks acting as directed trustees and custodians can assist plan sponsors and fiduciaries with their fiduciary oversight responsibilities by providing various analytics reports without rendering advice. Plan sponsors provide the criteria for the service provider's analysis, and the bank service provider relies upon industry benchmarks or risk-return data obtained from third parties or proprietary algorithms that are commonly utilized and not customized by the plan sponsor.

Similarly, a service provider may utilize reporting tools to filter for investment managers that satisfy the plan sponsor's criteria for a particular investment mandate. In this instance, the database of investment managers (including performance data) is provided by a third party. The plan sponsor provides the selection criteria and the reporting tools are not customized by the plan sponsor. Also, a bank service provider may provide reporting on an investment manager's compliance with the plan sponsor's investment guidelines, on a post-trade basis, if such manager makes an investment that does not appear to be within the investment guidelines. Similarly, the

[23] Proposal § 2510.3-21((b)(5)(ii), 80 *Fed. Reg*. at 21,958.

bank may provide analytical reports, applying an algorithm to numerical inputs provided by the plan sponsor, to provide a ranking of securities to meet the plan's collateral obligations.

The bank offers no investment advice when providing the aforementioned reports. It makes no recommendation regarding actions that might be taken by the plan sponsor as a result of such reporting. We believe such reports would be important information for a plan fiduciary to have in appropriately discharging its responsibilities to the plan; however, such information is unlikely to be made available by the bank service provider if merely providing such reports were to trigger fiduciary status under the Proposal. Consequently, the Department should confirm that a trustee's or custodian's provision of analytic reports to the plan, participant, beneficiary, or IRA owner does not trigger fiduciary status under the Proposal.

In addition to analytics reports, banks provide routine disclosures regarding account operations. These disclosures may contain information regarding investments held in a plan or IRA. For example, a bank may send information regarding a sweep option that, by definition, concerns an investment under the account, or comparison tools, but does not make any recommendation concerning securities or other property. Therefore, the Department should confirm that operational disclosures and communications are not, in and of themselves, "advice" triggering fiduciary status under the Proposal.

#### 6. <u>Health Savings Accounts, Archer Medical Savings Accounts, and Coverdell Education Savings Accounts</u>.

In addition to IRAs, the Department is considering whether to apply the Proposal to health savings accounts (HSAs), Archer Medical Savings Accounts, and Coverdell Education Savings Accounts (collectively, Non-IRA Accounts). The Department points out that, similar to IRAs, Non-IRA Accounts are given tax preferences under the Code, are subject to the Code's prohibited transaction rules, and (in the case of HSAs) can be used as long-term savings accounts for retiree health care expenses.[24] Non-IRA Accounts, however, differ significantly from IRAs in that they generally hold fewer assets and have shorter investment horizons. If included within the Proposal, there is serious danger that such accounts likely would lose many of the institutions that today provide services due to the small asset size of the accounts, when weighed against the cost to service such type of account under the Proposal. For these reasons, Non-IRA Accounts should be excluded from the Proposal's coverage.[25]

## B. <u>Proposal's Definitions</u>.

### 1. <u>Proposed Rule</u>.

#### a. <u>Definition of "Recommendation</u>."

The Proposal's overbroad definition of a person who renders investment advice (and therefore becomes a "fiduciary" under Proposal) hinges on the Department's use of the term

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[24] 80 *Fed. Reg.* at 21,947.

[25] *See* ABA HSA Council comment letter to the Department (July 21, 2015) for a detailed discussion on the application of the Proposal to HSAs.

"recommendation," which it defines to mean "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."[26] Equating the words "recommendation" and "suggestion" in this way, when coupled with a strict liability prohibited transaction regime, could actually harm retirement investors and is, we believe, unwarranted. Making a "suggestion" a basis for fiduciary responsibility is an unprecedented stretch of the term that belittles the concept of fiduciary duty while effectively silencing communication that can be worthwhile to retirement investors.

Inclusion of the word "suggestion" within the term "recommendation" captures a vast swath of written or oral communications that are not intended as a *bona fide* recommendation. This will serve only to cut off or stifle a retirement provider's conversations with its retirement customers and potential customers, for fear that any such conversation could be deemed a "fiduciary" action.

The definition, therefore, should 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 request that the definition of "recommendation" be revised to read, "a communication that is a *clear, affirmative statement of active endorsement and support for* the advice recipient to engage in or refrain from taking a particular investment course of action that is based on the individual needs of the advice recipient." This would ensure that both the retirement services provider and the retirement customer would be able to know when a recommendation is genuinely taking place.

**2. <u>Best Interest Contract Exemption</u>.**

The Proposal includes a proposed new Prohibited Transaction Exemption, the "Best Interest Contract Exemption,"[27] intended to allow fiduciaries to receive compensation that would otherwise not be permitted under ERISA and the Code while reaching to Proposal's objective of ensuring that the fiduciary's advice is in the best interest of its customers.[28] The purpose of the BICE appears to be to continue to allow current compensation arrangements between banks and mutual funds (for example, 12b-1 fees paid to the bank for services provided to the fund), provided its multiple conditions are satisfied. Banks that become fiduciaries as a result of the Proposal and that are not eligible to rely on the BICE would be exposed to the prohibited transaction provisions of section 406 of ERISA and section 4975 of the Code for any compensation received from a mutual fund or other investment product recommended (or possibly merely made available) by the bank to its IRA or other retirement plan customers. Consequently, any bank that wishes to receive, or continue receiving, compensation from such arrangements would be required to rely on the BICE in the absence of any other available exemption. As noted above, clarifying that general disclosures and operational communications are not considered "investment advice" under the Proposal would help ensure that a bank does not feel compelled to rely on the BICE simply based on the Proposal's lack of clarity and the bank's reasonable desire to avoid prohibited transactions.

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[26] Proposal § 2510.3-21(f)(1), 80 *Fed. Reg.* at 21,960.
[27] *See* Proposed Best Interest Contract Exemption, 80 *Fed. Reg.* 12,960 (Apr. 20, 2015).
[28] *Id.*

**a. <u>Definition of "Financial Institution</u>."**

The BICE provides that a "financial institution" and its affiliates and related entities are the only corporate entities eligible to rely on the BICE. Under the BICE, the definition of "financial institution" reads in relevant part: "A bank or similar financial institution . . . *but only if the advice resulting in the compensation is provided through a trust department of a bank*." Since many banks, including community banks, do *not* have a trust department, they would be categorically excluded from relying on the BICE, and therefore, effectively unable to serve their IRA customers.

There is no policy reason for this arbitrary distinction being included in the BICE, which would only serve to drive these banks from the IRA marketplace altogether. Banks without trust departments routinely and successfully serve IRA customers through the retail portion of their branches. There is no requirement for banks to operate a trust department in order to provide IRA products and services. The Department, therefore, should delete from the BICE the qualifying requirement that banks provide advice through a trust department (see the italicized language referenced above), so that *all* banks may continue serving their IRA customers.

**b. <u>Definition of "Asset</u>."**

Reliance on the BICE is limited to a fiduciary's offering of certain types of assets to retirement investors. The BICE defines an "asset" generally as bank and insurance products, U.S. government and corporate debt, and registered equity securities.[29] This is a narrow range of assets and does not reflect the state of the current investment environment. A great number of plans and IRAs are invested in non-registered assets such as real estate, limited partnerships, hedge funds, private equity funds, commodities (such as minerals, oil, and gas) and other alternative investments. The Proposal therefore should be modified to allow for such assets to be included within the BICE.

**C. <u>Proposal's Carve-Outs</u>.**

In the Proposal, the Department has set forth certain "carve-outs" to the definition of investment advice. As a threshold matter, many of the concerns we raise below regarding these "carve-outs" exist because the Proposal as currently structured is overbroad. Accordingly, there are considerable risks to what we believe are appropriately excluded activities if the "carve-outs" fail to be sufficiently inclusive and flexible.

**1. <u>Counterparty Transactions (Seller's Carve-Out)</u>.**

The first carve-out is the so-called "seller's" carve-out, which permits advice to independent plan fiduciaries who represent large plans (*i.e.*, those with 100 or more participants) or who manage $100 million or more in employee benefit plan assets, in connection with an arm's length sale, purchase, loan, or bilateral contract.[30] The Proposal states that the purpose of this carve-out "is to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length

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[29] *See* 80 *Fed. Reg.* at 21,987.
[30] Proposal § 2510.3-21(b)(1), 80 *Fed. Reg.* at 21,957.

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."[31]

The proposed seller's carve-out raises four issues. First, it may be impractical to set a hard limit of 100 participants and $100 million in assets as thresholds without allowing for flexibility in instances where plans or advisers might drift below these numbers temporarily, or might fluctuate between these thresholds, over the course of the year. In order to avoid this result, when dealing with a single plan relationship, the Proposal should be amended to allow for 100 participants or for a relevant assets test in two of the last three calendar years, or as reported on the plans' Form 5500, so that business relationships between providers and plans are not disrupted or inadvertently fall outside the scope of the carve-out.

Second, the carve-out is too narrow for the routine business relationship between the adviser and these plans. Specifically, the carve-out should encompass the *entire* relationship between the adviser and the plan and not be limited to sales pitches and business transactions. Here, the adviser deals with an independent plan fiduciary which itself is an ERISA fiduciary over a large plan and thus should have the degree of financial sophistication and business expertise necessary to represent capably the interests of the plan and its participants. The conditions laid out in the carve-out[32] could be part of the overall contractual relationship between the two parties, thus ensuring that the independent plan fiduciary is sufficiently protecting the plan and its participants.

Third, the seller's carve-out does not apply to plan participants or IRA owners, or to any plan with fewer than 100 participants (unless the plan is managed by a fiduciary with at least $100 million of employee benefit plan assets under management). The carve-out, therefore, should be extended to *retail and small plan* transactions in order to determine the point at which investment advice is rendered to the individual. As discussed above, without the seller's carve-out, banks providing IRA services to their customers, for example, would not know when routine conversations about IRAs would cross over into "recommendations," or whether a bank's merely providing its customer a complete list of the bank's offered investment products by itself and not intending to make any recommendations, would nevertheless trigger fiduciary status. Uncertainty over when the line would be crossed into investment advice would make it extremely difficult to serve their IRA customers, and may simply lead to a bank – (i) relying on the section 408(b)(4) exemption by placing IRA assets solely in bank deposit products, (ii) giving the customer the option to transfer to a higher-fee investment management advisory account, (iii) terminating the customer relationship, or (iv) refraining altogether from accepting any IRA business.[33] Permitting retail transactions to come within the seller's carve-out would not reduce consumer protections. Any such concerns could be addressed simply by prohibiting "boilerplate disclaimers" that the Department asserts could be used to avoid fiduciary status.

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[31] 80 *Fed. Reg.* at 21,941.

[32] Proposal § 2510.3-21(b)(1)(i)(B) & (C), 80 *Fed. Reg.* at 21,957.

[33] *See Sutherland Legal Alert* at 9 ("The absence of a carve-out for IRA platforms, however, creates an 'inadvertent fiduciary' problem – the point at which *the marketing of the platform crosses into fiduciary investment advice cannot be determined in advance with certainty* – for which the proposed complex of exemptions may not provide a workable solution.") [Emphasis added.]

Finally, under the Proposal, the counterparty carve-out is available only with respect to a sale, purchase, loan, or bilateral contract. Significantly, it is not clear whether the carve-out applies to services. Thus, the carve-out may mean that even incidental advice from a service provider that is specifically directed to the plan becomes fiduciary investment advice, even with the largest, most sophisticated clients. The counterparty carve-out, therefore, should be amended to clarify that it is available with respect to all services so that services/service arrangements are not inadvertently captured within the definition of investment advice.

**2. Swap Transactions.**

Under the Proposal, the swap and security-based transactions carve-out[34] applies to communications in connection with swap transactions regulated under the Securities Exchange Act or the Commodity Exchange Act, if the conditions of the carve-out are met. The carve-out applies only to plans that are represented by a fiduciary independent of the swap counterparty. It does not appear to apply to collective investment funds and other pooled funds that hold plan assets and that engage in swap and security-based transactions. This is an inconsistent result and disadvantages these types of funds that act as swap parties and counterparties. The Proposal, therefore, should be amended to permit collective investment funds and other pooled funds holding plan assets to rely on this carve-out.

**3. Platform Provider and Selection and Monitoring Assistance.**

The Proposal's carve-outs for platform providers and related "selection and monitoring assistance" are intended to exempt retirement plan service providers who offer a platform of investment funds from which plan fiduciaries may choose a diverse line-up of investment options for their plans, as well as certain common activities that platform providers may carry out to assist plan fiduciaries in selecting and monitoring the investment alternatives that they make available to plan participants.[35] The availability of this type of investment platform in the marketplace, however, is not limited to participant-directed defined contribution plans. Missing from the carve-out are plans whose investments are made, in whole or in part, *directly* by the plan fiduciary rather than by the plan participants. Platform providers should be able to provide their services to these plans on the same basis as provided to plans that are entirely participant-directed.

The carve-out, therefore, should be amended to include not only participant-directed plans but *all* plans where the investments are made directly by the plan fiduciary, including non-participant-directed defined contribution plans, participant-directed defined contribution plans that include contribution sources (*e.g.*. employer nondiscretionary contributions) that are invested by a plan fiduciary, defined benefit plans, and welfare benefit plans. Further, banks and other platform providers should be able to offer the same assistance to IRA owners to help them narrow the universe of available investment options on the platform, using objective criteria and tools.

[34] *See* Proposal § 2510.3-21(b)(1)(ii), 80 *Fed. Reg.* at 21,957.
[35] Proposal at § 2510.3-21(b)(4), 80 *Fed. Reg.* at 21,958.

### 4. **Investment Education**.

The Proposal provides a carve-out for the provision of investment materials to a retirement investor, provided that the materials do not include "recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations on investment, management, or value of a particular security or securities, or other property."[36] The Proposal contrasts sharply with the Department's Interpretive Bulletin 96-1 (Bulletin), which currently allows investment materials to include information on specific investment alternatives, provided the materials include a statement that information on other investment alternatives having similar risk and return characteristics may be available under the plan and identify where information on the alternatives may be obtained. The Department now proposes to replace the Bulletin with the substantially more restrictive Proposal.

Although it believes that the framework under the Bulletin could be used to steer recipients to particular investments "without adequate protections against potential abuse," the Department has not provided or referenced any evidence, statistics, or other data that show any such abuse in the marketplace. On the contrary, bank service providers have found that participants and IRA investors more clearly understand investments and investment alternatives when statistics and data on sample asset allocations and funds are shown. Customers have further appreciated and valued the ability to review illustrations of actual investments in order to recognize and understand particular investment strategies. If this meaningful investment education experience were removed, customers would be unlikely to see how particular investment and asset allocation strategies are actually applied. The Proposal's goal to protect the retirement investor would result in *reduced* investor education and understanding. Consequently, we request that the Department retain and incorporate into the Proposal's carve-out for investor education the ability to reference specific investments.

## D. **Procedural Issues**.

### 1. **Applicability Date**.

The Proposal states that a final rule would be effective 60 days after publication and that the requirements of the rule would generally become applicable eight months after the final rule's publication.[37] The Department states that this "is intended to balance the concerns raised by commentators about the need for prompt action with concerns raised about the cost and burden associated with transitioning current and future contracts or arrangements to satisfy the requirements of the final rule and any accompanying prohibited transaction exemptions."[38] Given the volume, complexity, and uncertainties of the Proposal, and its ambitious reformation and restructuring of entire portions of the retirement services industry, this is simply an unrealistic and unworkable deadline, more likely to work to reduce availability of services to retirement investors where inadequate time is available for designing compliance regimes.

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[36] *Id.*
[37] *Id.* at 21,950.
[38] *Id.*

In order to comply with the Proposal as written, affected banks would need to make business decisions that affect their entire line of retirement services, restructure that business, renegotiate and revise compensation packages and structures, renegotiate fee and service arrangements with third parties, create and implement bank policies and procedures, create and modify software and other technology systems to record, produce, and store significant amounts of new data, draft new contracts for IRA customers, and enter into contracts with all existing retirement customers. In addition, every current customer account would need to be reviewed, evaluated, and revised as necessary to take account of the Proposal's requirements.[39] 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 delivery of retirement services, eight months not only is unrealistic but the proposed implementation timeframe also greatly underestimates the magnitude of resources, labor, and costs required for the retirement services industry to comply with the Proposal. The Department, therefore, should extend the applicability date by at least 36 months from the effective date of any final rule.

### 2. **Stay on Enforcement.**

As noted above, under the Proposal, the rule's requirements generally would become applicable eight months after the final rule's publication. As it would likely take at least 36 months for banks to make all the necessary changes in order to ensure uninterrupted service to investors, we recommend that the Department provide a stay on enforcement of the Proposal for at least 36 months from the effective date (which should extend to the Internal Revenue Service as well for purposes of Code section 4975). 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.

### 3. **Amendment of Existing Contracts.**

The Proposal would require banks to amend significantly their existing contracts with customers in order to continue providing retirement products and services. This could involve contracts numbering in the thousands (or greater). In order to manage responsibly the tremendous burden this would place on bank staff, time, costs, and resources, we request that the Department permit banks and other product and service providers to use a "negative consent" approach to obtain customer approval of the amended contracts. This would involve notifying customers of all the changes effected by the final rule and informing them that all such changes to the contract will be deemed accepted by the customer unless the bank receives a written notice from the customer within a specified time period. This approach would facilitate the transition to the rule's new requirements and ensure that customers are able to continue relying on their bank to provide their retirement services.

## IV. **Conclusion.**

The Department has put forth a tremendous effort to improve the protection of the interests of plans and their participants and beneficiaries, and of the interests of IRA owners, as they work toward achieving a secure retirement. We appreciate and share the Department's goal of

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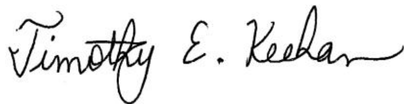
[39] *Cf.* Legal Memorandum from Davis & Harman LLP (Apr. 20, 2015).

providing individuals with the ability and means to maximize their retirement investment opportunities and returns. We believe, however, that the Proposal's blanket restructuring of the marketing, products, services, compensation, and administration of the retirement services industry is a misguided approach fraught with significant risks, costs, and uncertainties for retirement investors and the firms that supply their services.

Therefore, after the conclusion of hearings on the Proposal, the Department should withdraw the Proposal and consider how an amended Proposal might achieve its goals in a less intrusive manner. Among other things, the amended Proposal should provide for a more precise and targeted definition of the term "fiduciary" that would exclude entities and activities, such as those described herein, that are generally considered by retirement investors to be outside the scope of the term. We would be glad to work with the Department as it evaluates how to improve the 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 Department's objectives.

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

Sincerely,



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