M&T Bank Corporation

One M&T Plaza, Buffalo, New York 14203 PH 716 842-5464 FX 716 842-5376
e-mail: byoshida@mtb.com

Brian R. Yoshida
Senior Vice President and Deputy General Counsel

March 17, 2017

VIA Electronic Submission to the Federal eRulemaking Portal
The Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Fiduciary Rule Examination
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N–5655
Washington, DC 20210

Re: RIN 1210-AB79: Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice and Corresponding Prohibited Transaction Exemptions (ZRIN 1210-ZA25)

To Whom it May Concern:

M&T Bank Corporation and its affiliates (collectively, "M&T") appreciate the opportunity to provide comments to the Department of Labor (the "Department") regarding the proposed rule, published in the Federal Register on February 3, 2017, that would amend the Applicability Date[1] of: (1) RIN 1210-AB32: Definition of the Term "Fiduciary" Conflict of Interest Rule – Retirement Investment Advice; and (2) the corresponding Prohibited Transaction Exemptions created or modified by ZRIN 1210-ZA25 (collectively, the "Fiduciary Rule").

M&T believes that a delay in the Applicability Date of the Fiduciary Rule of 60 days, or even 120 or 180 days, is necessary for several reasons:

(1) The requirements of the Fiduciary Rule required significant technological enhancements and improvements described below, including the development of software by third-parties, the implementation of which was not, despite diligent efforts, feasible under the original implementation timeline, leaving Financial Institutions to rely on manual solutions and workarounds in order to comply with the rule on April 10, 2017;
(2) There remain many open questions regarding key provisions of the Fiduciary Rule that continue to cause significant industry and consumer confusion;

[1] All capitalized terms not defined herein shall have the meaning set forth in RIN 1210-AB32: Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice (29 CFR Parts 2509, 2510, and 2550).

(3) As the Department noted in the Proposed Rule delaying the Applicability Date, it will need additional time beyond the current Applicability Date to conduct a meaningful review and analysis of the Fiduciary Rule in light of President Trump's February 3, 2017 Memorandum on the Fiduciary Duty Rule (the "Presidential Memorandum");
(4) Significant litigation matters remain pending which could lead to alterations or amendments to the Fiduciary Rule; and
(5) In light of the various issues identified, moving forward with the original Applicability Date of April 10, 2017 will likely cause significant confusion amongst, and harm to, consumers.

Each of these reasons warranting a delay in the Applicability Date of the Fiduciary Rule will be addressed in more detail below.

In response to the Department's request for "comments on whether it should delay applicability of all, or only part, of the final rule's provisions and exemption conditions," M&T believes that all of the final rule's provisions and exemption conditions should be delayed. There already exists a significant amount of both industry and consumer confusion surrounding the Fiduciary Rule. Delaying only a portion of the Fiduciary Rule and the exemption conditions less than 1 month before the Applicability Date will undoubtedly cause additional confusion amongst the financial services industry and the investing public. Moreover, should the Department determine that revisions to, or even rescission of, the Fiduciary Rule are warranted, allowing a portion of the rule to become applicable and then revising or rescinding that portion of the rule will cause even more confusion and unnecessary industry disruption.

The Original Implementation Timeline Was Compressed and Not Feasible

As the Department is aware, the Fiduciary Rule significantly modified the regulatory landscape applicable to certain types of Financial Institutions that provide Investment Advice to Retirement Investors. In particular, the requirements of the Best Interest Contract Exemption (PTE 16-01) (the "BIC Exemption") required a considerable number of technological enhancements and modifications, such as the need to restrict certain types of trading activities or securities from being sold into retirement accounts, modifying compensation systems to account for newly designed compensation plans, and implementing enhanced financial planning software to be able to more comprehensively demonstrate compliance with the Impartial Conduct Standards.

The timeline for implementation of the Fiduciary Rule was approximately one year from publication of the final rule in the Federal Register to the Applicability Date. During that time, several critical and sequential steps needed to take place, including analysis of the Fiduciary Rule, analysis of any "gaps" in the Financial Institution's technological systems, development of enhancements and new software, and implementation of those enhancements and new software.

In many cases, development of technological enhancements and new software remains on-going or is nearing completion. As a result, on April 10, 2017, when the Fiduciary Rule is currently set to become applicable, Financial Institutions will likely just be learning how to use newly-implemented software and using real client situations as "test cases" for that software. In other circumstances where software is still in development, Financial Institutions will be employing a series of patchwork systems and manual "workarounds" to meet the requirements of the Fiduciary Rule.

Implementing technological solutions "live" without time to properly test them before implementation and using patchwork systems and workaround solutions will cause substantial disruption to the industry, lead to significant increased costs of manual labor for Financial Institutions, and result in a poor client experience for Retirement Investors or, worse yet, trade errors or other activities that are harmful to consumers. Moreover, once the technological solutions are implemented at some later date, clients may be subjected to new standards or redundant requests from Financial Institutions to "on-board" those clients onto the new technological platforms.

Simply put, the original timeline for implementation of the Fiduciary Rule did not properly account for the significant number of technological upgrades and enhancements that would be necessary or the need for Financial Institutions to rely on third-parties not governed by the Fiduciary Rule to develop those solutions. As a result, Financial Institution costs will significantly increase, client experiences will be adversely impacted, and neither side of the relationship between client and Financial Institution will be benefited.

In completing its analysis of the costs and benefits of the proposed delay, the Department should expressly consider the increased costs that Financial Institutions will face from having to implement manual processes and workarounds for technological systems that will not be ready by April 10, 2017. A delay of 60 days would reduce that impact and allow Financial Institutions and their technology partners to more fully complete the enhancement, development, and integration of technological systems and software and would improve the client experience as a result. A delay of 120 or 180 days would enable Financial Institutions to properly test all technological solutions and implement them in a systematic way that minimizes unnecessary expenses and ensures clients are fully informed of the changes they will experience.

Significant Confusion Still Surrounds Key Provisions of the Rule

The Department should also delay the Applicability Date of the Fiduciary Rule to address significant confusion about some of the key provisions of the Fiduciary Rule that continues to persist in the financial services industry. By way of example, the following significant issues have not yet been addressed by the Department:

(1) Can Financial Institutions that charge clients a level fee based on assets under management rely on the Level Fee Fiduciary provisions of the BIC Exemption if they receive third-party payments (such as 12b-1 fees) but rebate those fees to their clients or use those third-party payments to offset the fee owed by their clients?
(2) Can Financial Institutions that offer Individual Retirement Accounts that are limited to deposit products with a "bank or similar financial institution supervised by the United States or a State" rely on the statutory exemption contained in § 4975(d)(4) of the Internal Revenue Code to cover recommendations to rollover investments from other retirement accounts?

With respect to the first question, many industry participants and legal experts have opined that rebating any fees received from third-parties would be sufficient, under longstanding analogous Department of Labor guidance, to bring Financial Institutions under the definition of a Level Fee Fiduciary. During a public appearance by the Deputy Assistant Secretary for Program Operations of the Employee Benefits Security Administration, however, it was stated that the definition of Level Fee Fiduciary was intended to exclude those Financial Institutions. The Department, itself, has never publically addressed this concern to enable the financial services industry to know how the Department will interpret and apply the Level Fee Fiduciary definition, thereby seriously hindering Financial Institutions' good-faith efforts to comply with the rule.

With respect to the second question, as the Department is likely aware, the American Bankers Association engaged the law firm of Morgan, Lewis & Bockius LLP to prepare a Briefing Paper on the impact of the Fiduciary Rule on Bank IRA Deposit Programs which was released on August 24, 2016 (the "Briefing Paper"). The Briefing Paper concluded, amongst other things, that "it is reasonable to read the exemption [under Internal Revenue Code § 4975(d)(4)] as covering all aspects of the investment advice that leads to the Bank deposit investments, including the rollover advice." Many Financial Institutions and legal professionals believe that the Department will interpret the exemption contained in § 4975(d)(4) differently. Accordingly, industry participants and legal experts have asked the Department for clarification on whether the exemption contained in § 4975(d)(4) also applies to recommendations to rollover assets from one retirement plan to another. To date, there has been no guidance put forth by the Department regarding this very important issue, again inhibiting Financial Institutions' good-faith efforts to comply with the rule.

In addition to those open questions, the Department itself has, as recently as January 13, 2017, created significant confusion regarding the scope of applicability of the Fiduciary Rule. Specifically, in its second set of FAQs, just prior to President Trump's inauguration, the Department took the position that the re-investment of assets which are distributed from a

retirement account pursuant to a Required Minimum Distribution ("RMD") under the Internal Revenue Code are subject to the Fiduciary Rule if the advice given on the subsequent investment was given before the assets were distributed from the retirement account. This interpretation leads to the illogical result that whether advice will be considered fiduciary in nature will be determined **solely** by the timing of when the advice is given.

Under the Department's interpretation, a Financial Institution could avoid giving fiduciary advice, and thus avoid the many requirements of the BIC Exemption, if it simply waited until client assets were distributed pursuant to an RMD before giving advice on the subsequent investment of those funds. That approach, however, would lead to periods of time where client assets were not invested, which would be detrimental to consumers and runs directly contrary to the very purpose of the Fiduciary Rule. Alternatively, Financial Institutions would need to create additional technological systems and/or make additional technological changes to ensure that appropriate documentation, disclosures, etc. are given for the investment of assets into non-retirement accounts to cover this scenario.

In order to ensure a smooth implementation of the Fiduciary Rule in a manner that minimizes both consumer and industry confusion, the Department should delay the Applicability Date of the Fiduciary Rule to clarify these important issues.

The Completion of the Analysis Required by President Trump's February 3, 2017 Memorandum Will Likely Not Be Completed Before the Current Applicability Date

The Presidential Memorandum signed on February 3, 2017 directs the Department to conduct an analysis of the Fiduciary Rule in light of the following questions:

> (i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
>
> (ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
>
> (iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

M&T believes that this analysis is important for the Department to complete and that once it has done so, the Department will affirmatively answer some or all of the questions set forth in the Presidential Memorandum.

The Regulatory Impact Analysis that was initially conducted by the Department inflated the benefits of the regulation while simultaneously ignoring many of the increased costs that will be associated with the Fiduciary Rule and the potential harm that consumers will suffer as a result of the rule. For example, the private right of action created for class action lawsuits through the BIC Exemption is one that is ripe for abuse and, simultaneously, does not benefit consumers. As the Institute for Legal Reform noted in a 2013 empirical study conducted by Mayer Brown LLP, "[t]he vast majority of [class action] cases produced ***no benefits to most members of the putative class***-even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process (and the lawyers representing the defendants always did)."[2] Indeed, the Acting Chairman of the Securities and Exchange Commission Michael Piwowar has stated that the Fiduciary Rule "was never about investor protection. It was about enabling trial lawyers to increase profits."[3] The Department should consider the significant increase in costs to Financial Institutions, as well as the lack of benefit to consumers, when analyzing the Fiduciary Rule pursuant to President Trump's directive.

Because the Department's analysis is likely to result in an affirmative finding on at least one of the questions posited by President Trump, and thus the need to revise or even rescind the Fiduciary Rule, the Department should delay the Applicability Date for at least 60 days to complete that analysis. As the Department notes in the Proposed Rule published March 2, 2017, "if [its] examination prompts the Department to propose rescinding or revising the rule, affected advisers, retirement investors and other stakeholders might face two major changes in the regulatory environment rather than one." Regardless of one's position on the Fiduciary Rule, no reasonable person could conclude that two major changes in the regulatory environment rather than one would be beneficial to either consumers or the financial services industry.

Significant Litigation Matters Are Still Pending

While many of the litigation matters relating to the Fiduciary Rule have been resolved or have had decisions on preliminary injunctions issued, litigation remains on-going and appeals are

---

[2] *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, Mayer Brown LLP, available at: http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf (emphasis in original).

[3] *Piwowar blasts DOL fiduciary rule, says SEC should have 'comprehensive discussion' of advice standards*, Investment News, available at: http://www.investmentnews.com/article/20170302/FREE/170309975/piwowar-blasts-dol-fiduciary-rule-says-sec-should-have-comprehensive.

either expected, or have already been filed, in a number of matters where the Department was successful. The on-going litigation, standing alone, is sufficient reason for the Department to delay the Applicability Date of the Fiduciary Rule. Should a court find that all, or part, of the Fiduciary Rule is inconsistent with applicable law, further revisions and modifications to the Fiduciary Rule would be necessary and would lead to additional consumer confusion and increased costs for Financial Institutions. The Department need look no further than the November 22, 2016 Preliminary Injunction issued by the Eastern District of Texas in the matter of *State of Nevada et. al v. United States Department of Labor et. al*, Case No. 4:16-CV-00731, to see the types of issues that pending litigation can cause when regulations are set to become effective/applicable before the pending litigation is resolved.

The April 10, 2017 Applicability Date Will Cause Consumer Confusion

In light of the various unresolved issues identified above, moving forward with the April 10, 2017 Applicability Date of the Fiduciary Rule will lead to significant consumer confusion. In order to avoid this needless confusion, the Department should delay the Applicability Date by at least 60 days to allow these matters to be resolved and a well-settled rule to be implemented in a thoughtful and rational manner. A longer delay of 120 or 180 days would only further ensure that the Fiduciary Rule is implemented with full transparency for Retirement Investors in a way that minimizes unnecessary expenses and allows Financial Institutions to focus on serving its clients' needs.

For the foregoing reasons, M&T is supportive of the proposed rule delaying the Applicability Date from April 10, 2017 to at least June 9, 2017, and would further recommend that the Department delay the Applicability Date by 120 or even 180 days.

Sincerely,

Brian R. Yoshida