American Bankers Association
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Office of Exemption Determinations
Employee Benefits Security Administration
Attention: D-11933
U.S. Department of Labor
200 Constitution Ave., NW, Suite 400
Washington, D.C. 20210

Re: Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions – RIN 1210-AB82

Ladies and Gentlemen:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on the agency's Request for Information (RFI) regarding the Department's on-going review of the Fiduciary Rule and the Prohibited Transaction Exemptions (Exemptions). The Department has issued the RFI in connection with its re-examination of the Fiduciary Rule[2] and the Prohibited Transaction Exemptions in order to determine whether the Department should undertake changes or revisions to the Fiduciary Rule and whether to adopt additional exemption approaches.[3] The Department further requests a description of the issues that would best be addressed by changes to the Fiduciary Rule or by providing additional relief through the issuance of one or more Exemptions.

We commend the Department for its efforts to solicit public responses and input to the Fiduciary Rule and the Exemptions. Since taking effect on June 9, 2017 (Applicability Date), however, the Fiduciary Rule already has resulted in bank customers' diminished access to retirement products, and in some cases, elimination of retirement customer services. Fixed annuities are a good example of the kinds of products to which customers have reduced access, according to the ABA

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend more than $9 trillion in loans. Many of these banks are plan service providers, providing trust, custody, and other services for institutional clients, including employee benefit plans covered by the Employee Retirement Income Security Act (ERISA). Our member banks also routinely provide services for retail clients through individual retirement accounts and similar accounts that are covered by the Internal Revenue Code (Code). Learn more at www.aba.com.

[2] The Fiduciary Rule defines who is a "fiduciary" under ERISA and the Code as a result of giving investment advice for a fee or other compensation to a plan or its participants, or to the owner of an individual retirement account (IRA).

[3] *See* Department of Labor, Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 *Fed. Reg.* 31,278 (2017) (RFI).

survey described in this letter, the focus of which will be on bank distribution of fixed annuities and insurance.

II. ABA Survey of the Fiduciary Rule and Fixed Annuities Delivery in Banks.

During July 2017, ABA surveyed member banks about the impact of the Department's Rule on the distribution of fixed annuities, both fixed declared rate annuities and fixed indexed annuities.[4] Slightly more than 150 banks responded to the survey. We found that roughly half of all these banks distribute some form of fixed rate annuities.

Several of the banks indicated they have already stopped selling fixed index annuities in response to the Rule. Other institutions revealed their plans to increase the minimum dollar thresholds for the sale of fixed rate annuities in response to the Rule. Furthermore, banks are still grappling with how to distribute these products now that the Fiduciary Rule is effective. When asked about concerns over litigation, more than half of the respondents currently selling fixed annuities said they were concerned about litigation risk.

We draw three conclusions from this survey. First, and foremost, the Rule is having some negative impact on the sale of fixed annuities to qualified plans and IRAs. This is an unfortunate consequence of the Rule. Second, the Rule is creating a compliance challenge for banks engaged in the sale of fixed annuities as they seek to understand the distinctions between the PTE 84-24 and the Best Interest Contract (BIC) exemption. Third, litigation risk is a real concern.

II. The Definition of Fiduciary Should Differentiate Between Sales Activities and Investment Advice.

Based upon the results of this survey, we respectfully recommend that the Department narrow the definition of a fiduciary under the Rule to more clearly differentiate between sales activities and investment advice. Banks that merely offer annuity products to retirement savers (as well as other forms of insurance such as disability or life insurance) should not be treated as fiduciaries under the Rule. The Rule should apply only if the bank is recommending the insurance product in connection with an evaluation of the customer's financial situation.

There also is no need to subject insurance sales activities to the Rule since such activities already are subject to extensive regulation by state insurance regulators and state and federal banking regulators. This regulatory regime includes prohibitions against unfair or deceptive sales insurance practices that are designed to protect the interests of consumers.

If the Department decides not to narrow the definition of a fiduciary for purposes of the Rule, we urge the Department to revise the exemption process applicable to insurance products, including annuities. Banks should be permitted to select either the PTE 84-24 or the BIC exemption, without regard to the type of insurance product that is offered for sale to a plan or IRA account.

[4] Of the Survey's participants, 86% were community banks (under $10 billion in assets), 5% were midsize banks ($10-$50 billion in assets), 1% were regional banks ($50-$100 billion in assets), and 7% were large banks (over $100 billion in assets). ABA Survey on bank fixed annuities distribution (July 28, 2017).

For example, banks should be able to use either the PTE 84-24 exemption or the BIC exemption in connection with the sale of a fixed index annuity. In other words, the exemptions available to insurance products should not be based upon the type of product offered. Furthermore, we recommend that the Department review and simplify the reporting and disclosure requirements associated with the both exemptions.

III. <u>Insurance Sales Activities Should Not be Treated as Fiduciary Activities.</u>

We appreciate that the Rule has provisions designed to accommodate insurance sales activities; however, as discussed above, we believe the Rule is overly broad, capturing activities that, in our view, do not constitute investment advice. Insurance sales activities should not be treated as fiduciary activities.

We also appreciate that the Rule provides that "investment property" does not include health or disability insurance policies, term life insurance policies, or other property to the extent the polices or property do not contain an investment component.[5] Despite that provision, however, we are concerned with the impact of the following conflict of interest FAQ issued by the Department earlier this year:

> Q4. An investment adviser who is also a licensed insurance agent approaches a client who will soon begin receiving minimum required distributions from the client's 401(k) plan accounts and IRAs. The adviser recommends that once the client receives these required minimum distributions they should be used to fund a permanent life insurance product. The investment adviser in his or her capacity as insurance agent will receive a commission on the sale of the permanent life insurance product. Is the recommendation of the permanent life insurance product investment advice covered by the Rule?
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> Yes. Because the minimum required distributions are compelled by the Code, the adviser has not recommended a distribution from a plan or IRA simply by explaining the tax requirements and telling the plan participant that the law requires those distributions. However, the adviser has made a recommendation as to how securities or other investment property of a plan or IRA should be invested after the funds are distributed from the plan or IRA within the meaning of paragraph (a)(1)(i) of the Rule.[6]

While permanent life insurance has a savings component, it is primarily an insurance product and is regulated as such by state insurance regulators. Therefore, we recommend that the Department revise the definition of "investment property" to exclude any product regulated as insurance by state insurance authorities. This would ensure that retirement savers have access to different forms of insurance. Without this modification, the Rule would have the negative impact of reducing consumers' access to retirement product structures.

Additionally, we ask the Department to clarify that the Rule does not apply to minimum distributions once the funds have been distributed and are no longer in a retirement plan. In the

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[5] 29 C.F.R. § 2510.3-21(g)(4).
[6] https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf.

above cited FAQ, the advice was provided before the minimum distribution. After a minimum distribution, it is impossible for an insurance agent to determine if insurance premiums are paid with the proceeds from the distribution or from funds that were already in an account. Clarifying this issue would avoid dislocations or disruptions for insurance agents and insurance agencies that would adversely affect consumers.

Furthermore, we recommend that the Department clarify that periodic distributions from retirement plans into insurance policies that were entered into *before* the applicability date of the Rule are exempt from the Rule. The ongoing premiums paid to agents in such cases do not constitute a new recommendation, but are based upon a transaction that occurred prior to the Rule's applicability date. Without this clarification, insurance agencies may be forced to resign as servicing agents on these policies, and the policyholders would lose the benefit of their expertise to address questions regarding the policies. This clarification would avoid dislocations or disruptions for insurance agents and insurance agencies that would adversely affect consumers.

VI. Conclusion.

For the reasons stated herein, and in accordance with the Presidential Memorandum's directives, the Department either should rescind or revise the Fiduciary Rule and the Exemptions as described in this letter. If the Department decides to make revisions, then it should strive for an amended Fiduciary Rule that would provide for a sharpened, targeted definition of the term "fiduciary" that would provide discernible boundaries and certainty of compliance. If such revisions are not made, we believe that the Fiduciary Rule and the Exemptions will continue to make it difficult, complex, and costly for banks to deliver the insurance and annuities products, services. In such event, customers will continue to experience reduced or eliminated access to retirement products and services. Moreover, the inability of financial institutions to determine fiduciary status with certainty increases liability risk and will result in increased litigation, resulting in higher costs for consumers.

Thank you for consideration of these views. If you have any questions or require any additional information, please do not hesitate to contact the undersigned at 202-663-5072. (dmarino@aba.com).

Sincerely,

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Senior Vice President and Executive Director, ABA Bank Insurance Council