Statement for the Record

On Behalf of the

American Bankers Association

Before the

Subcommittee on Capital Markets

Of the

House Financial Services Committee

January 10, 2024

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Building Success. Together.

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The American Bankers Association[1] (ABA) appreciates the opportunity to provide a Statement for the Record for this hearing titled: Examining the DOL Fiduciary Rule: Implications for Retirement Savings and Access.

Summary

The ABA strongly supports the committee's interest in examining the proposed amendments to the Department of Labor's (Department) investment advice regulation (Fiduciary Rule) and related prohibited transaction exemptions (collectively, Fiduciary Proposal or Proposal) regarding the expanded circumstances under which a person is considered to be a "fiduciary" under the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the Internal Revenue Code of 1986, as amended (Code).[2]

The ABA shares the Department's goal of providing plans and individuals with the ability and means to maximize their retirement investment opportunities, options, and returns. We believe, however, that the Fiduciary Proposal's wholesale restructuring of the marketing, products,

[1] The American Bankers Association is the voice of the nation's $23.4 trillion banking industry, which is composed of small, regional, and large banks that together employ approximately 2.1 million people, safeguard $18.6 trillion in deposits, and extend $12.3 trillion in loans. Learn more at www.aba.com.

[2] *See* 29 C.F.R. § 2510.3-21 (2023) (Definition of "Fiduciary"). Section 2510.3-21(c) covers the definition of fiduciary for purposes of rendering investment advice.

services, compensation, administration, and eligibility of the retirement services industry is a misguided approach fraught with serious risks, costs, and uncertainties for retirement investors and for the banks and other organizations that supply their services. We recommend therefore that the Department **withdraw the Fiduciary Proposal** in its entirety.

I. Introduction

The Fiduciary Proposal provides (i) a new regulatory definition of "fiduciary" when a person renders investment advice for a fee or other compensation for purposes of Title I and Title II of ERISA, and (ii) related proposed amendments to Prohibited Transaction Exemption 2020-02 (PTE 202002) and several other administrative exemptions from the prohibited transaction rules applicable to fiduciaries under ERISA.[3]

Retirement investors have long looked to and relied on their bank to provide retirement services, including investment products, retirement planning, and investor education, in order to achieve a secure financial retirement. When acting in an ERISA fiduciary capacity, banks have always sought the best interest of their retirement customers and take great pride and satisfaction in successfully serving their customers' retirement needs. We agree with the Department that retirement service providers, when acting as ERISA fiduciaries, should act in the best interest of customers and that such customers deserve protection from financial abuse. We also believe that regulations should be carefully crafted to meet their objectives without stifling the delivery of retirement products and services to customers, or capturing communications, conversations, or relationships that are not appropriately regarded as fiduciary in nature.

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

The ABA believes that the Fiduciary Proposal neither demonstrates a compelling need to undertake a drastic regulatory reset nor employs the least burdensome tools to effect such change. On the contrary, we believe that the Proposal is overbroad and overreaching, and that it captures numerous persons and entities who provide valuable services to plans, plan fiduciaries, plan participants and beneficiaries, and IRA owners but who should not be viewed as, nor

[3] *See* U.S. Department of Labor, Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 *Fed. Reg.* 75,890 (2023) (Fiduciary Rule); 88 *Fed. Reg.* 75,979 (PTE 2020-02); 88 *Fed. Reg.* 76,004 (PTE 84-24); 88 *Fed. Reg.* 76,032 (PTEs 75-1, 77-4, 80-83, 83-1, and 86-128).

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

reasonably considered to be, a "fiduciary" under ERISA and the Code. If adopted in its current form, the Proposal is likely to harm the very plans, plan participants and beneficiaries, and IRA account owners that the Department is seeking to protect by making it extremely and unnecessarily difficult, complex, and costly for banks to make and deliver the products, services, and information necessary, helpful, and appropriate for achieving a financially sound retirement. As a result, the retirement planning benefits provided to these institutions and individuals will be significantly reduced or altogether eliminated.

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

We recommend therefore that the Department **withdraw the Fiduciary Proposal** and, following the suggested procedures described herein, research, analyze, and evaluate regulatory alternatives that are less burdensome and costly, and re-submit for public review and comment an amended Proposal that is more appropriately targeted to achieve the Department's regulatory objectives. If the Department proceeds with the Proposal, then we recommend that the Department adopt all of the recommendations described herein.[6] We believe these recommendations, if implemented in full, not only would provide tangible benefits to retirement investors but also would work to mitigate the compliance uncertainty, excessive administrative costs, and liability risks presented by the Fiduciary Proposal.

II. The Fiduciary Proposal

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

The Department proposes to expand part (ii) above of the statutory definition by re-interpreting what it means for a person to render "investment advice for a fee or other compensation" under

[6] *See* Sections IV(A) through IV(P), *infra.*
[7] ERISA § 3(21)(A); *see also* Code, 26 U.S.C. § 4975(e)(3). [Emphasis added.]

ERISA and the Code. The Proposal provides that a person becomes a fiduciary when such person provides investment advice or makes a recommendation to a "retirement investor" (defined to include a plan, plan fiduciary, plan participant or beneficiary, and IRA and its owner and fiduciary) for a direct or indirect fee or other compensation, and one of the following is true:

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

(2) The person:

- Directly or indirectly makes investment recommendations to investors on a regular basis as part of such person's business, and

- Provides a recommendation to a retirement investor under circumstances indicating that the recommendation:

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

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

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

The Proposal would replace the current five-part test of the Department's regulations,[9] which the Department continues to believe allows a number of investment professionals, consultants, and advisers to be free of any obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules governing fiduciary conduct, although the Department has not cited to any such incidents in the preamble.[10] The proposed reworked definition, the Department argues, "better reflects the text and the purposes of the statute and better protects the interests of retirement

[8] *See* Proposal, 29 C.F.R. § 2510.3-21(c)(1) (proposed), 88 *Fed. Reg.* at 75,977.
[9] The Department's current regulation creates a five-part test for determining whether a person should be treated as a fiduciary by reason of rendering investment advice. *See* 29 C.F.R. § 2510.3-21(c). For advice to constitute "investment advice," an adviser who does not have discretionary authority or control with respect to the purchase or sale of securities or other property for the plan must – (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement, or understanding, with the plan or a plan fiduciary, that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. *See id.*
[10] Specifically, the Department believes that the elements of the five-part test "too often work to defeat legitimate retirement investor expectations of impartial advice and allow some advice relationships to occur where there is no best interest standard." Proposal, 88 *Fed. Reg.* at 75,899.

investors."[11] The Proposal also would provide amendments to PTE 2020-02, which provides relief for certain compensation received by investment advice fiduciaries. The Proposal further would amend certain other related administrative exemptions designed to migrate retirement providers rendering investment advice from these other exemptions to PTE 2020-02 for appropriate administrative relief.

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

III. General Concerns

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

For example, it is not evident that the Department has fully considered the complexity of how the Proposal would apply to institutional investors that are responsible for managing multiple, significant pools of assets that comprise plan and non-plan assets, both those plan and non-plan pools that are separately managed as well as pools of combined plan and non-plan assets, such as those found in certain commingled funds. Indeed, if the Department takes the position that all financial or investment conversations with institutional investors that have any plan assets would subject the bank or adviser to ERISA fiduciary status with respect to the entire conversation, then the Department comes very close to supplanting the Securities and Exchange Commission and the federal banking agencies as the primary regulator of the financial markets and market

[11] Proposal, 88 *Fed. Reg.* at 75,890.
[12] *Id.* at 75,891.
[13] *Id.* at 75,890.

participants, as the broad scope of the Proposal may result in the bank assuming that every conversation could result in the bank becoming a fiduciary, no matter how remote.

We are particularly concerned that the Fiduciary Proposal oversteps the bounds of agency interpretive rulemaking into regulatory legislation of new standards and requirements for providing IRA services. The Department not only is implementing these changes through the investment advice regulation -- which changes appear inconsistent with ERISA and applicable judicial precedent – but also through a series of amendments to a number of exemptions that are, on their face, "voluntary" but as a practical matter are mandatory. Such agency action can reasonably be viewed as expanding the Department's regulatory authority beyond congressional intent, a failing the Fifth Circuit Court of Appeals identified when it vacated the Department's 2016 fiduciary rulemaking.[13]

The Department points to its "experience in the current marketplace" as a basis for concluding that the Proposal is warranted.[14] We are not told what this "experience" is and how it culminated into a Proposal that drastically reshapes fiduciary status under Department regulations. The Department does not cite a single contemporary authoritative source or body of evidence that demonstrates systematic retirement investor abuse or which otherwise would support a sweeping revamp of retirement services operations. Accordingly, the Proposal fails to demonstrate compliance with the Executive Orders on agency rulemaking.[15] Lacking hard evidence for its far-reaching proposed amendments, the Department should withdraw the Fiduciary Proposal as described in our recommendation below.

IV. ABA Recommendation: Withdraw Fiduciary Proposal

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

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

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

If the Department believes that amendments to the investment advice regulation, PTE 2020-02, or related PTEs are warranted, then it should withdraw the Fiduciary Proposal and undertake a comprehensive independent study and assessment of the investment advice regulation and related PTEs.[16] After this study is concluded, the Department would be better equipped to determine whether or not amendments would be necessary or appropriate.

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

V. ABA Recommendations for Issues Raised by the Fiduciary Proposal

Without limiting the foregoing, ABA offers the following recommendations on issues raise in the Fiduciary Proposal that are of particular concern to our members and which the Department should consider fully in its evaluation of the Proposal, including any re-proposal in this area.

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

B. "Recommendation" Resulting from Aggregating Exempt Statements and Actions
Withdraw the Aggregation Policy from the preamble and refrain from using this policy as a metric for determining whether a "recommendation" has been made and replace with a general anti-evasion provision that better serves efficient and prudent administration of the Fiduciary Rule.

C. Definition of Investment Advice Fiduciary: "Regular Basis"
Retain the current "regular basis" prong of the investment advice fiduciary definition and clarify with language consistent with ERISA and judicial precedent.

D. Institutional Retirement Investors
Amend the Fiduciary Proposal to expressly exempt institutional investors from its coverage.

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

E. Requests for Proposals (RFPs)

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

F. "Hire Me" Exclusion

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

G. Foreign Exchange (FX) Transactions

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

H. Securities Lending

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

I. Health Savings Accounts (HSAs)

Exclude HSAs from the Fiduciary Proposal's definition of IRA and clarify in the preamble that HSAs are exempt from the Fiduciary Proposal's coverage, and further limit the Proposal's applicability only to those accounts whose primary purpose is for retirement savings.

J. Investment Education

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

K. PTE 2020-02: Eligibility

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

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

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

L. <u>PTE 2020-02: Disclosures, Documentation, Reporting, and Recordkeeping</u>.

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

2. Eliminate the proposed rollover documentation and disclosure.

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

M. <u>PTE 2020-02: Policies and Procedures</u>

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

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

N. <u>PTE 86-128: Reliance on Exemption and Recordkeeping Requirements</u>.

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

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

O. <u>Effective Date and Compliance Date</u>

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

P. <u>Stay on Enforcement</u>

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

VI. Conclusion

The ABA shares the Department's goal of providing plans and individuals with the ability and means to maximize their retirement investment opportunities, options, and returns. For the reasons stated above, however, we believe that the Department should immediately withdraw Proposal and recommence the rulemaking process as described herein. The ABA looks forward to working with the House Financial Services Committee and the Department of Labor as the Department evaluates whether to act on and how to improve the Fiduciary Proposal, consistent with the federal government's priority that the rulemaking respond to a compelling need and offers the least burdensome tools to accomplish the promotion of retirement savings.