ABA Survey
Department of Labor Fiduciary Rule
July 20, 2017

Summary Report

This report provides the results of an American Bankers Association (ABA) Survey on the U.S. Department of Labor’s Fiduciary Rule (Fiduciary Rule or Rule) that was conducted among its membership, July 6-20, 2017. The purpose of the Survey was to determine banks’ understanding of the Fiduciary Rule and its impact on banks and their retirement customers. The Survey consisted of nine questions, the last of which provided an opportunity for banks to comment on the ways in which the Fiduciary Rule has impacted the bank and/or its customers.

The Fiduciary Rule defines who is a “fiduciary” under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code) as a result of giving investment advice for a fee or other compensation to an employee benefit plan or its participants, or to the owner of an individual retirement account (IRA). The Department of Labor (Department) finalized the Fiduciary Rule in April 2016 and the Rule became applicable on June 9, 2017.

The Survey focused on selected ABA working groups of member banks that service retirement investors. Approximately 250 banks participate in these working groups. Fifty-seven banks responded to the Survey. Of the Survey’s participants, 73% were community banks (under $10 billion in assets), 14% were midsize banks ($10-$50 billion in assets), 5% were regional banks ($50-$100 billion in assets), and 7% were large banks (over $100 billion in assets). Data from the responses was submitted and aggregated on a blind basis so that individual institutions and their employees could not be identified. Responses were limited to one per institution.¹

Banks’ Understanding of the Fiduciary Rule’s Definition of “Investment Advice”

Question 1 sought to obtain banks’ understanding of the definition of “investment advice” under the Fiduciary Rule. Under the Rule, a bank or other adviser is giving investment advice (and therefore is a “fiduciary”) if it gives a “recommendation” for compensation. The Fiduciary Rule defines “recommendation” as “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.” Understanding the definition is essential for determining whether one is a “fiduciary” under the Fiduciary Rule.

¹ Throughout this report, percentages cited for each Survey question do not always total to 100% due to rounding or multiple responses provided by the Survey participants.
Of the banks surveyed, 28% agreed that the definition is “clear” (2%) or “clear enough” (26%) to allow the bank to readily determine at any given time whether it is a fiduciary under the Rule, while 72% found that the definition is “not clear in certain places” (61%) or is “not clear at all” (11%), making it difficult for the bank to determine whether it is a fiduciary under the Rule.

**Bank and Customer Understanding When Fiduciary Investment Advice Is Given**

Question 2 was intended to determine a bank and customer’s knowledge of the boundaries between investment advice as defined under the Rule and non-advice. It asked whether the bank and its retirement customers understand when fiduciary investment advice is being given by the bank, thus triggering fiduciary status for the bank. Based on the definition of “investment advice” under the Fiduciary Rule, 6% of banks said that the bank and its customer will “both” be able to understand when the bank is providing investment advice, while 94% of banks said that the bank and its customer “sometimes” (59%) or “often” (35%) may not understand when the bank is providing investment advice.

**Banks’ Ability to Determine Compliance with the Fiduciary Rule**

Question 3 asked whether, and the extent to which, banks are able to determine with certainty whether they are in compliance with the Fiduciary Rule. Two percent of banks surveyed said that the bank is “always able to determine with certainty” whether it is in compliance with the Fiduciary Rule. In contrast, 52% of banks said that “sometimes” and 30% of banks said “often” the bank is unable to determine with certainty whether it is in compliance with the Fiduciary Rule. Twenty-five percent of banks added that their bank is unable to determine with certainty whether it is in compliance with the Fiduciary Rule “in critical areas,” citing sales and marketing activity, IRAs invested in bank deposit products, and asset allocation discussions with customers, among others.

**Fiduciary Rule’s Impact on Products and Services Available to Retirement Investors**

Question 4 requested information on the Fiduciary Rule’s impact on the bank-customer relationship and the availability of products and services to retirement investors. Zero percent of banks surveyed said they have “added” to the number of retirement products and/or services available to customers in order to take advantage of fiduciary status under the Fiduciary Rule, while 30% said that they have “eliminated or reduced” the number of retirement products and/or services available to customers in order to avoid triggering fiduciary status under the Fiduciary Rule. Thirty-eight percent of banks also agreed that the bank’s advisory and/or financial relationship with customers “has been fragmented” as a result of the Fiduciary Rule applying to retirement assets only, “since the bank is unable to provide holistic financial advice to its customers.” Forty-five percent stated that the bank has “neither added nor reduced” the number of retirement investor products and/or services available at the bank.
A follow-up question asked which customers have been most impacted by those banks that have eliminated or reduced the availability of products and services for retirement accounts. Six percent of banks reported that customer accounts of more than $100,000 have been most impacted while 63% of banks report customer accounts of $25,000 or less have been most impacted.

**Impact of Fiduciary Rule’s “Aggregation Provision” on Bank Compliance**

Question 5 concerned the Fiduciary Rule’s “Aggregation Provision,” which defines a “recommendation” to include the following: “Furthermore, a series of actions, directly or indirectly (e.g., through or together with any affiliate), that may not constitute a recommendation when viewed individually may amount to a recommendation when considered in the aggregate.” This gives the Department the authority to aggregate non-recommendations in order to conclude that a recommendation (and therefore fiduciary investment advice) has been given, thus triggering fiduciary status under the Rule. Question 5 asked whether or not this portion of the definition of “recommendation” was helpful in clarifying the definition. Two percent of banks surveyed agreed that the Aggregation Provision “[c]larifies the definition of ‘recommendation’ in a helpful way,” while 98% of banks agreed that the Aggregation Provision “[m]uddies the definition of ‘recommendation’ and is therefore not helpful.”

For those banks which disagreed that the Aggregation Provision was helpful in this way, nearly two-thirds of banks (65%) said it made it more difficult to determine whether a recommendation was actually given in these circumstances (i.e., as a result of non-recommending actions). Furthermore, 56% said the Aggregation Provision makes it “virtually impossible” to determine in advance whether any particular set of actions would be deemed a “recommendation,” while 49% said it makes it “virtually impossible” to comply since a bank would need to supervise and monitor its employees and all of its affiliates, where each action is not intended to implicate the Fiduciary Rule.

Citing examination concerns, more than seven out of every ten banks surveyed (71%) said that the Aggregation Provision makes it “virtually impossible” to comply with the Fiduciary Rule “since at any time and with the benefit of hindsight, the Department could conclude that a bank’s program or activity is captured by the Fiduciary Rule, notwithstanding that the program/activity was reasonably structured in good faith to operate outside the Rule.” Liability also was expressed as a concern: 71% of banks agreed that the Aggregation Provision increases liability risk as a result of the bank being unable to determine, in advance and with certainty, whether any two or more non-recommendations will be aggregated into a recommendation.
Bank Investment Options for IRAs

Question 6 asked banks to list the investment options for IRAs (including brokerage account IRAs). Ninety-five percent of banks surveyed provide certificates of deposit (CDs) as an investment option, 49% provide other bank products (such as money market deposit accounts), 65% provide managed investments, and 58% provide customer-directed investments.

Fiduciary Rule’s Impact on Bank IRA/CD Programs

Question 7 asked banks what they would do if the Department were ever to determine that the Fiduciary Rule applies to bank IRA/CD programs (i.e., where a retirement customer invests IRA assets in a bank CD or other FDIC-insured bank product). Forty-four percent of banks surveyed said they would continue their bank’s IRA/CD program and make any changes necessary to comply with the Fiduciary Rule, while 56% of banks said they would convert to a customer-directed program (54%) or discontinue the IRA/CD program altogether (2%).

Fiduciary Rule’s Impact on Bank Liability and Litigation Risk

Question 8 inquired into bank liability and litigation risk under the Fiduciary Rule. Two-thirds (67%) of banks surveyed believe that the Fiduciary Rule has increased the bank’s liability and litigation risk under ERISA and/or the Code, while nearly a third (31%) said such risks have “significantly increased.” Fifteen percent said the Fiduciary Rule has not changed bank’s liability or litigation risk equation under ERISA and/or the Code. Zero percent of banks said that the Fiduciary Rule either decreased or significantly decreased the liability/litigation risk under ERISA and/or the Code.

Fiduciary Rule’s Impact on the Bank and the Customer

Question 9 provided banks the opportunity to describe the ways in which the Fiduciary Rule has impacted the bank and/or the bank’s customers. Thirty-two comments were provided. Most of the comments focused either on (i) how the Fiduciary Rule has resulted in customer confusion, frustration, and dissatisfaction due to the reduced availability of advice, guidance, and offerings from the bank on retirement products and services, or (ii) the bank’s difficulties and challenges of implementing the Fiduciary Rule’s requirements, due primarily to the disruption on bank marketing and sales activity, the complexity of the Rule, the uncertainty of the Rule’s applicability and scope, and the elevated risks of noncompliance. Respondents that have scaled back or eliminated retirement services cite concerns about liability for noncompliance or litigation (including class action litigation) risk.