American Bankers Association
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September 1, 2017

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers

Dear Chairman Clayton:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments to the Securities and Exchange Commission (Commission) in response to the Commission's Public Statement (Statement) announcing the solicitation of the public's views on the Commission's potential future actions regarding the standards of conduct applicable to broker-dealers and investment advisers when they provide personalized investment advice to retail investors.[2] The Statement was issued partly in response to the Department of Labor (Department) regulation on the definition of a "fiduciary," commonly known as the DOL Fiduciary Rule (DOL Fiduciary Rule or DOL Rule), which the Department finalized on June 9, 2017, and which the Commission believes "may have significant effects on retail investors and entities regulated by the SEC."[3] The Statement includes a series of questions requesting public comment on the DOL Fiduciary Rule's impact and on prospective Commission actions regarding the Commission's establishment of a standard of conduct.

We commend the Commission for resuming its consideration of a proposed standard of conduct applicable to registered broker-dealers and advisers. Because many of our members have broker-dealer and/or advisory departments, divisions, subsidiaries, or affiliates as well as

[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. A number of these banks offer their retail clients access to investment products through a number of distribution channels including bank trust departments, registered broker-dealers, and registered investment advisers. Many of these banks are also 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] *See* Public Statement of Jay Clayton, Chairman, Securities and Exchange Commission, "Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers (June 1, 2017).
[3] *Id.*

extensive and longstanding business relationships with registered broker-dealers and advisers, the Commission's actions in this area can have a significant and lasting impact on the banking industry. Moreover, the DOL Fiduciary Rule greatly affects banks of all sizes and activity, so any further regulatory action either by the Department or Commission on standards of conduct will have a sustained ripple effect across the banking and the financial services industry.

Therefore, should the Commission decide to pursue regulatory action leading to the establishment of a standard of conduct, we recommend that the Commission –

(1) coordinate with the Department and adopt an incremental rulemaking strategy to produce a uniform and consistent standard of conduct that specifically targets the conduct to be regulated and provides compliance certainty;[4]

(2) enact a standard of conduct that maintains investor choice and access to investor education by preserving the ability of retail investors to choose specific products and levels of service that best meet their investment needs; and

(3) refer to the standard of conduct as a "best interest" standard rather than as a "fiduciary" standard, in order to mitigate the potential for investor confusion over the meaning of the term "fiduciary."

I. Introduction.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the Commission has the authority to promulgate a standard of conduct that would require broker-dealers and investment advisers, when providing personalized investment advice to retail customers, "to act in the best interest of the customer, without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice."[5] This is similar to the standard of conduct for fiduciaries under ERISA, which requires a fiduciary to discharge his duties "solely in the interest of the [employee benefit plan's] participants and beneficiaries."[6] Anyone who becomes a fiduciary under the DOL Fiduciary Rule (*i.e.*, anyone providing investment advice for a fee or other compensation), is required to follow this standard of conduct under ERISA (for employee benefit plans and their participants/beneficiaries) or under the corresponding provisions of the Internal Revenue Code (for an owner of an individual retirement account (IRA)).[7] Although different remedies are provided respectively under the securities laws and ERISA, both statutory and regulatory schemes are intended to protect the retail investor through a "best interest" standard.[8]

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[4] This joint action should be carried out in consultation with the federal banking regulators, which would be responsible for supervising and examining those banks with brokerage or advisory subsidiaries or affiliates that may be subject to any standard of conduct promulgated by the Commission.
[5] Dodd-Frank Act § 913(g)(1).
[6] ERISA § 404(a).
[7] *See id. See also* Internal Revenue Code (IRC) § 4975.
[8] *See* Dodd-Frank § 913(g)(1), *supra*; Department of Labor, Definition of the Term "Fiduciary," 81 *Fed. Reg.* 20,946, 20,948 (2016) (The [DOL Fiduciary Rule] and exemptions aim to ensure that advice is in consumers' best interest, thereby rooting out excessive fees and substandard performance otherwise attributable to advisers' conflicts, producing gains for retirement investors.").

II. **DOL Fiduciary Rule Concerns.**

In its Statement, the Commission requests information on the DOL Fiduciary Rule's impact on retail customers and market participants in order to inform the Commission's analysis of a possible standard of conduct for broker-dealers and investment advisers.[9] As a preliminary matter, when acting in their capacity as fiduciaries, banks have always sought the best interest of their customers and take great pride and satisfaction in continually and successfully serving their customers' retirement and investment 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 customers deserve protection from financial harm and abuse. We further believe that regulations should serve this purpose, without inadvertently stifling or interfering with the delivery of retirement products and services or capturing communications or relationships that are not appropriately regarded as fiduciary in nature.

The DOL Fiduciary Rule, unfortunately, seriously fails to achieve this objective. We oppose the DOL Fiduciary Rule as written because it is overbroad and captures activity that should not be deemed fiduciary activity, such as routine sales activity and information sessions with customers. This creates considerable uncertainty and risk as to when a person is, or is not, acting as a "fiduciary" under ERISA and the Code. In the nearly three months since the DOL Rule has been in effect, retirement investors already are experiencing diminished access to the retirement products and services upon which they have come to rely from their bank. This result is confirmed by a recent ABA survey, conducted between July 6, 2017 and July 20, 2017, which focused on selected ABA working groups of member banks that service retirement investors. (A summary report of this survey is attached to this letter.) The survey requested information on banks' understanding of the DOL Fiduciary Rule, the continued availability of retirement products and services, which bank customers have been most affected, and the overall impact that the DOL Fiduciary Rule has had on banks and their customers since the DOL Fiduciary Rule's effective date.

The survey results show clearly that the DOL Fiduciary Rule is deeply flawed in several critical areas that prevent it from functioning properly, making compliance for banks unworkable while also depriving retail investors of basic retirement customer services. For instance, the survey reveals that only 2% of banks surveyed agree that the definition of "investment advice" under the DOL Fiduciary Rule is clear and allows the bank to determine readily, at any given time, whether it is a "fiduciary."[10] Similarly, 72% of banks surveyed believe that the definition of a "recommendation" – the linchpin of determining whether investment advice is rendered under the DOL Fiduciary Rule – is not clear in certain places or is not clear at all, making it difficult for the bank to determine whether it is a fiduciary under the DOL Rule. Moreover, the survey results show that 94% of banks believe that the bank and the customer "sometimes" or "often" may not understand when the bank is providing investment advice that is fiduciary in nature, as defined by the DOL Rule. This means that in the vast majority of bank-customer relationships, there will be multiple instances in which there is no understanding between the two parties as to whether "fiduciary investment advice" as defined under the DOL Rule is actually being given,

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[9] *See* Statement, *supra*.
[10] *See* ABA Survey (July 20, 2017).

sowing confusion and uncertainty in the delivery of the bank's retirement services and the customer's expectations.

Consequently, banks already are reporting that this confusion and uncertainty has caused them to reduce their product offerings or to withdraw altogether from providing basic retirement services. Nearly a third (30%) of banks surveyed report that, as a result of the DOL Fiduciary Rule, their bank "has eliminated or reduced the number of retirement products and/or services available to customers," while 38% agree that the DOL Fiduciary Rule has fragmented the bank's advisory and/or financial relationship with customers."[11] As reported by the banks –

> *"Customers are substantially confused."*
>
> *"Our bank is unsure as to its ability to communicate with our customers when they ask rollover questions."*
>
> *"The bank may need to severely limit its retirement products and services."*
>
> *"Because of uncertainty as to the applicability of the rule, we've had to train bankers to essentially stop 'helping' their customers so that they won't be deemed to have given 'advice'."*
>
> *"The [DOL Fiduciary R]ule is restricting the way we help customers."*
>
> *"We will reduce offering for low dollar investments due to [the] cost to administer compliance with the [DOL R]ule."*
>
> *"As a result of the risks and complexities of compliance with the [DOL R]ule our bank has decided to no longer allow our bank associates to offer IRA products and services to bank customers. They will now be directed to contact a call center."*[12]

The survey results show in stark terms that the DOL Fiduciary Rule is failing to work as intended; in fact, it is counterproductive to customer interests in its effects. Therefore, we have requested that the Department either rescind the DOL Rule or revise it to provide, among other things, for a sharpened, targeted definition of who is a "fiduciary" that would provide clearly delineated boundaries and certainty of compliance.[13] If such revisions are not made, customers will continue to experience reduced or eliminated access to retirement products and services, undermining their ability to achieve a financially sound retirement.

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[11] *Id.*

[12] *Id.*

[13] We have made these points in our comment letter to the Department of Labor. *See* ABA Comment Letter to Department of Labor (Aug. 7, 2017), available at: https://www.aba.com/Advocacy/commentletters/Documents/DOL-Fiduciary-Rule- RFI-080717 (ABA DOL Letter).

III. Recommendations for Commission Rulemaking.

A. Coordinate with the Department.

The DOL Fiduciary Rule's significant and on-going challenges are a direct result of the Department's efforts that were well-intentioned but which (i) misdiagnosed the nature and gravity of the problem and (ii) followed a flawed rulemaking process. The Department perceived as the problem the presumed prevalence of certain retirement service provider conflicts of interest involving the selection of investments for retirement investors that ineluctably cause consumers harm. It concluded that the Department's regulation at that time, the "five-part" test for determining whether investment advice is rendered, to be insufficient to address this perceived consumer harm.[14]

In seeking to address this alleged harm, a proper solution would have been for the Department to gain a full understanding of the nature and scope of the perceived problem (impermissible conflicts of interest), identify the cause(s), and then address the issue through the supervisory and enforcement process, followed if necessary by targeted and sensible (*i.e.*, incremental) rulemaking that would fix the apparent deficiencies of the five-part test and properly address the specific practices or conduct giving rise to those conflicts. Such rulemaking further would have considered the full range of regulatory alternatives available to solve the alleged problem, including adoption of the "least burdensome tools" to accomplish its objective.[15] Instead, the Department simply chose to scrap and rework the *entire* process by which investment advice is determined. In doing so, the Department leveled and reconfigured entire portions of the retirement services landscape with an elaborate, untried, and unproven regulatory scheme, significantly disrupting and displacing long-established and sound financial institution-retirement customer relationships, reducing consumer access to retirement products and services, and ultimately raising costs for retail retirement investors.

The Commission should avoid this unwarranted and unnecessary regulatory outcome by understanding, first, the nature and scope of any problems posed under the current regulatory scheme governing broker-dealers and advisers that a standard of conduct would address. The Commission's RAND study of investor perspectives begun in 2006, followed by a solicitation of data and other information in 2013, are solid steps in this direction.[16] The Commission then should evaluate and determine the extent that additional regulation may be required to accomplish its purpose. The Statement includes a question whether the Commission should act *incrementally* in proposing a standard of conduct, taking into account the effect of its initial action, before considering further proposed actions.[17] We encourage the Commission to adopt an incremental regulatory approach as a means to address this issue specifically, which would minimize collateral, adverse consequences caused by misdirected proposals or errant regulation. We also ask that the Commission coordinate its efforts with the Department (as we have requested the Department to take similar action with the Commission) in order to avoid the

[14] *See* 29 C.F.R. § 2910.3-21(j) (former five-part test).
[15] Executive Order 13563 (Jan. 18, 2011).
[16] *See* RAND Institute for Civil Justice, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers (2008); SEC Release No. 34-69013, Duties of Brokers, Dealers, and Investment Advisers (March 1, 2013).
[17] *See* Statement, *supra*.

emergence of multiple, and possibly conflicting or inconsistent, standards of conduct governing personalized investment advice to retail investors.

B. Preserve Investor Choice and Education.

As the Commission considers instituting a standard of conduct, it should keep in mind that investment advice is not a "one-size-fits-all" proposition. When evaluating investment advisory programs and practices, the Commission among other things should take into account the level of service sought by the retail investor, including recognition that in some circumstances the investor may be seeking little or no investment advice. Such customers instead may be seeking merely additional information from the broker-dealer or adviser to confirm their understanding of the investment selection or strategy they have chosen. The required standard of conduct, therefore, should distinguish sufficiently between advisory and customer-directed services so that both the broker-dealer/adviser and the customer understand the nature of the relationship and the services being provided, with the customer retaining the option whether to enter into an advisory arrangement.[18] Regulatory clarity is essential in order to provide mutual understanding of the financial institution-retail investor relationship and compliance certainty for broker-dealers and advisers.

Similarly, the Commission should view investment education as a means for a retail investor to receive a broad range of information without having such activity rise necessarily to the level of "advice." Such information could include providing definitions and illustrations of general financial and investment concepts, such as (i) risk and return, (ii) diversification, (iii) dollar cost averaging, (iv) compounded return, and (v) tax-deferred investments. Education can also involve customer interaction and dialogue with a financial professional, such as (i) in determining investment time horizons, (ii) in the use of interactive investment materials (questionnaires, worksheets, calculators, and similar materials) that can assess the impact of different asset allocations on income, and (iii) in asset allocation models of portfolios of hypothetical individuals with different time horizons and risk profiles (such as pie charts, graphs, and case studies). These information sessions equip customers to understand the types of programs or products that are appropriate for them and their specific financial situation, and therefore should be preserved as investment education when delineating the boundaries for a standard of conduct.[19]

In the Statement, the Commission asks whether certain activities should be expressly excluded from the definition of "investment advice." As we have stated in our most recent letter to the Department,[20] we believe that marketing activities, such as sales pitches and presentations and routine customer-specific question-and-answer sessions, should not be deemed investment advice. This exclusion should include any investment recommendations made as part of the marketing activity, unless and until the broker-dealer/adviser is hired by the customer, in which

[18] We have raised these points previously with the Commission in connection with the Commission's July 2010 study on the obligations of broker-dealers and advisers. *See* ABA Comment Letter to Securities and Exchange Commission (Aug. 30, 2010).
[19] A prior ABA letter to the Commission lays out in detail how investment education can be differentiated from investment advice. *See* ABA Letter to Securities and Exchange Commission (Jan. 24, 2012).
[20] *See* ABA DOL Letter, *supra*.

case such recommendations then could attach as "investment advice." Excluding marketing activity from "investment advice" further could be conditioned on the broker-dealer/adviser providing a statement beforehand to the retail investor that the information to be provided to the investor is a marketing or sales presentation, not advice. This would allow for a transparent, informed sales pitch to be made to the customer, who then can use such information to choose whether to retain the broker-dealer/adviser.[21]

C. Avoid Use of the "Fiduciary" Label.

The DOL Fiduciary Rule substantially expanded who is considered a "fiduciary" under ERISA and the Code. The term "fiduciary," however, carries a variety of meanings. A "fiduciary" under agency law means that the agent has agreed to act on behalf of the principal and the principal has the right to control the agent's acts. In agreeing to act on behalf of the principal, the agent must act with the care, competence, and diligence that are ordinarily exercised by agents in similar circumstances.[22] A "fiduciary" under trust law has an altogether different meaning. A trust fiduciary must act in the best interests of all existing and future beneficiaries. The duties of a trust fiduciary are many, chief among them are the duties of loyalty, impartiality, and prudent investment.[23]

We have expressed concern to the Department that the term "fiduciary" under the DOL Fiduciary Rule sweeps in bank-customer interactions that are not intended to be fiduciary. We do not believe, for example, that a bank teller should be deemed a "fiduciary" under the Rule simply for informing a bank customer of a particular range of investments (*e.g.*, short-term CDs) available to the customer in connection with an IRA rollover. As is the case with the DOL Fiduciary Rule, we are concerned that if broker-dealers are deemed to be "fiduciaries," then retail customers will be confused when different financial services providers, such as bank trust departments, represent to their customers that *they* are fiduciaries, though the bank in this instance likely would carry much weightier obligations to the customer. For this reason, we believe that any standard of conduct applicable to broker-dealers and advisers should be referred to as a "best interest" standard rather than a "fiduciary" standard.[24]

Furthermore, we believe a "best interest" standard of care approach will allow the parties to define the scope of the duties of the broker-dealer/adviser at the commencement of the relationship and will allow for the application of the duty to vary with the specific services that the client seeks and the specific obligations assumed by the financial services provider. Thus, for example, a retail customer and his or her broker-dealer can structure the level of service sought under a best interest standard to make clear, as section 913 of the Dodd-Frank Act does, that the duty arises only during the giving of investment advice and does not require a continuing

[21] The DOL Fiduciary Rule broadly includes any investment recommendation as "advice," even if made as part of a marketing or sales pitch. We are requesting that the Department expand the "Hire Me" exception to allow for routine marketing and sales activity. *See id.*
[22] *See* Restatement (Third) of Agency § 8.06 (2006).
[23] *See* Restatement (Third) of Trusts §§ 78, 90-92 (2007); Uniform Prudent Investor Act (1992).
[24] ABA first raised this issue with the Commission in 2010 just after the passage of the Dodd-Frank Act and the Commission's commencement of its study on a standard of conduct for broker-dealers and advisers. *See* ABA Letter (Aug. 30, 2010).

duty of care or loyalty to the customer following the provision of such advice.[25] If a retail investor is informed that the broker-dealer is a fiduciary, however, then he or she may assume incorrectly that the broker-dealer's duties continue beyond the time the advice is rendered, or may involve additional duties beyond the provision of investment advice. Such issues can be mitigated, however, with written disclosure, a principle we strongly support as a means to avoid customer confusion and to provide compliance certainty.

IV. **Conclusion.**

We look forward to the Commission's next steps in working toward a standard of conduct applicable to broker-dealers and investment advisers. We urge the Commission to work closely with the Department in order to ensure that any such standard of conduct is uniform and consistently applied and that it be established to promote, rather than inhibit, financial innovation and growth.

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.

Sincerely,

Timothy E. Keehan

Timothy E. Keehan
Vice President & Senior Counsel

Attachment: ABA Survey – Department of Labor Fiduciary Rule (July 20, 2017)

[25] *See* Dodd-Frank Act § 913(k)(1).

ABA Survey

Department of Labor
Fiduciary Rule

July 20, 2017

American
Bankers
Association

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]

<u>Banks' Understanding of the Fiduciary Rule's Definition of "Investment Advice"</u>

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.