

March 11, 2016

Mr. Ross A. Rutledge, Policy Analyst
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Re: ABA Meeting with OIRA Staff on Department of Labor Proposed Rule on the Definition of the Term “Fiduciary”; Conflict of Interest Rule – Retirement Investment – RIN 1210-AB3; Proposed Exemptions and Proposed Amendments to Exemptions – ZRIN 1210-ZA25 (Proposed Rule)

Dear Mr. Rutledge:

The American Bankers Association¹ (ABA) would like to thank you and your staff of the Office of Information and Regulatory Affairs (OIRA) for meeting with ABA on Monday, March 7, 2016 to discuss ABA’s concerns about regarding the Proposed Rule of the Department of Labor (Department) regarding the expanded circumstances under which a person is considered to be a “fiduciary” under the Employee Retirement Income Security Act of 1974 (ERISA) or the Internal Revenue Code (Fiduciary Rule).

As expressed at our meeting, we are concerned about the Department’s apparent failure throughout the entire rulemaking process to contact and meet with the Office of the Comptroller of the Currency (OCC) concerning the Fiduciary Rule. As we pointed out, at least one provision of the Fiduciary Rule (Section V of the Best Interest Contact Exemption (BICE)) violates the National Bank Act and implementing OCC regulations. In particular, the Fiduciary Rule states that records of any national bank or federal savings association kept in connection with compliance with the BICE must be made “unconditionally available at their customary location for examination during normal business hours by . . . any authorized employee or representative of the Department.”² The National Bank Act’s visitorial powers³ provision (12 U.S.C. Section 484), however, prohibits the Department from coming in to inspect or examine the books and

¹ The American Bankers Association is the voice of the nation’s \$16 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$12 trillion in deposits, and extend more than \$8 trillion in loans. Many of these banks are plan service providers, providing trust, custody, routine deposit/cash management, and other services for institutional clients, including employee benefit plans covered by the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code. Our member banks also routinely provide services for retail clients through individual retirement accounts and similar accounts that are covered by the Code. Learn more at www.aba.com.

² BICE, Section V(d)(1)(A). [Emphasis added.]

³ The term “visitorial powers” refers to the power of a regulator to inspect or examine or supervise the affairs of an entity. See OCC, Visitorial Powers Final Rule Questions and Answers (Jan. 7, 2004).

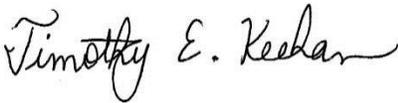
records of a national bank, and by extension, those of a federal savings association.⁴ As stated in our comment letter of September 22, 2015, the Department may not create out of whole cloth a regulatory (non-statutory) exception to the visitorial powers prohibition, or to examine national bank/federal savings association records in the absence of an actual or prospective violation of law or regulation.⁵

Executive Order 12866 requires the Department to “avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies” (such as the OCC).⁶ Therefore, the Department should submit the Fiduciary Rule to OCC staff for review, analysis, and discussion with Department staff to (i) identify provisions of the Fiduciary Rule that conflict or may conflict with, or are otherwise inconsistent or incompatible with, OCC regulations or OCC examination policies; and (ii) amend and correct the language of the Fiduciary Rule to both the Department’s and OCC’s satisfaction, so that there is no longer any conflict, inconsistency, or incompatibility between the Fiduciary Rule and the federal banking laws and OCC regulations. The immediate goal would be to ensure that the Department is not unlawfully seeking to engage in the inspection of a national bank’s or federal savings association’s books and records.

Likewise, we would expect OIRA to discharge its express duty under Executive Order 12866 to ensure that the provisions of the Fiduciary Rule “do not conflict with the policies or actions of [the OCC]”⁷ by providing meaningful guidance and oversight as the staffs of the Department and OCC address and resolve this issue. Since the Fiduciary Rule applies to all banks, we would also expect OIRA to ensure that the Department has reached out to the other federal banking agencies, the Board of Governors of the Federal Reserve System (Federal Reserve) and the Federal Deposit Insurance Corporation (FDIC), to provide them with the opportunity to review and examine the Fiduciary Rule for consistency and compatibility with Federal Reserve and FDIC regulations and examination policies.

Thank you again for your time and attention to this matter. If you have any questions or require any additional information, please do not hesitate to contact the undersigned at 202-663-5479 or by e-mail at tkeehan@aba.com.

Sincerely,



Timothy E. Keehan
Vice President & Senior Counsel

⁴ See 12 U.S.C. § 1465(c) (extending the visitorial powers provisions to federal savings associations).

⁵ See ERISA § 504 (which gives the Department statutory authority to examine bank records only in connection with a formal investigation to determine whether the bank has violated, or is about to violate, any provision of ERISA or Department regulation or order).

⁶ Executive Order 12866 § 1(b)(10).

⁷ Executive Order 12866 § 6(b) (Sept. 30, 1993).

cc: Howard Shelanski, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget