Testimony of

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On behalf of the

American Bankers Association

for the hearing

"Definition of the Term 'Fiduciary': Conflict of Interest Rule – Retirement Investment Advice and Related Proposed Prohibited Transaction Exemptions"

before the

Employee Benefits Security Administration

United States Department of Labor

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Members of the panel, my name is Gerry Cleary. I am Senior Vice President for The Northern Trust Company in Chicago, Illinois, and I provide regulatory and compliance support to our Corporate and Institutional Services business. I appreciate the opportunity to be here today to represent the American Bankers Association regarding the Department of Labor's proposed regulation.

My testimony today will cover three primary concerns with the Department's proposal: first, the proposal's definition of "recommendation" and its elimination of the existing "mutual understanding" requirement; second, the proposal's effect in the institutional marketplace; and finally, the proposal's treatment of statements of asset values provided by bank custodians.

At the outset, ABA agrees that retirement service providers, when acting as fiduciary investment advisers, should be subject to a "best interest" standard. However, ABA believes the Department's proposal is overbroad and captures many services that should not be treated as fiduciary "investment advice" under either ERISA or the Code. If adopted in its current form, the proposal will make it extremely difficult, complex, and costly for banks to deliver the investment-related products, services, and information necessary to achieve a financially sound retirement. This will likely harm the very retirement investors the Department is seeking to protect by limiting their access to valuable investment information and services that should continue to fall outside ERISA's fiduciary framework. Given the significance of the widespread concerns with the current proposal, we urge the Department to issue a revised proposal and allow for additional public comment prior to issuing a final rule. The three issues we've selected to discuss illustrate the compliance challenges banks would face under the current proposal.

First, the proposal's definition of the term "recommendation," combined with its elimination of the current "mutual understanding" requirement, results in an overbroad and unworkable definition of "investment advice." Based on existing FINRA guidance, the proposal broadly 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. Making a "suggestion" a basis for ERISA fiduciary responsibility is especially problematic given the proposal's elimination of the existing requirement that the recommendation be provided pursuant to a mutual understanding that it will serve as a *primary basis* for investment decisions and will be *individualized* based on the needs of the plan. Instead, the proposal merely requires that there be a mutual understanding that the recommendation is "specifically directed to the advice recipient for consideration."

Consistent with common business practice, benefit plans and retirement investors both realize that not every investment suggestion directed to them by their bank custodian constitutes "investment advice" that should be expected to comply with ERISA's fiduciary standards. Extending fiduciary status to any service provider who "specifically directs" an investment-related "suggestion" to a plan fiduciary or retirement investor would capture vast swaths of written and oral communications from banks that are clearly not acting as fiduciary investment advisers. In fact, the proposal could be interpreted to capture within "investment advice" virtually any and every investment-related conversation with a participant, beneficiary, plan fiduciary, or IRA owner. This could include, for example, sales conversations, requests for proposals, discussion of new products and services, discussions of performance data, and other communications that should fall well outside the scope of ERISA's justifiably strict fiduciary responsibility requirements.

Treating every such investment-related conversation or sales pitch as potential fiduciary investment advice will unnecessarily limit plan fiduciaries' ability to obtain and consider information, analysis, and viewpoints from multiple sources in making their investment decisions. Rather than requiring that service providers comply with complex exemptions in order to make any investment suggestions to their retirement plan customers, the proposal should allow the parties to agree whether all investment suggestions will be treated as fiduciary investment advice rather than, for example, investment education or even mere data points for further consideration. Indeed, plan fiduciaries and retirement investors often seek investment suggestions, market color, and performance data in casual conversations with their bank custodians that neither side expects will rise to the level of fiduciary investment advice.

Because of its overly-broad definition of investment advice, the current form of the proposal will only serve to cut off or stifle retirement providers' conversations with their retirement customers, for fear that any such conversation could be deemed a "fiduciary" act that could result in a prohibited transaction or self-dealing violation. Failure to narrow the definition to situations where both parties understand the service provider is making bona fide, individualized investment recommendations that will be relied upon as a primary basis for investment decisions will only inhibit retirement customers' ability to obtain and understand investment information. By promoting awkward and truncated investment discussions, the proposal is also likely to reduce customers' trust in their retirement providers' ability to respond to their investment needs and objectives.

In order to address these concerns, ABA believes the definition of "recommendation" should be revised to include only those communications that constitute a "*clear, affirmative statement of active endorsement and support"* for taking or refraining from a particular investment course of action. In addition, the "primary basis" and "individualized" prongs of the mutual understanding requirement should be reinstated to make it clear that both parties must be aware that services include tailored advice that will serve as a primary basis for investment decisions. Otherwise, service providers will either need to refrain from making valuable investment suggestions to their clients or face the potential penalties of unintentionally becoming an ERISA fiduciary.

ABA's second major concern is the proposal's needless insertion into the institutional retirement marketplace. The Department has focused much of its attention – in media statements, congressional testimony, and regulatory analysis – on the proposal's benefits in the *retail* marketplace, without having analyzed the need for the proposal in the *institutional* marketplace. There is simply no evidence that institutional plan fiduciaries are being systematically misled, disadvantaged, or abused by banks or other service providers as they seek market information or viewpoints for their consideration in making their own independent investment decisions. The Department's one-size-fits-all approach to applying strict liability provisions to all potential advice providers, no matter how sophisticated the customer, ignores the fundamental fact that institutional plan fiduciaries understand the environment in which they operate and the transactions they undertake.

Therefore, we believe that the proposal needs to be modified to recognize the differences between unsophisticated retail investors, who have limited sources of investment information, and institutional or other sophisticated investors. In particular, the proposal should recognize that institutional investors often rely on their own investment experts and are in no way expecting their custodian banks to act as ERISA fiduciaries every time they make a suggestion regarding their products or other investments. In this regard, we note that FINRA Rule 2111(b) clearly recognizes this distinction. This rule essentially eliminates the "suitability" requirement for sophisticated institutional investors who acknowledge they are exercising their own judgment. We urge the Department to make a similar distinction in the ERISA context.

Finally, we wish to address the proposal’s inclusion of statements of value that are “similar” to appraisals or fairness opinions. As trustees and custodians of plans and IRAs, many banks provide record keeping and reporting services. These include periodic reporting of account statements that reflect the current prices of a retirement account’s assets based on information obtained from pricing vendors and other third parties. Under the proposal, “investment advice” could be interpreted to include such statements, if provided in connection with a specific transaction.

ABA is concerned that the inclusion of the words “similar statement . . . concerning the value of securities or other property,” when read together with the associated “carve-out,” creates confusion with respect to routine reporting that is not legally required, such as periodic reporting of account assets and prices. For example, a plan fiduciary may receive a trust accounting statement listing the current values of the plan’s holdings, and then decide to buy or sell particular securities based on information in that statement. Similarly, a plan participant or beneficiary may decide to enter into a transaction, such as a transfer between investment options or a distribution, based on the valuation information provided by the bank in the normal course – such as a benefit statement, account information on a plan website, or a response to a phone inquiry regarding current account values.

Such statements of account values are provided solely as factual information and are not intended as recommendations regarding a particular transaction. Accordingly, they should not be treated as fiduciary investment advice under the proposal. The proposal’s carve-out, which exempts statements of value solely provided for compliance with legal reporting and disclosure obligations, is too narrow to afford protection to banks and others who routinely provide statements of values outside legally required reporting and disclosure. We therefore urge the Department to revise the proposal to exclude any statements of value that consist solely of objective financial data.

We sincerely hope the Department finds these comments to be helpful. Thank you for your time, and I’m happy to answer any questions you may have.