THE BANK OF NEW YORK MELLON

February 3, 2011

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary Proposed Rule
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Washington, D.C. 20210

Attention: Proposed Regulations on the Definition of the Term Fiduciary (2510.3-21(c))

Dear Mr. Doyle:

BNY Mellon appreciates the opportunity afforded by the Department of Labor ("Department") to comment on the proposed regulations which revise Regulation §2510.3-21(c) published in the Federal Register on October 22, 2010 ("Proposed Regulations").

The Bank of New York Mellon Corporation is a bank holding company established on July 1, 2007, as a result of the merger of The Bank of New York Company, Inc. and Mellon Financial Corporation. Its primary subsidiary banks are The Bank of New York Mellon, a New York chartered bank, and BNY Mellon, National Association, a nationally chartered bank. The Bank of New York Mellon Corporation has over 40,000 employees world-wide, more than $1.7 trillion of assets under management, and $25.0 trillion in assets under administration and custody. Through its banks, service companies, and more than a dozen investment management subsidiaries, it provides a multitude of services to employee benefit plans, including trust, custody, investment management, performance measurement, and benefit payment services. Through its affiliates, custodial and other services are also provided to small plans and IRAs. Trust, custody and related services alone provide over 50% of the Corporation's revenue and a substantial portion of that revenue is attributable to services provided to employee benefit plans. In this letter The Bank of New York Mellon Corporation and its subsidiaries are referred to as "BNY Mellon."

We share many of the concerns that have been covered in detail in letters by various industry groups, such as American Bankers Association, the American Benefits Council, the Financial Services Roundtable and the Securities Industry and Financial Markets Association. However, we have identified a number of issues with the regulations which are of particular concern to us and are discussed below. It should be noted that the Proposed Regulations will have significant implications for IRAs, as well as ERISA-covered plans, and the issues covered in this letter will significantly impact trustees and custodians who provide services in both of these markets.

In general, we view the Proposed Regulations as a major shift in the Department's definition of "fiduciary." Rules which have been in place with service providers for over 35 years are now being changed. Rules which have been understood by service providers are now being replaced with provisions which lack clarity. The Department has stated in the supplementary information to the Proposed Regulations that the changes are motivated by the need to deal with faulty valuations prepared by professional appraisers for securities and other property. However, the

thrust of the consequences of the changes goes well beyond the limited need identified in the supplementary information.

Reports and Statements

The Proposed Regulations cover a person who meets one of the "advice" requirements (Section 2510.3-21(c)(1)(i) of the Proposed Regulations) and one of the status provisions (Section 2510.3-21(c)(1)(ii) of the Proposed Regulations. Section 2510.3-21(c)(1)(iii) of the Proposed Regulations includes an exception which states that:

> "For purposes of paragraph (c)(1)(i) of this section, the term ``advice, or appraisal or fairness opinion" shall not include the preparation of a general report or statement that merely reflects the value of an investment of a plan or a participant or beneficiary, provided for purposes of compliance with the reporting and disclosure requirements of the Act, the Internal Revenue Code, and the regulations, forms and schedules issued thereunder, unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries."

This provision is awkwardly written. It sets out a narrow exception to the general definition of a fiduciary under the Proposed Regulations and, by implication, provides that general reports and statements not meeting the limited exception are considered to be advice, which would make fiduciaries of those persons preparing those reports and statements.

BNY Mellon, like many other banks, provides trust and custody services for clients' ERISA-covered plans. Plan sponsors and named fiduciaries expect that the banks will provide reports and statements on a periodic basis as a part of its normal services as a directed trustee or custodian. There is no expectation on the part of the banks or their clients that these reports or statements are being provided by the banks as a fiduciary service or on the part of the banks as fiduciaries. Most of these reports and statements are produced on a daily, monthly or quarterly basis and, although such reports and statements may assist named fiduciaries and plan administrators in complying with certain reporting requirements, they are not "provided for purposes of compliance with the reporting and disclosure requirements of the Act, the Internal Revenue Code, and the regulations, forms and schedules issued thereunder."

In addition, the banks do not control the purposes for which the report is used. That is a matter determined by the plan administrator or other named fiduciary. Any one of these reports could serve as the "basis on which a plan may make distributions to plan participants and beneficiaries." As a result, under the contorted language of this regulation, the directed trustee or custodian providing such a report or statement could be swept into the category of being a fiduciary under the Proposed Regulations through actions completely within the discretion of the plan administrator or the named fiduciary. This could occur despite the understanding of the directed trustee or custodian and the plan administrator or named fiduciary that the trustee or custodian, in providing such reports and statements, is merely performing a ministerial duty.

It needs to be noted that where a bank and financial services company, such as BNY Mellon, acts as a directed trustee or custodian, it does not select the investments of the plan. Those decisions are made by the named fiduciaries and investment managers hired by the named fiduciaries. Nevertheless, the bank is expected to produce periodic reports for the named fiduciary and plan administrator which include the value of the assets in the trust.

BNY Mellon's non-banking entities are also asked to provide reports to clients based on their access to custodial data and their ability to combine the client's data with non-custodial data, such as performance and analytic data. These reports may assist the client in documenting compliance with SEC regulations, state regulations and for other compliance purposes. In these instances, BNY Mellon is acting as a mathematician, it is not providing advice on regulatory compliance nor is it in a position to assess the client's overall compliance or the efficacy of the report for that purpose. Limiting the exception under Section 2510.3-21(c)(1)(iii) to certain regulatory purposes may result in a change to the product offerings many service providers currently make available to their clients.

Creating only a narrow exception to the general definition of a fiduciary under the Proposed Regulations would have an enormous consequence on the directed trustees and custodians providing reporting services, including BNY Mellon. Making the directed trustees and custodians fiduciaries merely for producing reports and statements which do not satisfy the exception could lead to unintended consequences:

1. Directed trustees and custodians could refuse to hold assets which are not "assets for which there is a generally recognized market;"
2. Directed trustees and custodians could increase fees substantially to offset the risk of being considered to be a fiduciary under the circumstances;-
3. Directed trustees and custodians could limit reports to those which would meet the Department's limited exception;
4. Reporting services may no longer be provided or may be provided at an increased cost which offsets the additional risk of being fiduciary in providing such reports; and
5. Other service providers (who are willing to accept fiduciary responsibility associated with the reports) may provide such services, thus requiring the transfer of data to these service providers and creating greater risk of breaches of confidentiality and security breaches.

It is recommended that the Department revise Section 2510.3-21(c)(1)(iii) of the Proposed Regulation to directly state an exception to the definition of fiduciary covering reports and statements provided by service providers, such as directed trustees and custodians, performance and analytics providers or other reporting services, who are currently not fiduciaries with respect to such services. The exception would be as follows:

> "For purposes of paragraph (c)(1)(i) of this section, the term ``advice, or appraisal or fairness opinion" shall not include the preparation of a general report or statement that reflects the value of an investment of a plan or a participant or beneficiary, or a statistical analysis or other objective numerical report relating to a plan, participant or beneficiary."

Pricing Services

As previously stated, in providing trust and custody services to its clients for ERISA-covered plans, BNY Mellon and other trustees/custodians typically provide periodic reports that include prices for the various assets held by those plans. BNY Mellon requests clarification that the phrase "provides advice concerning the value of securities and other property" is not intended to encompass the reporting of prices for assets included on general reports and other statements that are provided by service providers such as directed trustees and custodians (whether or not such

reports or other statements are intended to help satisfy the general reporting requirements of ERISA).

Trust and custody clients electing to receive such reports and statements may choose daily or monthly reporting and generally request pricing of the assets listed. When providing such requested pricing, custodians and directed trustees do not undertake independent valuations regarding securities held in the various portfolios. BNY Mellon, for example, has millions of different types of assets under administration, the majority of which require daily pricing. Out of necessity, BNY Mellon relies on third party vendors and other client authorized sources to provide the prices it reports. Currently, all pricing vendors are external to BNY Mellon. Whether a plan's investment portfolio includes investments for which there is a generally recognized market or not, directed trustees and custodians rely on pricing services and other such authorized sources to supply prices for the securities and other investments. Where available, BNY Mellon uses more than one vendor for securities of each asset type, class or issue. At the time of acquisition, each security or other investment is assigned a primary pricing source in accordance with pricing guidelines disclosed to, or otherwise agreed to by, BNY Mellon clients, based on the characteristics of the security or other investment. The price received from a primary source is used in connection with such reports or other statements unless a tolerance check or price challenge by an authorized client source, results in the use of a price from a secondary vendor, or unless BNY Mellon is directed as to a specific price or source to be used.

Where vendors are available to provide prices for particular securities, BNY Mellon administratively monitors prices supplied by such vendors and may use a secondary vendor or change a primary vendor designation if (a) a price for a particular security is not received from the primary vendor, or (b) the vendor no longer prices a particular asset type, class or issue. Vendor-provided prices are subjected to automated tolerance checks to identify and to help avoid, where possible, the use of inaccurate prices. A price that does not satisfy the tolerance check is reported to the vendor that provided the price. If a price is validated by the vendor in question, that vendor-sourced price is used. If not, a secondary source price that has passed the applicable tolerance check is used (or queried with the vendor if it is out of tolerance), resulting in either the use of a secondary price, where validated, or the last reported price for the particular asset type, as in the case of a missing price for the subject reporting date.

Where a vendor provided price is not available for a security, BNY Mellon must look to other authorized pricing sources such as a named fiduciary, investment manager, or general partner of a partnership for pricing information. As noted above, BNY Mellon discloses to plan sponsors and certain other plan fiduciaries its pricing procedures and guidelines, including the third party pricing vendors that it uses. In choosing BNY Mellon to provide trust or custody services, the named fiduciaries agree to these pricing procedures and guidelines.

An important point with regard to this service is that BNY Mellon does not determine the price or otherwise perform an independent valuation service, but applies and reports prices provided to it. In many (if not all) cases, the pricing vendors (and other authorized sources) do not warrant or guarantee the accuracy of the prices provided. Although BNY Mellon applies tolerance checks to the vendor provided prices, the purpose of these ministerial checks is merely to raise questions as to whether a "correct" price has been provided; these checks do not *establish* the price. A reported price for a security should be looked at as a reflection of the last market trade for a like security or the ministerial application of a series of factors designed to indicate a close approximation of what someone might have used when trading a security. A reported price can never be a guarantee of what a willing buyer and seller would use when trading a security in the future.

The use of pricing services has never been considered by trustees and custodians to be investment advice under the current definition of investment advice. It is BNY Mellon's position that the use of prices from a pricing vendor or other authorized source is in no way considered a recommendation, appraisal or fairness opinion as to the value of a security under the regulations that would make reporting of prices and values a fiduciary act. For this reason, BNY Mellon urges the Department to specifically exclude prices received from such pricing services (and other authorized sources) and included on reports and other statements from being considered "advice" for purposes of the Proposed Regulations.

While the comments above are applicable to larger ERISA-covered plan relationships, the comments are also applicable to other trust and custody situations. BNY Mellon has affiliates that offer custodial and other services to the small business plans and IRA account owners. The impact of the issues identified related to reports, statements and pricing service are also significant to that market. IRA Custodians would not expect to become fiduciaries for providing a value on assets each month for statement purposes. IRA Custodians similarly rely on pricing services, and like other custodians, apply the prices provided to them. IRA Custodians, who can no longer rely on a pricing service, could take the position that they will no longer hold assets that are hard to value. IRA Custodians do not select these investments for an account owner, and will be reluctant to accept fiduciary status. This may trigger further impact to the account owner, including the possibility that the account owner may need to liquidate or distribute the asset, resulting in a decrease in their retirement savings.

Other Services

Section 2510.3-21(c)(1)(i)(3) of the Proposed Regulations covers activities where a person "provides advice or makes recommendations as to the management of securities or other property." The Department's explanation of the regulations provides minimal guidance as to what is meant by this language. It only notes that such activities would include "advice and recommendations as to the exercise of rights appurtenant to shares of stock (e.g. voting proxies) and as to the selection of persons to manage plan investments."

It is BNY Mellon's concern that the above language in the Proposed Regulations is unclear and could potentially apply to services which trustees and custodians provide to plan fiduciaries on a non-fiduciary basis. An example is performance and risk analytics services. Plan fiduciaries may use the service to obtain information to make decisions with respect to the plan's investments, to select investment managers and to analyze risk, performance and asset allocation. The services consist of measuring performance, not recommending or advising on investments.

Numerous non-banking entities provide these services today. BNY Mellon does not believe that these entities consider themselves financial advisors or fiduciaries in providing services or that their reports to constitute "recommendations" simply because their reports analyze manager performance through mathematical or statistical analysis that is based on historical data.
We recommend that the Proposed Regulations be revised to clearly state that these types of client support services are not considered advice under the Proposed Regulations.

Revision of the Accepted Criteria of a Fiduciary Providing Advice or Making a Recommendation

Under Section 2510.3-21(c)(1)(ii) of the Proposed Regulations, the Department has set out four statuses, one of which must be met in order to be determined to be a fiduciary. The fourth status (Section 2510.3-21(c)(1)(ii)(D)) covers a person who:

> "Provides advice or makes recommendations described in paragraph (c)(1)(i) of this section pursuant to an agreement, arrangement or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant or beneficiary that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary."

This provision is a rewrite of the current five-part rule which has operated efficiently for many years. In rewriting this status, the Department has deleted key portions of the current rule upon which BNY Mellon's businesses have relied. Specifically, the Department has deleted the concepts that advice is provided "on a regular basis" and through a "mutual" agreement, arrangement or understanding.

By deleting the criteria that advice is provided "on a regular basis," the Department has injected a high level of uncertainty into the relationship between a plan fiduciary or a participant and the provider of information concerning its services and products. Under the proposed rule, information provided on a one-time basis may be treated, even in hindsight, by a plan fiduciary or participant as making the provider of such information a person meeting the status under Section 2510.3-21(c)(1)(ii)(D) above. While the Department may believe that one-time advice can be fiduciary in nature, the proposed language does not go to the nature of the advice which makes the person a fiduciary in providing one-time information.

Further, the Department has eliminated the word "mutual" from the five-part test. While the provision still provides for an "agreement, arrangement or understanding, written or otherwise," the deletion of the word "mutual" creates ambiguity about this requirement. Interchanges between plan fiduciaries, participants or beneficiaries and service or product providers occur under many circumstances. Plan fiduciaries, participants and beneficiaries have various interests or reasons (disclosed or undisclosed) for engaging in discussions with service and product providers. The concept of mutuality provides an added level of formality which is critical to determining that an actual advisory relationship exists. An advisor is entitled to know when a plan fiduciary, participant or beneficiary considers it to be a fiduciary when engaging in discussions.

BNY Mellon recommends that Section 2510.3-21(c)(1)(ii)(D) be revised to add back in language requiring that advice be provided "on a regular basis" and that an agreement, arrangement or understanding be "mutual."

Mutual Fund Platforms

Under the Proposed Regulations Section 2510.3-21(c)(2)(ii)(B), the Department has proposed the following exception:

> "Marketing or making available (e.g., through a platform or similar mechanism), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property from which a plan fiduciary may designate investment alternatives into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, if the person making available such investments discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice."

BNY Mellon has affiliates that offer both a proprietary mutual fund and brokerage platform. When its sales associates speak to clients or potential clients, part of the assistance they provide is to provide information on asset allocation/diversification concepts. It is common for our sales associates to group investments into subsets by asset class and/or to provide reports to assist plan fiduciaries or individuals in reviewing investment alternatives. Under the proposed regulations, it is unclear whether such assistance to plan fiduciaries and individuals is considered to be "individualized." While the plan fiduciaries and individuals are given parameters to enable them to organize and review fund alternatives, this information is not of a level which would be considered specific to a plan. In addition, all decisions as to the selection of investment alternatives are made by the plan fiduciary or the individual, not the sales associate.

BNY Mellon recommends that the Department amend the Proposed Regulations to exclude from "individualized" advice assistance and information provided to a plan fiduciary or a participant to enable them to review investment alternatives.

Affiliates

Section 2510.3-21(c)(1)(ii) of the Proposed Regulations covers five statuses for a person who is potentially a fiduciary for purposes of the Proposed Regulations. However, the opening language of that portion of the Proposed Regulations expands the coverage of the five categories by including the following language: "such person either directly or indirectly (e.g., through or together with an affiliate)..."

This language appears to state that a person's status as a fiduciary under Section 2510.3-21(c)(1)(ii) of the Proposed Regulations is dependent upon its relationship to an affiliate that is a fiduciary with respect to the plan and that is performing unrelated services for the plan.

We recommend that Section 2510.3-21(c)(1)(ii) of the Proposed Regulations be revised to read: "such person when engaging in any activity described in paragraph (c)(1)(i) ..."

Coordination of Regulations

As previously stated, the Department's proposed regulations, even in a modified form, are expected to be an enormous shift in the definition of fiduciary. At this time it is unknown when a change in the definition would be effective. However, service providers are now in the process of implementing policies and procedures to comply with the requirements of the regulation for ERISA Section 408(b)(2). Those regulations require, in part, disclosures where services are "provided directly to the covered plan as a fiduciary" (Section 2550.408(b)-2(c)(1)(iii)(A)(1)). The effective date of the regulations under Section 408(b)(2) is July 16, 2011.

If the Department proceeds to make a significant revision of the definition of fiduciary, such revisions would be effective after July 16, 2011. In anticipation that some services currently provided and determined in good faith not to be fiduciary in nature under the current regulations are subsequently determined to be fiduciary services under a new definition of fiduciary, the Department needs to provide relief for service providers who find that services they have provided for past periods are now subject to new fiduciary requirements. We recommend that the Department revise the Proposed Regulations to grandfather existing contractual relationships.

Effective Date of the Regulations

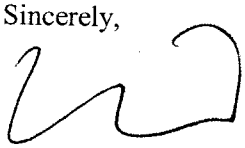
The Proposed Regulations state that the regulations are to be effective 180 days after the publication of the final regulations in the Federal Register. Given the magnitude of the consequences from the changes in the definition of fiduciary being proposed by the Department, it is unrealistic to expect that service providers would be able to comply with the final regulations in such a short time period. A minimum implementation period of one year from the date of the publication of the final regulations is needed.

Summary

In summary, the Proposed Regulations represent a major rewrite of the definition of fiduciary under ERISA Section 3(21). It overturns long established practices which the Department has not previously identified as being problematic and substitutes a new rule which lacks clarity. As set forth in this letter, the Proposed Regulations require significant changes.

If you have any questions concerning the comments in this letter or wish to discuss issues further, please contact me at 412-234-1508, Susan Hollingsworth, Senior Managing Counsel, at (412) 234-6342 or Stanley Koepke, Managing Counsel, at (412) 234-7120.

Sincerely,



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