

February 3, 2011

**VIA ELECTRONIC MAIL**

Mr. Robert J. Doyle  
Director  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

**Re: Proposed Rule on Definition of the Term “Fiduciary” Under ERISA**

Dear Mr. Doyle:

The American Bankers Association (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on the proposed rule regarding the expanded circumstances under which a person is considered to be a “fiduciary” under the Employee Retirement Income Security Act of 1974 (ERISA) when providing investment advice to an employee benefit plan or to a plan’s participants (Proposal). The ABA represents banks of all sizes and charters and is the voice for the nation’s \$13 trillion banking industry and its two million employees. Many of these banks are plan service providers, providing trust, custody, and other services for institutional clients, including employee benefit plans covered by ERISA. As of year-end 2009, banks held \$7.5 trillion in defined benefit and defined contribution accounts.<sup>1</sup>

The definition of fiduciary is a fundamental component of ERISA, with significant implications for our member banks. We are, therefore, pleased that the Department plans to hold a hearing on the Proposal next month and trust that the Department will carefully weigh, and will take appropriately into account, industry reactions, comments, and input prior to taking further action.

We believe that the Proposal is overbroad and unintentionally captures persons who were never intended to be included within the term “fiduciary” under ERISA. If adopted in its current form, the Proposal is likely to impact negatively the very participants, beneficiaries, and account holders that it is intended to protect by making it extremely difficult or costly for banks to deliver the services and information necessary, helpful, or appropriate for a financially sound retirement. It is further possible that some services provided to plans and their participants and beneficiaries may altogether be discontinued. This in turn may lead to greater costs and inefficiencies in the administration of the nation’s pension plans and individual retirement accounts. In light of these concerns, we request that the Department amend the Proposal, taking into account the testimony obtained from the upcoming hearings on the Proposal as well as on-going coordinated action

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<sup>1</sup> FDIC Quarterly Banking Profile, Table VIII-A (December 2009).

with the other agencies as addressed below. Rather than a sweeping re-definition of “fiduciary”, the amended Proposal should: (i) focus on the *specific actions* that the Department has concluded should warrant inclusion within the fiduciary definition, and (ii) make clear or expressly carve out from the definition those activities that do not rise to the level of fiduciary activity (such as the activities described herein).

Section 3(21)(A) of ERISA provides that a person is a “fiduciary” with respect to a plan to the extent (i) it exercises any discretionary authority or discretionary control with respect to management of such plan or exercises any authority or control with respect to management or disposition of its assets; (ii) *it renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so*; or (iii) it has any discretionary authority or discretionary responsibility in the administration of such plan.<sup>2</sup>

In the Proposal, the Department proposes to expand part (ii) above of the fiduciary definition by re-interpreting what it means for a person to provide “investment advice for a fee or other compensation.” Under the Proposal, a person becomes a fiduciary when such person: “(1) Provides advice, or an appraisal or fairness opinion, concerning the value of securities or other property, (2) Makes recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property, or (3) Provides advice or makes recommendations as to the management of securities or other property.”<sup>3</sup>

Among the reasons the Department cites for proposing these changes are: (1) the shift from defined benefit plans to defined contribution plans in the financial marketplace; and (2) the difficulty for the Department to conclude, under the current five-part test<sup>4</sup> of the Department’s regulations, whether one is a fiduciary under ERISA. The marketplace shift from defined benefit plans to defined contribution plans as well as the increased complexity of investment products, however, have not impacted the core determination of when one is acting as a fiduciary under ERISA. Moreover, the occasional challenge posed by implementing the five-part test does not warrant a wholesale abrogation of the current regulation in favor of a far-reaching definition of “fiduciary”.

We also note that the Proposal comes at a time when banks and other entities subject to ERISA are attempting to comply with the Department’s recently issued interim final rule governing fee

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<sup>2</sup> ERISA § 3(21)(A). [Emphasis added.]

<sup>3</sup> 75 Fed. Reg. 65,264 (Oct. 22, 2010).

<sup>4</sup> The Department’s regulation creates a five-part test for determining whether a person should be treated as a fiduciary by reason of rendering investment advice. See 29 C.F.R. § 2510.3-21(c). For advice to constitute “investment advice,” an adviser who does not have discretionary authority or control with respect to the purchase or sale of securities or other property for the plan must – (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary, that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. See *id.*

disclosures to plan fiduciaries under section 408(b)(2) of ERISA.<sup>5</sup> We believe that the Proposal's attempt to re-define a fiduciary will produce confusion and uncertainty regarding the content of these disclosures.

Finally, we note that in light of the significant changes occurring in the financial services industry as a result of the passage of the Dodd-Frank Act (Dodd-Frank),<sup>6</sup> the securities activities of banks (including those involving fiduciary duties owed to their customers and to parties with whom they do business) will be subject to overlapping and possibly conflicting regulatory requirements and obligations, as well as oversight by multiple federal regulators. In addition to the Department, bank fiduciaries may be subject to regulation by the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), and the Municipal Securities Rulemaking Board (MSRB). The Department's issuance of the Proposal appears to preempt the contemporaneous efforts of these regulatory bodies to regulate bank fiduciary activities in the financial marketplace. Consequently, the Proposal, if finalized, may duplicate, overlap, or conflict with the actions of the other regulators. Before taking any further action, the Department should seek to coordinate the Proposal's provisions with the other federal agencies' regulatory initiatives mandated by Dodd-Frank.

Although we provide our initial thoughts on the Proposal below, we wish to reserve the opportunity to comment further on the Proposal after we have carefully reviewed and analyzed the pending regulatory actions of the SEC, CFTC, and MSRB.

## **I. The Proposal Expands the Definition of Fiduciary to Include Non-Fiduciary Administrative and Other Services.**

### **A. Providing a Statement that Includes the Values of Assets that Are Not Part of a “Generally Recognized Market” Should Not Lead to Fiduciary Status.**

Under the Proposal, it appears that a service provider, in certain situations, could be deemed a fiduciary merely by providing a plan fiduciary or plan participant a general statement reflecting the value of plan investments (unless that statement or report is provided “for purposes of compliance with the reporting and disclosure requirements” of ERISA or the Internal Revenue Code and the regulations thereunder). It is common for banks to prepare and provide reports and statements more frequently than ERISA's minimum reporting requirements. For example, many trustees, custodians, and record keepers, in addition to providing periodic (e.g., monthly or quarterly) statements, make available continuous access online to current information regarding plan investments. Providing such online access and information in addition to periodic statements is a purely administrative function and should not be considered a fiduciary act. Consequently, the “reporting and disclosure requirements” exception to fiduciary status should be expanded to cover expressly all such access and information and other similar periodic reports.

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<sup>5</sup> 75 Fed. Reg. 41,600 (July 16, 2010).

<sup>6</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (2010).

The Proposal, moreover, limits the reporting and disclosure requirements exception by providing that the exception does not apply if “such report involves assets for which there is not a *generally recognized market* and serves as a basis on which a plan may make distribution to plan participants and beneficiaries.” [Emphasis added.] Typically, however, directed trustees and custodians receive prices from third parties for assets which are not part of a “generally recognized market.” It is often because there is not any generally recognized market that an investment manager will use a pricing service or appraiser, such as for real estate or private equity investments, to help provide a value for such securities or other assets. Merely taking that price from the third party and placing it on general statements or reports on plan assets is a purely administrative function and should not cause a bank, acting as a trustee or custodian, to become a fiduciary with respect to the provision of such reports.

With respect to valuation, we also ask the Department to consider and analyze the implications for a person who, under the Proposal, might be a fiduciary when the individual accepts a valuation responsibility. What would be the scope and duration of the resulting duties? Since this would now apply where a party is engaged for a one-time service only, how would fiduciary responsibilities apply? For example, how would a monitoring responsibility apply to the person supplying a one-time service such as valuation? What will be the start and end time of this responsibility?

We have further concerns with the phrase “generally recognized market” since this term is not defined in the Proposal and thus unintentionally could exclude from its ambit a variety of situations, such as modeling or matrix pricing, or even simple mathematical calculations following industry standard methodologies, that are used to arrive at a market valuation. Another service that trustees or custodians may provide to employee benefit plans is the calculation of net asset values (NAV) for a portion of a plan or an investment option, such as a separately managed account contained in a plan. As with other calculations described above, the calculation of a NAV involves no discretion but merely straightforward mathematical calculations. This likewise should not be considered a fiduciary act. For example, directed trustees and custodians sometimes calculate the value for swaps or derivatives based upon the elements or characteristics of the instrument received from other entities. These characteristics are reflected in the valuation model and are used to ascertain a market valuation. While directed trustees and custodians may be the ones who create the model, all of the elements that determine the price itself are provided by other parties. In other circumstances, the model may be purchased from a vendor. The creators of these models do not stand behind them and make no representation that the prices they generate represent the fair value of the underlying instrument. The inclusion of value of any such asset’s value on a statement, therefore, should not be considered a fiduciary act.

Also, alternative plan assets such as limited partnership interests may be reported based upon an industry standard process known as roll-forward methodology. Under this methodology, the last available statement from the limited partnership or investment is adjusted solely to reflect subsequent contributions made or distributions received with respect to the investment. The adjustment requires no exercise of discretion and merely follows the industry standard methodology.

A related concern is the interplay between the Proposal and the plan asset rules. Under the plan asset rules, both a plan's equity investment in a bank collective investment trust (CIT) and an undivided interest in the CIT's investment in other vehicles are "plan assets." An example is when a CIT invests in a real estate fund, hedge fund, or private equity fund. Under the Proposal, any party passing along information to the CIT's investment manager on the value of the CIT's investment in the underlying investment vehicle (units in the underlying fund), or on assets of that vehicle that are used in computing the vehicle's unit values, is potentially an ERISA fiduciary under the Proposal because it may be deemed to be giving advice on the value of securities or other property owned or to be purchased by a plan. This would be true whether the underlying investment vehicle invests in publicly offered securities or in non-public assets (with values determined by appraisal). As a result, we are concerned that investment managers, custodians, and sub-custodians of the underlying investment vehicles could all be deemed fiduciaries under the Department's proposed definition.

These examples show how valuation of an asset outside a "generally recognized market," or the simple act of passing along a plan asset's value to another party, may unintentionally confer fiduciary status on multiple entities (service providers as well as investment managers) that were never intended to be considered fiduciaries under ERISA.

### **B. Providing Direction to an Individual Regarding Distribution from a 401(k) Plan Should Not Lead to Fiduciary Status.**

The Proposal questions whether the expansion of the term "fiduciary" should include direction regarding distributions from a 401(k) plan. We believe this would blur the distinction between advice, on the one hand, and education and marketing on the other hand.

When a service provider speaks to individuals about distributions from their 401(k) plan, this falls somewhere between investment education and marketing, both of which are specifically, and appropriately, excluded from being considered fiduciary activity. As the Proposal states, "the following acts in connection with an individual account plan . . . shall not, in and of themselves, be treated as rendering of investment advice . . . (A) Provision of investment education information and materials. . . (B) 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 . . . 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."<sup>7</sup>

The conversation between a participant departing employment and the plan sponsor generally involves information about the distribution options that are available to that individual. This is important educational information. Service providers will be impeded from providing possible investment options to plan participants out of concern that any such information imparted to the individual might be deemed "advice" that would trigger fiduciary status. The Department,

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<sup>7</sup> 75 Fed. Reg. at 65,277.

therefore, should clarify the situations that involve generalized (as opposed to individualized) needs of plan participants regarding possible actions to take with regard to their investments. A provider marketing a standardized set of investment options to participants, for example, should not be deemed to be giving individualized advice to a particular plan participant, and therefore, should not make the provider a fiduciary.

**C. Providing Certain Services in Connection with Making Investment or Management Decisions Should Not Lead to Fiduciary Status.**

The Proposal includes language (section (c)(1)(ii) (D)) regarding the provision of individualized advice or making investment recommendations regarding plan assets. This provision uses phrases that make unclear whether the advice will rise to the level of fiduciary responsibility. The proposal's language includes advice that "may be considered" in connection with making an investment or management decision. We are unsure how to determine when advice provided "may" be considered, since that term does not require a meeting of the minds, as is typically required under contract law.

The Proposal also is unclear when advice rises to the level of "individualized." In this regard, the Department should clarify this term or broaden the scope of the limitation available with respect to marketing or making available an investment menu from which a plan fiduciary may designate investment alternatives for individuals in an individual account plan. For example, during a plan fiduciary's due diligence process with respect to prospective record keepers, the plan fiduciary may request a sample investment lineup from a prospective record keeper. In response, record keepers may provide a sample lineup or may narrow down the universe of investment alternatives on its menu based on objective, quantitative criteria (such as international equities or short-term equities, ratings, expense ratios, etc.). The Department should clarify that these practices are not the provision of "individualized" advice since the universe of investment options is simply pared down to a reasonably tailored set of options (without singling out a particular investment strategy, investment option, or portfolio). Alternatively, the Department should broaden the scope of the limitation with respect to marketing or making available an investment menu to encompass these practices.

The Department should further clarify that the provision of analytics reports regarding (i) plan performance, (ii) an investment manager's performance, or (iii) an investment manager's compliance with investment guidelines, does not constitute investment advice. Directed trustees and custodians can assist plan sponsors and fiduciaries with their fiduciary oversight responsibilities by providing various analytics reports without exercising discretion. Plan sponsors provide the criteria for the service provider's analysis, and the service provider relies upon industry benchmarks or risk-return data obtained from third parties or proprietary algorithms that are commonly utilized and not customized by the plan sponsor. Similarly, a service provider may utilize reporting tools to filter for investment managers that satisfy the plan sponsor's criteria for a particular investment mandate. Again, the database of investment managers (including performance data) is provided by a third party. The plan sponsor provides the selection criteria and the reporting tools are not customized by the plan sponsor. Also, a service provider may provide reporting on an investment manager's compliance with the plan

sponsor's investment guidelines, on a post-trade basis, if such manager makes an investment that does not appear to be within the investment guidelines.

The service provider exercises no discretion when providing the aforementioned reports. It makes no recommendation regarding actions that might be taken by the plan sponsor as a result of such reporting. We believe such reports would be important information for a plan fiduciary to have in appropriately discharging its responsibilities to the plan; however, such information is unlikely to be made available by the service provider if merely providing such reports were to trigger fiduciary status.

#### **D. Clarification Requested on Seller's Exception.**

In connection with the Proposal, we would ask that the Department clarify that when a bank (or other entity) is responding to an RFP or an existing customer's inquiry, and the bank recommends itself or an affiliate to provide additional services to a plan, that this action would appropriately fit within the seller's exception found in the Proposal under section (c)(2)(i). This would help ensure that the bank would avoid being unintentionally designated as a fiduciary under the Proposal.

#### **II. The Proposal Unnecessarily Expands the Definition of Fiduciary to Investment Advisers.**

Under section (c)(1)(ii) of the Proposal, the definition of fiduciary includes persons that were not intended to fall within the term. Specifically, the Proposal significantly broadens the definition of fiduciary to include persons who are deemed to be investment advisers under the Investment Advisers Act of 1940, as amended (Advisers Act).<sup>8</sup> In doing so, the Department appears to have concluded that an investment adviser, because it owes fiduciary duties to its customers under the Investment Advisers Act, should automatically be deemed a fiduciary under ERISA. We note that fiduciary status under one regulatory scheme (the Advisers Act) should not inexorably confer fiduciary status under another regulatory scheme (ERISA), particularly where there may be differences in fiduciary standards, duties, responsibilities, obligations, and liability between the two distinct schemes. This is particularly the case here, where a recently released SEC study on an investment adviser's fiduciary duties to retail customers is expected to lead to a revised standard of conduct for advisers (and a new standard applicable to brokers and dealers).<sup>9</sup>

#### **III. The Proposal Creates Confusion and Uncertainty over Compliance with the Interim Final Rule Governing Fee Disclosures Under Section 408(b)(2) of ERISA.**

On July 16, 2010, the Department issued an interim final rule regulating the disclosures provided to plan fiduciaries under section 408(b)(2) of ERISA (Disclosure Rule). The Disclosure Rule requires certain service providers to employee pension benefit plans to disclose information to

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<sup>8</sup> 15 U.S.C.A. § 80b-1 et seq.

<sup>9</sup> See Dodd-Frank Act § 913(g)(2); Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers (Jan. 2011).

assist plan fiduciaries in assessing the reasonableness of contracts or arrangements, including the reasonableness of the service providers' compensation and potential conflicts of interest that may affect the service providers' performance. Among the disclosures required is a statement that the service provider (including an affiliate or subcontractor) "will provide, or reasonably expects to provide, services . . . as a fiduciary."<sup>10</sup>

In order to comply with the Disclosure Rule, covered services providers (including banks) will need to determine whether the services they provide to the plan fiduciary rise to the level of a fiduciary service. This may be a difficult task since it is not always clear when a particular service is a "fiduciary" service. The Proposal, in re-defining the term "fiduciary" under section 3(21)(A) of ERISA, introduces additional uncertainty and confusion into this determination. This is a key concern since a service provider's failure to provide accurate disclosures could result in fiduciary liability and/or termination of the service provider's contractual relationship with the plan fiduciary.<sup>11</sup> We are also concerned that, should the Department finalize the Proposal, service providers would have insufficient time and opportunity to consider, and if necessary amend, the language of the disclosures originally formulated to comply with the Disclosure Rule.

We request that the Department provide (i) guidance on the interplay between the Proposal and the Disclosure Rule so that covered service providers will be able to formulate accurate disclosures to plan fiduciaries regarding their services that are deemed to be fiduciary services under the Disclosure Rule; and (ii) adequate time to allow for service providers to adjust the disclosure language as required under the Disclosure Rule, should the Proposal become finalized.

#### **IV. The Proposal Is Inconsistent with the Objectives of the Pension Protection Act.**

The Proposal is inconsistent with the congressional intent in passing the Pension Protection Act of 2006 (PPA)<sup>12</sup> and undermines the prohibited transaction exemption for participant investment advice enacted as part of the PPA. The PPA amended ERISA and the Internal Revenue Code by adding a statutory exemption that permits the provision of investment advice to a participant through an "eligible investment advice arrangement."<sup>13</sup> Shortly thereafter, the Department issued a Field Assistance Bulletin clarifying that the varying fee limitation under an eligible investment advice arrangement applied to the compensation received by the individual providing the advice and his employer, but not to that paid to affiliates of the fiduciary adviser.<sup>14</sup>

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<sup>10</sup> 29 C.F.R. § 2550.408b-2(c)(1)(iv)(B).

<sup>11</sup> Commenters to the Disclosure Rule expressed concern that the factual nature of fiduciary status under ERISA adds a level of uncertainty as to compliance. The Department believes that the final disclosure provision on fiduciary status addresses the commenters' concerns since "the final provision only requires disclosure if the provider will *or reasonably expects* to be providing services as a fiduciary or registered investment adviser." 75 Fed. Reg. at 41,608. The Department's response, however, begs the question whether the service provider's conclusion that a service is non-fiduciary is in fact a reasonable conclusion, and therefore, does not remove the uncertainty whether compliance has been achieved.

<sup>12</sup> Pub. L. 109-280, 120 Stat. 780 (Aug 17, 2006).

<sup>13</sup> See ERISA § 408(g)(2).

<sup>14</sup> Department of Labor, Field Assistance Bulletin No. 2007-01 (Feb. 2, 2007).

The Department's expansive view of the term "fiduciary" under the Proposal, however, could substantially restrict the application of the new PPA exemption and therefore limit the provision of high quality investment advice to participants and IRA account holders. Many fiduciary advisers relying on the exemption would be affiliated with institutions that may receive variable compensation. Under section (c)(1)(ii)(D) of the Proposal, these affiliated institutions would be considered to be acting as ERISA fiduciaries in recommending their respective advisory programs because a plan "may consider" the recommendation. Consequently, a fiduciary adviser's affiliate that is considered to be a fiduciary under the Proposal, and which receives varying fees as permitted under the PPA statutory exemption, would appear to be engaged in prohibited self-dealing under ERISA.<sup>15</sup> We request that the Department amend the Proposal so that fiduciary advisers and their affiliates, whose fee arrangements have been structured to comply with the PPA, may continue to rely on the PPA statutory exemption with respect to such arrangements.

## **V. The Proposal Should Not Apply to Individual Retirement Accounts.**

The Department suggests that a primary impetus behind the Proposal is to accomplish better its enforcement objectives. Individual Retirement Accounts ("IRAs"), however, are not subject to Department enforcement authority. Although the Proposal applies equally to IRAs and qualified plan accounts, there are numerous distinctions between the two types of accounts, which distinctions have historically been recognized in other areas of law. The Proposal nevertheless disadvantages IRAs because only individual account plans (such as 401(k) plans) are afforded exemptions from the Proposal's coverage. In the absence of these exemptions, the Proposal's application to IRAs would ultimately have a disproportionately negative impact on the thousands of IRA account holders who have come to rely on banks and other financial institutions to deliver investment services and support. At this time, therefore, we suggest that IRAs be deleted from coverage under the Proposal in order for the Department to determine whether the unique costs and structure of IRAs would support a different fiduciary standard.

## **VI. Under Dodd-Frank, Banks Will Be Subject to Multiple Fiduciary Standards.**

The Department has issued the Proposal at a time of rapid change in the fiduciary marketplace. The passage of Dodd-Frank has resulted in several major regulatory initiatives which impact bank fiduciary activities. First, as required by Dodd-Frank, the SEC has recently issued a study that will serve as the springboard for issuing a uniform federal fiduciary standard of care on brokers, investment advisers, and their respective associated persons. The primary purpose of this initiative is to harmonize the different standards of care applicable to brokers and advisers. Second, Dodd-Frank mandates the CFTC to promulgate rules applicable to the business practices and potential conflicts of interest of swap dealers and major swap participants.<sup>16</sup> The CFTC has already issued proposed rules in this area.<sup>17</sup> Third, the MSRB, under the SEC's oversight, is in

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<sup>15</sup>See 29 C.F.R. § 2550.408b-2(e).

<sup>16</sup> Dodd-Frank § 713(h).

<sup>17</sup> See Commodity Futures Trading Commission, Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 Fed. Reg. 80,638; Commodity Futures Trading Commission, Implementation of Conflicts of Interest Policies and Procedures by Swap Dealers and Major Swap Participants, 75 Fed. Reg. 71,391.

the process of establishing a new regulatory scheme applicable to municipal advisers, which will include provisions on fiduciary duties owed to an adviser's clients.<sup>18</sup>

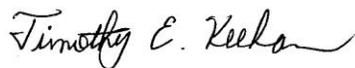
All of these regulatory initiatives significantly impact the activities of banks subject to ERISA. Rather than acting in piecemeal fashion, which could potentially disrupt industry practices, create confusion and uncertainty in the marketplace, and prove an impediment to investment for retirement, the Department either should refrain from acting on the Proposal until these initiatives are complete or work alongside the other agencies to promulgate fiduciary standards of care and conduct that are consistent.

## **VII. Conclusion.**

We share the Department's efforts to improve protection of the interests of plans and their participants and beneficiaries by targeting certain professionals whose misconduct or deficient actions have fallen inappropriately outside the definition of "fiduciary" under ERISA. We believe, however that the Proposal is overbroad and captures persons never intended to be included as ERISA fiduciaries. We strongly encourage further study of these proposals and the relevant issues involved. After the conclusion of its hearings on the Proposal, the Department should amend the Proposal in a way that takes into account industry concerns, comments, and input, and enhances banks' ability to provide to their customers the financial services that they need and want. The amended Proposal should provide for a narrowed expansion of the term "fiduciary" that would exclude activities, such as those described herein, that are generally considered to be outside the scope of the term. Furthermore, in light of proposals arising from the SEC, CFTC, and MSRB on similar fiduciary issues, the Department should closely coordinate its rulemaking actions with these regulatory bodies in order to minimize the chance of overlapping and conflicting regulatory requirements.

If you have any questions, please do not hesitate to contact me at 202-663-5479.

Sincerely yours,



Timothy E. Keehan  
Vice President & Senior Counsel  
Center for Securities, Trust and Investments  
American Bankers Association

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<sup>18</sup> The MSRB already has amended its "fair dealing" rule to apply to municipal advisers. See MSRB Rule G-17. In addition, at its quarterly board meeting on January 27-28, 2011, the MSRB approved a proposed municipal adviser fiduciary duty rule, G-36, and draft interpretive notice, which will be shortly issued for industry comment.