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Northern Trust

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Via email to e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Definition of Fiduciary Proposed Rule

Ladies and Gentlemen:

Northern Trust Corporation ("Northern Trust") appreciates this opportunity to comment on the Department of Labor's proposed rule which would more broadly define the circumstances under which a person is considered to be a "fiduciary" by reason of giving investment advice to an employee benefit plan or a plan's participants. Northern Trust, a multi-bank holding company, is a leading provider of investment management, asset and fund administration, banking solutions and trust, custody and related services for corporations, institutions and affluent individuals worldwide. As of December 31, 2010, Northern Trust had assets under custody of US$4.1 trillion, and assets under investment management of US$643.6 billion. Corporate retirement plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA" or the "Act"), and individual retirement accounts are large and important parts of our business.

Although we generally share the concerns that have been expressed in letters submitted by several industry groups in which we participate, including the American Bankers Association, the Financial Services Roundtable, and the American Benefits Council, we would like to emphasize the following issues that are of particular concern to us and our affiliates. All of these issues, if left unresolved, would in our view create the very sorts of "unnecessary burdens on businesses" that President Obama pledged to remedy in his recent State of the Union Address.

1. **Asset pricing and reporting services**

Section 2510.3-21(c)(1)(i)(A) of the proposed regulation lists three types of activities that may cause a person to "render investment advice for a fee or other compensation" within the meaning of section 3(21)(A)(ii) of ERISA, thereby causing such person to become a fiduciary. The first of these activities involves providing "advice, or an appraisal or fairness opinion, concerning the value of securities or other

property". Section 2510.3-21(c)(2) of the proposed regulation then sets forth several examples of acts or circumstances that will not cause a person to be deemed a fiduciary under the proposed regulation.

Northern Trust is concerned that section 2510.3-21(c)(2)(iii) of the proposed regulation as currently written could make trustees and custodians fiduciaries with respect to the preparation of virtually all reports they prepare for ERISA plans and IRAs. We have this concern because the exception set forth in this section is limited to reports that are provided for purposes of complying with the reporting and disclosure requirements of ERISA and the Internal Revenue Code, and does not apply to reports containing assets for which there is not a generally recognized market where such reports serve as a basis on which a plan may make distributions to plan participants and beneficiaries.

We do not believe that the mere reporting of asset prices should make a trustee or custodian a fiduciary. These are ministerial, administrative functions. Trustees and custodians report prices furnished by various third parties, including pricing vendors, insurance companies, general partners of partnerships, investment managers and other plan investment fiduciaries. Most trustees and custodians have detailed written pricing procedures that are provided to investment fiduciaries, and most trust and custody agreements are drafted to make clear the service provider's limited role with respect to pricing. Investment fiduciaries are free to challenge or direct prices they question or disagree with, and should have no expectation that the service providers' reporting of prices constitutes "advice" regarding the fair market value of an asset for which there is not a generally recognized market, much less an "appraisal" or "fairness opinion" of such asset.

The retirement plan industry is premised on the assumption that trustees and custodians are not fiduciaries with respect to asset pricing and reporting functions. Changing this premise would be disruptive to the industry and would result in a substantial increase in costs. Trustees and custodians price and report assets on the basis of a set of ministerial procedures that do not require the exercise of discretion. Deeming trustees and custodians fiduciaries with respect to these functions would require them to design and implement new procedures to properly discharge their newfound responsibilities. The proposed regulation offers no guidance on what a trustee or custodian would need to do in this regard. But it seems clear that if the regulation were implemented in its current form trustees and custodians, in order to protect themselves, would need to hire additional staff to perform due diligence on prices received from third parties on numerous assets. The additional staff would undoubtedly command higher salaries than existing staff because of the skill set required to perform these new tasks. To maintain reasonable profit margins, trustees and custodians would need to pass these increased costs on to plan sponsors who, in turn, would likely pass them through to their plans.

Making trustees and custodians fiduciaries with respect to asset pricing and reporting functions could also force them to reevaluate their service offerings. If they

determined that they were incapable of managing the fiduciary risks associated with these tasks at a reasonable cost, some trustees and custodians might decide that they will no longer report prices for assets they believe create too much risk. This would force investment fiduciaries and plan sponsors, at great inconvenience, to make other arrangements to fill the gaps in the asset reports.

For all of the foregoing reasons, we believe that Section 2510.3-21(c)(2)(iii) should be revised to delete everything following the phrase "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".

2. Third Party Pricing Sources

Northern Trust is also concerned that if the current wording of the proposed regulation is not changed, many third party pricing sources for hard to value assets, fearing fiduciary status, may increase the cost of their services or simply refuse to provide prices for assets they decide are too risky. Again, any such outcome would result in increased burdens to plans and their participants.

3. Affiliates

Northern Trust is concerned that the lead in to paragraph (c)(1)(ii) of the proposed regulation is ambiguous and could lead to a number of unintended consequences. As written, the paragraph suggests that a person's fiduciary status when engaging in activities described in paragraph (c)(1)(i) may hinge on whether or not such person or an affiliate happens to be a fiduciary of the plan for other, unrelated reasons, or on whether such person happens to have an affiliate who is an investment adviser within the meaning of section 202(a)(11) of the Investment Advisers Act of 1940. To avoid the possibility of such clearly inappropriate outcomes, we respectfully request that the Department revise the lead in to paragraph (c)(1)(ii) of the proposal to read: "Such person, *when engaging in an activity described in paragraph (c)(1)(i)*, either directly or indirectly (e.g., through or together with any affiliate)--" (emphasis added).

4. Acknowledgement of Fiduciary Status

Under paragraph (c)(1)(ii)(A) of the proposed regulation, one of the conditions that may cause a person to be considered rendering advice within the meaning of the regulation is a person who "[r]epresents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to providing advice or making recommendations described in paragraph (c)(1)(i)". The Department said in the overview to the proposal that it believes "explicitly claiming ERISA fiduciary status, *orally or in writing*, enhances the adviser's influence, and gives the advice recipient a reasonable expectation that the advice will be impartial and prudent." (Emphasis added.) Northern Trust does not believe it is appropriate to make a person's fiduciary status hinge on determinations relating to an advice recipient's recollection of oral discussions. If this were the standard, then it would seem that plaintiffs in litigation could make claims that

would survive a motion to dismiss—and increase the settlement value of their claims—simply by alleging their recollection that a provider of advice or recommendations had told them they were acting as a fiduciary. This could result in a significant increase in costly litigation. We strongly urge the Department to clarify that a person will not be deemed to have represented or acknowledged that they are acting as a fiduciary under paragraph (c)(1)(ii)(A) unless they do so expressly and in writing.

5. Personalized Advice by Broker-Dealers to Retail Customers.

We endorse the comments of the Financial Services Roundtable and others that there needs to be harmonization of the proposal with rules currently under consideration by the Securities and Exchange Commission relating to personalized advice about securities to retail customers. Subjecting broker-dealers to inconsistent standards of care for ERISA and IRA customers versus other types of retail customers in our view will confuse investors and increase firms' regulatory compliance costs with no tangible benefit to plan participants and beneficiaries.

6. Advice or Recommendations as to the Management of Securities or Other Property

The third type of activity described in paragraph (c)(1)(i) relates to a person who "[provides] advice or makes recommendations as to the management of securities or other property". The only guidance on the intended meaning of this paragraph is contained in the overview of the proposal, which states that it would include "advice and recommendations as to the exercise of rights appurtenant to share of stock (e.g., voting proxies), and as to the selection of persons to manage plan investments". Further guidance is needed with respect to the intended meaning of the terms "advice" and "management". We do not believe, for instance, that those terms should include "performance analytics" services that do not include investment recommendations. Although the information derived from such services may be used by plan fiduciaries in making asset allocation and investment manager hiring and firing decisions, the services themselves consist merely of measuring and reporting plan performance against performance universes and other objective criteria.

Nor do we believe that all consultative services rendered in connection with manager searches should be considered "investment advice" within the meaning of (c)(1)(i). In our view, a trustee, custodian or other provider of manager search services should not be considered to be rendering "investment advice" where such services consist merely of providing lists—without endorsement or recommendation—of investment managers that satisfy objective search criteria selected by the plan fiduciary.

Some trustees and custodians of ERISA plans provide pre-trade analysis services to the plan's investment fiduciary when an investment manager is terminated. These services typically include an analysis of projected costs of liquidating or transitioning the terminated manager's portfolio to a successor manager, timing of the transition, and analysis regarding foreign exchange considerations and equitization of cash that will be

temporarily "out of the market" during the transition period. Again, absent a specific investment recommendation to the plan investment fiduciary, we do not believe these services should be considered "investment advice" within the meaning of (c)(1)(i).

Similar issues arise when a plan transitions assets from one custodian to another (e.g., relative merits of cash vs. in-kind movement of assets, choice of market for effecting transactions, whether or not to equitize cash, and relative merits of futures vs. ETFs), and we believe services in connection with such transitions should be treated similarly, again provided that no specific investment recommendation is made.

Yet another category of services we do not believe constitutes the rendering of investment advice involves "risk/return analysis services", which consist of reviewing different combinations of funds (mutual funds, collective funds, group trusts, etc.) to meet a plan's investment objectives and liability stream. In our view, provided that the funds included in the review and the basis for reviewing them are determined by an independent plan investment fiduciary, or pursuant to an objective process approved by the independent plan investment fiduciary, and provided that the service does not include the making of investment recommendations, the service should not be considered "investment advice" and the service provider should not be precluded from including its own funds, or those of its affiliates, in the review.

We respectfully request that the Department clarify that none of the above types of services will be considered "investment advice" within the meaning of paragraph (c)(1)(i) subject to the above described provisos.

7. Interaction with ERISA Regulation 2550.408b-2

The Department's interim final rule on reasonable contracts or arrangements under section 408(b)(2) of the Act is scheduled to become effective on July 6, 2011. Any expansion of the definition of "fiduciary" under 2510.3-21(c) will necessarily affect the disclosure obligations of service providers under 408(b)(2). We respectfully request that the Department provide guidance allowing service providers sufficient time to bring their disclosures into compliance, once changes to the definition of "fiduciary" are finalized.

8. Conclusion

Again, we thank the Department for the opportunity to comment on this important endeavor, and urge you to thoughtfully consider our comments in your deliberations.

Sincerely,

Dale K. Nichols
Assistant General Counsel