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July 6, 2011

The Honorable William Daley
Assistant to the President and
Chief of Staff
The White House
1600 Pennsylvania Avenue, N.W.
Washington, C.D. 20500

Re: Proposed Regulation from the U.S. Department of Labor's Proposed Rule Regarding New Definition of Fiduciary in the Employee Retirement Income Security Act ("ERISA")

Dear Mr. Daley:

We are writing on behalf of International Bancshares Corporation ("IBC"), a multi-bank financial holding company headquartered in Laredo, Texas. IBC maintains over 278 facilities and more than 440 ATMs, which serve 107 communities in Texas and Oklahoma. IBC is the largest Hispanic-owned financial holding company in the continental United States with over $12.2 billion in assets. IBC is a publicly-traded holding company

The purpose of this letter is to support the comments made by Mr. Frank Keating, President and CEO, American Bankers Association, in a letter dated June 20, 2011, to you as they relate to a proposed rule issued by the U.S. Department of Labor ("DOL") on October 10, 2010, seeking to expand the scope of its regulatory definition of fiduciary investment advisors under ERISA. The new definition of "fiduciary" would more broadly define the term as a person who provides investment advice to retirement plans for a fee or other compensation. DOL's proposed rule would amend a 1975 regulation that defines when a person providing investment advice becomes a fiduciary under ERISA. According to the proposal, the 1975 rule's approach to fiduciary status may, "... inappropriately limit the department's ability to protect plans, participants and beneficiaries from conflicts of interest that may arise from today's diverse and complex fee practices in the retirement plan services market."

DOL's 1975 rule created a five-part test in order for the definition of the term "fiduciary" to be met and among the key elements of the 1975 five-part test was the requirement that the advice had to be given on a regular basis and that it had to be given pursuant to a mutual understanding that the advice would be the primary basis for the investment decision. The DOL's proposed regulations modify the five-part test, essentially creating a two-part test that may apply to a broader group of services. Under the proposed definition, a person would be a fiduciary under ERISA if, for a direct or indirect fee or other compensation: (i) the person

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renders certain defined types of investment services and (ii) the person is engaged in certain activity or has an established status.

The proposal, if adopted in its current form, could significantly expand the number of parties who are subject to the ERISA fiduciary rules. It would remove three key arguments commonly relied upon by parties to disclaim investment advice fiduciary status—"regular basis," "primary basis," and "mutual agreement" (although a revised form of the "agreement" factor remains.

The proposed regulations raise concerns and considerations for financial institutions and could cause such institutions to be deemed to be fiduciaries under ERISA if they provide any investment advice, recommendation or appraisals to a plan unless the institution is engaging in certain principal transactions for the purchase or sale of securities or other property, or acting for a person whose interests are adverse to the plan (and in either case, unless the institution is not otherwise providing impartial advice).

For example, under the proposed regulations, advice and recommendations would no longer need to be "a primary basis" for an investment decision, or even be provided on a "regular basis" to give rise to fiduciary status. Moreover, the advice need only potentially be considered in connection with an investment decision. Could this now include discussions of general market conditions or trends, research reports, or general investment ideas in the ordinary course of dialogue? Or, could this now include a bank acting as a trustee of a profit sharing plan or 401(k) plan providing investment proposals to its own employees?

Additionally, under the proposed regulations, a service provider could be deemed to be a fiduciary even without a "mutual agreement" between the service provider and the investment plan about the intent to provide investment advice or a recommendation. The proposed language suggests that the advice or recommendation need only be used by the plan for its own needs, regardless of the intent or expectation of the service provider. Consequently, the proposed regulations appear to give the plan control over whether the service provider is, or is not, a fiduciary. A service provider that becomes a fiduciary as a result of providing investment advice would face additional legal compliance costs and liability exposure as a result of its fiduciary status.

Also, providing advice, recommendations with respect to securities or other property could result in fiduciary status if the person providing the advice is doing so on behalf of a registered investment adviser (even if, it seems, the entity were also registered as a broker-dealer or otherwise or is a bank or bank holding company), where the individual providing the advice is not excepted from Section 202(a)(11) of the Investment Advisers Act. For example, although certain advice provided by a broker that is solely incidental to the conduct of brokerage services may be exempt, not all individuals may be engaged in brokerage or otherwise have an exemption available to them (such as individuals who deal in futures, commodities or other assets for which securities brokerage is not required). The preamble suggests that similar

organizational and structural concerns could arise for banks and bank holding companies under Section 202(a)(11) if banking and advisory functions are not performed through separately identifiable divisions or departments.

In conclusion, the proposed regulations, if implemented, would result in substantial changes to the established definition of fiduciary under ERISA and would significantly alter traditional notions of fiduciary relationships. The DOL itself acknowledges that the change could result in "increased costs and liability exposure associated with ERISA fiduciary status," may result in higher fees for plans, and that as a result, service providers might "limit or discontinue the availability of their services or products" to plans. We also note that the U.S. Securities and Exchange Commission and the Commodities and Futures Trading Commission are developing their own definitions of "fiduciary" pursuant to the Dodd-Frank Act. All of these different "fiduciary" definitions are likely to be inconsistent and, therefore, confusing to banks and other providers of retirement investment advice, and, more importantly, consumers.

Thank you very much for your consideration.

Sincerely,

Cary Plotkin Kavy

CPK:dks

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