November 5, 2010

Financial Stability Oversight Council
c/o United States Department of the Treasury
Office of Domestic Finance
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Submitted electronically via regulations.gov

Re: Public Input for the Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds (Docket No. FSOC-2010-0002)

Dear Sir or Madam:

The American Benefits Council ("Council") greatly appreciates the opportunity to provide comments regarding the Financial Stability Oversight Council's ("FSOC") request for information regarding the Volcker Rule, as set forth in section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[1]

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

Our members are still studying the effects of the Volcker Rule on retirement plans, so the comments contained herein are only preliminary. We expect to have further comments as our review of the Volcker Rule continues. This letter focuses on two narrow issues related to the Volcker Rule's broad definitions of "hedge fund," "private equity fund," and "sponsor" (*i.e.*, Question 3 in the request for information). First, we

[1] Public Input for the Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds, 75 Fed. Reg. 61,758 (Oct. 6, 2010).

request that the FSOC, in conducting its study, recognize that Congress clearly did not intend that retirement plan trusts be included in the definitions of "hedge fund" and "private equity fund." Second, even if some retirement plan trusts may somehow be classified as "hedge funds" or "private equity funds" for purposes of the Volcker Rule, banks should not be considered "sponsors" under the Volcker Rule to the extent that they simply serve as directed trustees to such retirement plan trusts. In addition to our substantive comments below, we urge the FSOC to consider the unintended and potentially costly effects that regulatory action (or lack thereof) may have on retirement plans, their sponsors, and their participants.

I. Congress Clearly Did Not Intend that Retirement Plan Trusts Be Included in the Definition of "Hedge Fund" or "Private Equity Fund"

Council members have expressed concern that the Volcker Rule's broad statutory definitions of "hedge fund" and "private equity fund" may be interpreted to include retirement plan trusts. If this is the case, then retirement plan trusts would be extremely limited in their ability to interact with banks. As discussed below, it is clear that Congress did not intend for retirement plan trusts to be included in the definition of "hedge fund" or "private equity fund" for purposes of the Volcker Rule. We urge the FSOC to consider this issue in its study.

Under section 619 of the Dodd-Frank Act, "hedge fund" or "private equity fund" is defined to include all funds exempt from registration solely because of section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940. The terms may include similar funds, as defined by regulators. Accordingly, if a retirement plan trust is exempt from registration solely by virtue of section 3(c)(1) or 3(c)(7), then, in the absence of regulatory action, it will be a hedge fund or private equity fund for purposes of the Volcker Rule.

Many retirement plan trusts, other than group trusts, are exempt from registration as a result of section 3(c)(11), which very generally exempts qualified plan trusts. Congress clearly excluded from the definitions of "hedge fund" and "private equity fund" such trusts that are exempt from registration by reason of section 3(c)(11).

Not all retirement plan trusts are exempt from registration under section 3(c)(11), however. For example, institutional retirement plan clients often form group trusts pursuant to Rev. Rul. 81-100 for the investment of plan assets. Such group trusts create significant economies of scale for plans and participants. Such group trusts are frequently exempt from registration under section 3(c)(7) rather than section 3(c)(11). As a result, they may be considered hedge funds or private equity funds for purposes of the Volcker Rule, which makes no sense, given that they are simply a collection of trusts that are not hedge funds or private equity funds.

In other words, per the statutory language, although a retirement plan trust exempt from registration under section 3(c)(11) will not be a hedge fund or a private equity fund for purposes of the Volcker Rule, it is possible that a group trust entered into solely to create economies of scale will be a hedge fund or a private equity fund simply because it is exempt from registration under section 3(c)(7). It does not make sense for Congress to differentiate between group and individual plan trusts based solely on the trust's form, where, by any other account, the trusts serve identical purposes. Such an approach would serve to subject one trust to the extreme restrictions of the Volcker Rule, while another substantially identical trust would not be subject to any such restrictions. This would not further any purpose of the Volcker Rule. We urge the FSOC to fulfill Congress' clear intent as it conducts its study and to recommend that retirement plan trusts are not, under any circumstances, hedge funds or private equity funds for purposes of the Volcker Rule.

II. Banks Should Not Be Considered "Sponsors" of Retirement Plan Trusts

If retirement plan trusts are somehow included in the definition of hedge fund or private equity fund in some cases, banks that act solely as directed trustees of such trusts should not be viewed as "sponsors" of such trusts for purposes of the Volcker Rule. The directed trustee role assumed by banks with respect to retirement plan trusts is very limited and allows banks no discretionary authority with respect to trust assets.

It is important to recognize that the exception set forth in section 619(d)(1)(G) of the Dodd-Frank Act does not provide a sufficient "fix" for banks that serve as directed trustees to retirement plan trusts. In order to use the exception, a bank cannot enter into any "covered transaction" under section 23A of the Federal Reserve Act. This means that a bank could not fulfill many of its typical obligations in the course of serving as directed trustee, including extending credit to the trust on a short-term basis. Accordingly, a bank may be effectively prohibited from providing traditional directed trustee services to the trust.

Treating a directed-trustee bank as a "sponsor" achieves none of the objectives of the Volcker Rule and could make it difficult for retirement plan trusts to enlist the services of directed trustees. A sizable number of directed trustees are banks. If banks are suddenly not permitted to serve as directed trustees, there would be enormous disruption of the retirement plan area as a primary source of directed trustees would be eliminated overnight. The Volcker Rule was not intended to prevent banks from serving as directed trustees – a nondiscretionary position – so the disruption would not have a public policy basis.

Another issue arises in considering banks' status as sponsors. Without regulatory confirmation to the contrary, banks' retirement plans may be viewed as bank subsidiaries;[2] thus, the retirement plan trust would not be permitted to make or retain investments in a hedge fund or private equity fund without complying with the Volcker Rule. Retirement plan trusts are already highly regulated by ERISA. For example, all plan investments are subject to the highest fiduciary standard applicable under U.S. law, under which fiduciaries making investment decisions are held to the standard of a prudent expert. Accordingly, additional restrictions under the Volcker Rule are not necessary and would only serve to harm participants by limiting the plan investment options. It is inconceivable that Congress intended for the Volcker Rule to interfere with plan investment options, as such a reading would not further any of the purposes of the Volcker Rule.

III. Banks Should Not Be Prevented from Holding Bank-Owned Life Insurance Policies

Another issue is that, in the absence of regulatory clarification to the contrary, some separate-account bank-owned life insurance ("BOLI") policies may be included in the definitions of "hedge fund" and "private equity fund," given their frequent exemption from registration under section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940. We urge the FSOC to consider the negative impact this would have on banks, as they frequently use separate-account BOLI permanent life insurance policies to finance their own employee benefit liabilities, such as retiree health. By subjecting separate-account BOLI to the Volcker Rule, banks would face significant financial burdens as a result of being required to sell their interests in separate-account BOLI policies.

There are two types of BOLI – general-account and separate-account. General-account BOLI is excluded by statute from the Volcker Rule as a permitted activity. There is no reason why separate-account BOLI should not be similarly excluded. BOLI is already subject to extensive regulation.

Including separate-account BOLI in the definitions of hedge fund and private equity fund, simply by virtue of the way in which such separate accounts are classified by securities law, would not further the purposes of the Volcker Rule, and, as noted above, would only create unnecessary expense and burdens for banks. We note that nothing in the clarification we are requesting would limit the applicability of the Volcker Rule to the underlying types of asset classes in which banks may invest through separate-account BOLI or otherwise. Separate-account BOLI is already subject to significant regulation and does not place banks in financial jeopardy.

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[2] Section 2(g)(2) of the Bank Holding Company Act provides that "shares held or controlled directly or indirectly by trustees for the benefit of (A) a company, (B) the shareholders or members of a company, or (C) the employees (whether exclusively or not) of a company, shall be deemed to be controlled by such company, unless the Board determines that such treatment is not appropriate in light of the facts and circumstances of the case and the purposes of the Act."

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We urge the FSOC to keep in mind the concerns addressed above as it completes its Study Regarding the Implementation of the Prohibitions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds. Please contact me at (202) 289-6700 with any questions or if we can be of further assistance.

Sincerely,

Lynn D. Dudley

Lynn D. Dudley
Senior Vice President, Policy