American Bankers Association
Building Success. Together.

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October 21, 2013

Gerard Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314–3428

re: National Credit Union Administration; Charitable Donation Account; 12 C.F.R. Parts 703 and 721; 78 Federal Register 57539, September 19, 2013

Dear Mr. Poliquin:

The American Bankers Association[1] (ABA) appreciates this opportunity to comment on the National Credit Union Administration (NCUA) proposed amendments that would allow federal credit unions (FCU) to fund a charitable donation account (CDA). According to the proposed rule, a CDA is a "hybrid charitable and investment vehicle," the funding of which is an incidental business activity for FCUs.

Although ABA does not wish to comment on the appropriateness of CDAs as a general matter, we do wish to correct a misperception in the release about the duties that banks, savings associations, and trust companies (collectively, banks) are subject to when providing trustee and investment management services. Contrary to the implication in the proposed rule, when providing those services, banks are indeed subject to a fiduciary duty and must act solely in the best interests of the clients or trust beneficiaries. For these reasons, the proposal should be amended to allow both federal and state banks, savings associations, and trust companies to act as trustee and to manage the investments of the CDA.

NCUA Proposal

Under the proposal, a FCU may open a CDA if seven specific conditions are met. These conditions include restrictions on maximum aggregate funding; a requirement that the CDA be placed in a segregated custodial account or special purpose entity; documentation requirements; and a minimum charitable distribution requirement. Of particular interest to ABA and our members is the "Regulatory Oversight" requirement, which reads as follows:

> Regulatory Oversight. If an FCU chooses to establish a CDA using a trust vehicle, then the trustee must be an entity regulated by the Office of the Comptroller of the

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its 2 million employees. Learn more at aba.com.

Currency, the U.S. Securities and Exchange Commission (''SEC'') or another federal regulatory agency. A regulated trustee or other person who is authorized to make investment decisions for a CDA (''manager''), other than the FCU itself, must be registered with the SEC as an investment advisor. This will help to ensure proper regulatory oversight of those professionals who owe fiduciary duties to the FCU, and to mitigate counterparty, credit, interest rate, liquidity, and reputational risks associated with funding a CDA.

Banks as Trustees

The provision above allows banks, savings associations and certain other federally-regulated entities to act as trustee, if the FCU establishes the CDA as a trust. However, under the provision, a nondepository state-chartered trust company would not be able to act as trustee, because it has no federal regulator, such as the OCC, the Federal Deposit Insurance Corporation (FDIC), or the Federal Reserve Board of Governors (FRB).[2]

There is no reasonable basis for such a restriction on nondepository state-chartered trust companies. All banks, savings associations, and trust companies, whether federally chartered or state chartered, are subject to the highest fiduciary duty when acting as trustee, a fiduciary duty that has evolved over hundreds of years under common law and more recently codified in state statutes. These duties include duty of loyalty, duty of administration, and duty of prudent investment, among other things. See Appendix for more detail. Furthermore, state law confers the authority to act as a corporate trustee, as opposed to acting as a trustee in an individual capacity, *exclusively* to banks, savings associations, and trust companies.[3]

Banks as Investment Managers

Under the proposal, banks, savings associations, and trust companies may not manage the assets of the CDA, even if acting as trustee. The release states: "A regulated trustee or other person who is authorized to make investment decisions for a CDA (''manager''), other than the FCU itself, must be registered with the SEC as an investment advisor. This will help to ensure proper regulatory oversight of those professionals who owe fiduciary duties to the FCU, and to mitigate counterparty, credit, interest rate, liquidity, and reputational risks associated with funding a CDA." The implication of the last sentence is that only investment advisors registered with the SEC are subject to proper regulatory oversight, owe a fiduciary duty to their client, and can mitigate the risks associated with funding a CDA.[4]

[2] State-chartered banks and savings associations may be regulated by either the FDIC or the FRB, and therefore would be allowed to act as trustee of a CDA under the proposal. Similarly, national trust companies are chartered and regulated by the OCC and would also be allowed to act as trustee of a CDA.
[3] In other words, registered investment advisors and their related persons may only act as trustee in an individual capacity not as a corporate trustee.
[4] Banks, savings associations, and trust companies are not required to be registered with the SEC as investment advisors because they are statutorily exempt under the Investment Advisers Act of 1940.

In fact, banks, savings associations, and trust companies acting in a fiduciary capacity are subject to proper regulatory oversight, do owe a fiduciary duty to their clients and trust beneficiaries, and can mitigate risks associated with funding a CDA. Federal and state banking regulators examine institutions for compliance with applicable fiduciary and other laws at least every eighteen months, and for some of the larger institutions there are examiners in place. Furthermore, banking law and regulation imposes a fiduciary duty on banks and trust companies when offering investment advice for a fee.[5] In other words, banks must act in the best interests of the client and follow the client's investment policy objectives. Given this regulation and supervision, it is no wonder that insured depository institutions with trust powers were given the responsibility to manage over $3 trillion in over 1.4 million fiduciary accounts in 2012.[6]

There is, therefore, no reason to restrict the entities that can manage the CDA investments, whether the fund is organized as a trust or as a special purpose vehicle, to registered investment advisors alone. Excluding banks, savings associations, and trust companies from managing the CDA's investments will unnecessarily limit the options for FCUs looking for an investment manager. As mentioned above, banks, savings associations, and trust companies are subject to a fiduciary duty when providing investment management services for a fee. Therefore, their ability to serve as investment manager would surely meet the NCUA's objective to "ensure proper regulatory oversight of those professionals who owe fiduciary duties to the FCU, and to mitigate counterparty, credit, interest rate, liquidity, and reputational risks associated with funding a CDA."

Conclusion

In conclusion, ABA believes that the final rule should include nondepository state-chartered trust companies as a trustee, if the FCU establishes the CDA as a trust.

Also, ABA urges the NCUA to allow banks, savings associations, and trust companies to manage the investments of a CDA. There is no reason to restrict the entities that can manage the CDA investments to registered investment advisors alone. Although banks, savings associations and trust companies are subject to a fiduciary duty, they are not registered with the SEC as investment advisor because they are statutorily exempt. The proposed rule would disqualify them from providing investment advice or managing the assets in the CDA, even if they were acting as trustee. Such a restriction would unnecessarily limit the options for FCUs looking for an investment manager.

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[5] See 12 CFR 9.3(e), which reads "Fiduciary capacity means: trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gifts to minors act; investment adviser, if the bank receives a fee for its investment advice; any capacity in which the bank possesses investment discretion on behalf of another; or any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. 92a." See also, 12 CFR 9.101, "Providing investment advice for a fee." See also OCC Investment Management Services Handbook, available at http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/invmgt.pdf.

[6] See FDIC Quarterly Banking Report, Fourth Quarter 2012, Table VIII-A. The $3 trillion figure does not include nondepository national trust companies, regulated by the OCC, nor does it include the managed assets of state-chartered trust companies.

If you have any questions, please contact Phoebe Papageorgiou, Senior Counsel within the ABA's Center for Securities, Trust and Investments, at 202-663-5053.

Sincerely,

Keith Leggett
Vice President and Senior Economist

Appendix: Fiduciary Duties Imposed on Banks, Savings Associations, and Trust Companies

In fulfilling their fiduciary duties, corporate trustees will often provide investment management services, safekeeping of assets, as well as tax planning, preparation and tax payment services. These fiduciary duties include:

- *Duty of loyalty*. A trustee has a fundamental duty to administer a trust solely in the interests of the beneficiaries. A trustee must not engage in acts of self-dealing.

- *Duty of administration*. A trustee must administer the trust in accordance with its terms, purposes, and the interests of the beneficiaries. A trustee must act prudently in the administration of a trust and exercise reasonable care, skill, and caution, as well as properly account for receipts and disbursements between principal and income. A trustee can properly "incur and pay expenses that are reasonable in amount and appropriate to the purposes and circumstances of the trust.

- *Duty to control and protect trust property*. A trustee must take reasonable steps to take control of and protect the trust property.

- *Duty to keep property separate and maintain adequate records*. A trustee must keep trust property separate from the trustee's property and keep and render clear and accurate records with respect to the administration of the trust.

- *Duty of impartiality*. If a trust has two or more beneficiaries, a trustee must act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

- *Duty to enforce and defend claims*. A trustee must take reasonable steps to enforce claims of the trust and to defend claims against the trust.

- *Duty to inform and report*. A trustee must keep qualified trust beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Some jurisdictions also impose a duty to provide an accounting to qualified beneficiaries.

- *Duty of prudent investment*. A trustee who invests and manages trust property has a duty to "invest and manage trust property as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust." This duty is tied to the duty to use reasonable care and skill to make the trust property productive.