June 28, 2019

Via Electronic Mail

Office of the Comptroller of the Currency
Chief Counsel’s Office
400 7th Street SW, Suite 3E–218
Washington, DC 20219

Re: Advance Notice of Proposed Rulemaking – Fiduciary Capacity: Non-Fiduciary Custody Activities
(Docket No. OCC–2018–0018)

Dear Ladies and Gentlemen:

The Bank Policy Institute\(^1\) appreciates the opportunity to comment on the advance notice of proposed rulemaking Fiduciary Capacity: Non-Fiduciary Custody Activities (“ANPR”),\(^2\) issued by the Office of the Comptroller of the Currency to explore amendments to the definition of “fiduciary capacity” in section 9.2(e) and section 150.30 of the OCC’s regulations and promulgation of a new OCC regulation to impose requirements on non-fiduciary custody activities. The ANPR covers important components of the regulatory framework for fiduciary activities and custody activities conducted by national banks and federal savings associations.\(^3\) This regulatory framework has generally proven robust and highly stable over time and enabled national banks to engage in a wide range of fiduciary and custody activities and to offer innovative fiduciary and custody products and services in response to changes in customer demands, industry trends, and state law.

Accordingly, BPI strongly recommends that the OCC reconsider its intent to modify the regulatory framework for fiduciary activities and custody activities through changes to the “fiduciary capacity” definition and a new regulation for non-fiduciary custody activities. These modifications are unnecessary for the OCC to supervise such activities effectively and for national banks to engage in them in a manner that is consistent with safety and soundness, innovative, and on par with state-chartered institutions. To the extent the OCC intends to move forward with modifications to its regulatory framework in this area, BPI urges the OCC, in addition to considering comments received in response to the ANPR, to undertake a comprehensive review and analysis of the fiduciary activities and custody activities conducted by national banks and any deficiencies observed by OCC supervisory staff. Any proposal to modify the regulatory framework for fiduciary activities and custody activities would benefit from the

\(^1\) The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation’s leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation’s small business loans, and are an engine for financial innovation and economic growth.


\(^3\) For purposes of this letter, we generally refer to institutions covered by the ANPR as national banks, though we recognize that federal savings associations chartered by the OCC are covered as well.
findings resulting from this review and analysis, and BPI further recommends that the OCC release such findings for public comment before formulating a proposal.

If the OCC decides to proceed with a rulemaking and the rulemaking follows the modifications contemplated in the ANPR, the outcome would be worse than a set of redundant regulatory requirements. The outcome could include practical consequences that destabilize important business lines without meaningful improvement in the integrity of the OCC’s supervision of these services or in the benefits that bank customers receive from these services. The ANPR creates potential conflicts between state and federal law, and muddies the distinctions between custodial activities that must be performed in accordance with a fiduciary standard of care and those that are not subject to that standard. The ANPR, if finalized as suggested, also could impose substantial and potentially disproportionately burdensome new costs on national banks that offer fiduciary services and custody services without a corresponding benefit to customers or other stakeholders.

Section I of this letter responds to the questions in the ANPR pertaining to potential changes to the definition of “fiduciary capacity,” and Section II responds to the questions in the ANPR relating to a new OCC regulation for non-fiduciary custody activities.

I. Definition of “Fiduciary Capacity”

The ANPR suggests that the OCC is considering whether to update the definition of “fiduciary capacity” in parts 9 and 150 of the OCC’s regulations to address trust-related roles that are not explicitly included in the definition. These updates are unnecessary given the interplay between the OCC’s regulations, the National Bank Act (“NBA”), and Home Owners’ Loan Act (“HOLA”), and could create rather than mitigate confusion and litigation risk.

A. The interplay between the statutory and regulatory authorizations for national banks and federal savings associations to engage in fiduciary activities renders the suggested amendments to the definition of “fiduciary capacity” unnecessary.

Section 92a(a) of the NBA⁴ and section 5(n) of HOLA⁵ authorize national banks and federal savings associations to exercise a broad range of fiduciary powers. These powers include explicit powers such as acting as trustee, executor, and administrator.⁶ The OCC has promulgated regulations that define the term “fiduciary capacity” based on these statutory grants of power.⁷

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6 See 12 U.S.C. § 92a(a) (“The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.”); 12 U.S.C. § 1464(n) (“The Comptroller may grant by special permit to a Federal savings association applying therefor the right to act as trustee, executor, administrator, guardian, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which compete with Federal savings associations are permitted to act under the laws of the State in which the Federal savings association is located.”).
7 See 12 C.F.R. § 9.2(e) (“Fiduciary capacity means: trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gift 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.”); 12 C.F.R. § 150.30 (“You are subject to this part if you act in a fiduciary capacity, except as described in subpart E of this part. You act in a fiduciary capacity when you act in any of the following capacities: (a) Trustee, (b) Executor, (c) Administrator, (d) Registrar of stocks and bonds, (e) Transfer agent, (f) Assignee, (g) Receiver, (h) Guardian or conservator of the estate of a minor, an incompetent person, an absent person, or a person over whose estate a court has taken
Importantly, national banks and federal savings associations are authorized under sections 92(a) and section 5(n) to engage in any other fiduciary capacity in which state banks, trust companies, or other corporations which come into competition with national banks or federal savings associations are permitted to act under the laws of the state in which the national bank or federal savings association is located. The OCC included in its definition of “fiduciary capacity” a reference to the OCC providing “authorization” for such unenumerated fiduciary capacities,\(^8\) but the specific mechanism for authorizing a national bank or federal savings association to act in a fiduciary capacity in which a state bank, trust company, or other corporation may act under state law is not circumscribed in the NBA, HOLA, or OCC regulations, and the OCC has stated in interpretive guidance that a national bank approved to exercise “full” fiduciary powers may carry out under section 92(a)(a) any fiduciary activity approved for state banks in that particular state.\(^9\)

Based on this interplay between sections 92(a)(a) of the NBA and section 5(n) of HOLA on the one hand and sections 9.2(e) and 150.30 of the OCC’s regulations on the other, national banks and federal savings associations may engage in a wide array of fiduciary activities that are conducted by state-chartered banks or other corporations, including the activities described in the ANPR as being part of the evolving landscape of fiduciary activities under state law. These activities include acting as an “investment trust adviser,” “distribution trust adviser,” and a “trust protector” under Illinois law, or as an “adviser” or “protector” under Delaware law. Accordingly, there is no need to add these activities to the list of specified fiduciary activities in the definition of “fiduciary capacity” in order for national banks and federal savings associations to be able to engage in them.

B. It is not apparent that there is any confusion in the industry that warrants expansion of the regulatory list of fiduciary capacities.

The ANPR indicates that the OCC believes that the omission of such trust advisory roles from the list of specified fiduciary capacities has led to confusion among national banks. However, BPI is not aware of any such confusion in the industry. Moreover, if other banks have been confused by the current phrasing of the definition of “fiduciary capacity,” the OCC could address such confusion without a rulemaking. The OCC could issue an annual or bi-annual update describing the trust activities conducted by national banks and federal savings associations, including acting as trust protector in certain states, or it could update its list of Activities Permissible for National Banks and Federal Savings Associations to include such activities.

C. Adding fiduciary capacities to the definition already contained in part 9 could increase uncertainty and litigation risk and would cause part 9 to deviate from other, complementary regulatory regimes.

If the OCC intends to move forward with changes to this component of the framework for trust activities, it should reconsider whether modifying the definition of “fiduciary capacity” to include trust advisory roles is a sound approach. First, if the OCC moves forward and revises the definition to include, as set forth in the ANPR, “any activity based on the authority a national bank or Federal savings association has with respect to a trust, such as the power to make discretionary distributions, override the trustee, or select a new trustee,” in order to better track

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jurisdiction, other than under bankruptcy or insolvency laws, (i) A fiduciary in a relationship established under a state law that is substantially similar to the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act as published by the American Law Institute, (j) Investment adviser, if you receive a fee for your investment advice, (k) Any capacity in which you have investment discretion on behalf of another, and (l) Any other similar capacity that the OCC may authorize under 12 U.S.C. 1464(e).".

See 12 C.F.R. §§ 9.2(e), 150.30.

See, e.g., OCC Interpretive Letter No. 895 (Dec. 8, 1995) ("Such a national bank may exercise any of the fiduciary powers granted in section 92(a) in any state unless that state both prohibits national banks and restricts its own state institutions from exercising that fiduciary power."). National banks and federal savings associations that have been granted only limited fiduciary powers are required to obtain the OCC’s approval to engage in fiduciary activities that are not authorized in the OCC’s initial approval. See 12 C.F.R. § 5.26(e)(1)(iv).
developments of fiduciary activities under state law, it will be committing the OCC to the untenable course of (1) updating the definition of “fiduciary capacity” on an ongoing basis to address developments in state laws governing fiduciary activities and (2) analyzing state legislation and case law regarding fiduciary activities to determine whether, for purposes of state law, a given activity is in fact a fiduciary activity under state law. The former task will be costly and time-consuming for the OCC staff. The latter task requires the OCC to opine on the meaning of state laws that it does not administer, and its determinations in that regard would be unlikely to attract judicial deference.

In addition, if the OCC adds fiduciary capacities to the definitions in section 9.2(e) and section 150.30, it is making a judgment that these activities are fiduciary capacities under state law, including with respect to the various trust-related roles described in the ANPR. Contrary to one of the stated purposes of the modifications contemplated in the ANPR, this judgment could expose national banks and federal savings associations to greater litigation risk. If the OCC adds to the definition of “fiduciary capacity” any activity that a national bank or federal savings association may have with respect to a trust, there is a risk that the state law that governs the national bank’s or federal savings association’s fiduciary activities does not consider such activity actually to be a fiduciary activity authorized under the standard in section 92a(a) of the NBA and section 5(n) of HOLA. For example, national banks and federal savings associations may engage in a variety of recordkeeping and administrative activities that are not fiduciary activities under applicable state law. An expanded definition of “fiduciary capacity” may result in these activities being deemed fiduciary activities, resulting in a clear conflict between state and federal law. This would increase litigation risk to national banks and federal savings associations navigating the federal and state frameworks that define the scope of their permissible fiduciary activities and the standards that govern them. In addition, these non-fiduciary activities—such as recordkeeping and administrative activities—would be subject to the requirements in part 9 and part 150 even if they are not subject to fiduciary standards under state law, potentially leading to confusion and litigation regarding the applicable standards as well as potential inconsistencies with contractual documentation.

The ANPR’s contemplated modifications also may have particular effects on other regulations that address fiduciary activities. For example, the term “fiduciary capacity” in the Securities Exchange Act of 1934 and Regulation R issued jointly by the Federal Reserve and the SEC, generally is coterminous with the definition of the term in section 9.2(e). A national bank that effects transactions in a fiduciary capacity in a manner that satisfies certain conditions is exempt from broker-dealer registration requirements. The OCC’s modification of the definition of “fiduciary capacity” may create disparities between section 9.2(e) and related definitions such as the definition in the Securities Exchange Act of 1934. This could potentially disrupt the application of exemptions that have long been relied upon by banks to engage in fiduciary activities without being subject to broker-dealer requirements.

For these reasons, BPI urges the OCC to reconsider its contemplated proposal to modify the definition of “fiduciary capacity.”

II. Non-Fiduciary Custody Activities

The ANPR indicates that the OCC is considering the promulgation of a new regulation with standards that apply to non-fiduciary custody activities and identifies a number of potential standards. As summarized in the ANPR, national banks currently are subject to the requirements in numerous legal regimes that apply to non-fiduciary custody activities. This existing legal framework is generally durable and well-defined and one reason why it is unnecessary for the OCC to promulgate a new regulation that imposes additional requirements on national banks’ non-fiduciary custody activities. Additionally, a rulemaking could muddy the distinctions between custodial activities that must be performed in accordance with a fiduciary standard of care and those that are not subject to that

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11 See 12 C.F.R. § 218.721(a)(5); 17 C.F.R. § 247.721(a)(5).
standard and would increase costs and administrative burden for national banks without a corresponding benefit to their customers or other stakeholders.

A. The current regulatory framework ensures the protection of custodian banks’ customers.

Article 8 of the Uniform Commercial Code (“UCC”) contains several requirements implemented into state laws and custody agreements that apply to national banks’ custody relationships with clients. For example, section 8-503 of the UCC, which governs client property rights in securities held for safekeeping, provides that all securities and related financial assets held by a financial intermediary are held for its clients and not for the intermediary, to the extent necessary to satisfy the clients’ “securities entitlements.” This provision effectively has resulted in segregation on the intermediary’s books and records, and it is not necessary for the OCC to promulgate regulations to prescribe this standard.

Section 8-504 of the UCC requires securities intermediaries to promptly obtain and thereafter maintain financial assets in a quantity corresponding to the aggregate of all security entitlements of clients; and to refrain from granting any form of securities interest in a financial asset held for its clients, except as agreed by the client. Section 8-504 also establishes, in the absence of an agreement, a default standard of “due care in accordance with reasonable commercial standards” with respect to the securities intermediary’s safekeeping, asset servicing, and settlement responsibilities. Other sections of Article 8 impose obligations on the securities intermediary with regard to income payments and other distributions with respect to financial assets, the exercise of instructions as to the client’s rights with respect to financial assets, and settlement of transactions in accordance with directions. These provisions of the UCC typically apply to national banks’ custody activities via the underlying custody agreements and in this regard establish a uniform set of requirements.

In its approach to the applicability of state law to national banks, the OCC has generally been careful to distinguish the UCC from some other types of states laws because the UCC provides a uniform infrastructure for commercial activity that is consistent with national banks’ exercise of their federally authorized banking powers nationwide. A prescriptive new custody regulation has the potential to disrupt states’ interpretation and application of their own UCC provisions, eroding uniformity and provoking unnecessary conflict with state authorities in an area where national banks have successfully operated under both federal and state standards for decades.

There also are several frameworks that apply to the custody of specific assets by national banks. For example, the Internal Revenue Service has issued rules that apply to the custody of individual retirement accounts. The assets of IRAs, to the extent held in custodial accounts as opposed to formal trust instruments, are required to be segregated and may not be commingled with other property unless in a common trust fund or common investment fund. IRA custodians also are required to satisfy various requirements, including net worth requirements and audit requirements. The Securities and Exchange Commission (“SEC”) has adopted Rule 17f-4 to impose requirements on custodians of securities owned by registered management investment companies. These requirements obligate the custodian to exercise due care in accordance with reasonable commercial standards.

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12 See 26 C.F.R. § 1.408-2(d).
13 See Internal Revenue Code § 408(a); 26 C.F.R. § 1.408-2.
14 See 26 C.F.R. § 1.408-2(e)(5)(ii), (iii).
15 See 17 C.F.R. § 270.17f-4.
16 See 17 C.F.R. § 270.17f-4.
The U.S. Department of the Treasury has promulgated regulations with requirements for U.S. government securities held by national banks in a custodial capacity. Such institutions are required to maintain possession or control of all government securities held for the account of customers by segregating them from the assets of the institution and keeping them free of any lien, charge or claim of any third party. The regulations also require institutions to provide a confirmation or safekeeping receipt for all securities held by the institution. Finally, Freddie Mac and Fannie Mae have established contractual requirements for the custody of their enterprise-related documents.

In addition to frameworks that apply directly to a national bank’s custody activities, there are frameworks that apply to the custody activities of certain affiliates of the bank or non-U.S. operations of the bank. The SEC has issued regulations related to the custody of client assets by investment advisers and national securities exchanges as well as regulations that establish standards for the custody of investment company assets with futures commission merchants and commodity clearing organizations. State insurance commissioners have imposed requirements on the custody of regulated insurance company assets, including by issuing template agreements and contractual provisions for such custody arrangements. The UK Financial Conduct Authority (“FCA”) has issued custody rules for its supervised firms. Other host country regulators of foreign branches of national banks likewise have promulgated rules for custody activities.

The numerous requirements that apply to the custodial activities of national banks, their affiliates, and their non-U.S. operations comprise an expansive and layered framework of standards. Promulgation of a new OCC regulation dedicated specifically to non-fiduciary custody activities would achieve sparse supervisory benefits, particularly given the risk-based approach currently employed by OCC examination teams, while introducing complexity and redundancy to the existing framework.

B. The OCC’s current supervisory framework is sufficient for the effective supervision of custody activities.

Examiners conduct a risk assessment of a national bank’s or federal savings association’s custody activities, and such assessment determines the extent of testing procedures performed. As part of OCC oversight of custody activities, OCC examiners develop an overall conclusion on the quantity of risk associated with such activities, including transaction risk, compliance risk, credit risk, strategic risk, and reputation risk, and the quality of risk management, including direction from the board of directors and senior management, policies and procedures.

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17 See 17 C.F.R. § 450.
18 See 17 C.F.R. § 450.4(a)(1).
19 See 17 C.F.R. § 450.4.
system of internal controls, processes for account acceptance, management information systems, vendor oversight, and controls to comply with applicable laws and regulations. By tailoring the degree of examination procedures and testing to the specific risks implicated by the bank’s custody activities, the OCC is able to effectively supervise non-fiduciary custody activities with appropriate regard for cost-benefit principles in supervision and the need to facilitate innovation in custody services. This risk-based approach to supervision of national banks’ custody activities, including non-fiduciary custody activities, appropriately reflects the range of roles played by national banks in safeguarding customer assets, and a new OCC regulation is unnecessary for clarifying these roles.

C. The potential benefits of a new regulation governing non-fiduciary custody activities are in all likelihood significantly outweighed by the potential adverse effects a new rule would have on non-fiduciary custody businesses of national banks, including significant constraints on current custody practices, impediments to innovation, and potential confusion about the standards that apply to custody activities.


The market for non-fiduciary custody services is mature and consists of market participants that are sophisticated and well regulated. The vast majority of client assets held in custody by national banks are held for large, institutional customers. As such, the agreements for custody services are heavily negotiated and impose substantial requirements on the bank custodian. We do not see how promulgation of an OCC regulation with additional standards would meaningfully add to the protections of assets held in custody by national banks. The ANPR contemplates that a new regulation for non-fiduciary custody activities could contain numerous prescriptive requirements. The imposition of new regulatory requirements across different types of custody-related business lines such as those contemplated in the ANPR could substantially slow down and make more costly many standard custody practices. As described above, the contractual documentation for non-fiduciary custody services is robust to protect the assets held in custody and heavily negotiated. The addition of new mandatory provisions through such a checklist in all likelihood would lengthen contractual negotiations and make the administration of such agreements much more time-consuming and burdensome.

The ANPR suggests possible requirements regarding, among other things, segregation and control of custodied assets that may be impracticable and unduly burdensome, taking into account the breadth of the types of assets that are custodied by national banks. For example, national banks frequently hold assets registered on the books of transfer agents that are employed by the issuer as “memo positions” due to the operational burden of performing reconciliations. Assets such as loan participations, which are not suitable to being controlled in the same way as an immobilized security, also are held and serviced as memo positions. It is currently market practice for the custody agreement to set forth the segregation and control obligations of the custodian for memo positions with respect to these types of assets. In addition, banks are required in a number of foreign markets to maintain local currency accounts with a sub-custodian and in the name of the client. It would be overly burdensome if these accounts were to be treated as holding clients’ money (as opposed to the banks’ money) and subjected to prescriptive regulatory requirements analogous to similar requirements imposed by the FCA.


In certain foreign countries there are a limited number of sub-custodians with the expertise and capabilities to provide services to national banks that engage in custody activities for customers. A new OCC regulation that establishes requirements on the engagement of a sub-custodian in a non-U.S. jurisdiction may further reduce the number of sub-custodians available in these jurisdictions to provide services. This would be particularly problematic.

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28 Comptroller’s Handbook, pp. 43-64.
in a jurisdiction with only one or two viable sub-custodians. Additionally, there are scenarios in which the custody client and not the custodian in practice selects the sub-custodian. Often this is for market reasons, such as in Taiwan, where an institutional investor using multiple global custodians is only permitted to hold its Taiwanese securities at a single local bank, or China, where allocations of opportunity for non-Chinese banks to acquire certain types of equity securities are dependent on the securities being held in custody at the bank that provided the allocation. In these scenarios, or others when a custodian and its institutional investor decide for commercial reasons to allow the investor to select the local sub-custodian, it could be problematic for a regulation to impose on the custodian responsibility for the qualifications or performance of the sub-custodian.


As described in the ANPR, banks' non-fiduciary custody activities have evolved significantly to cover a range of products and services and a range of asset classes. The products and services being explored by national banks include innovative settlement processes powered by blockchain and distributed ledger technologies that have the potential to reduce costs and processing time for transactions. An OCC regulation that imposes prescriptive requirements on these custody services could make it much more difficult to develop the underlying technologies for these services, especially since the technologies and customer demand are continuing to evolve. In addition, many financial institutions are exploring the provision of custodial services for digital assets such as cryptocurrencies and digital tokens, and several state-chartered institutions in New York, Nevada, and other states have been providing these services to the digital asset industry for years.27 The OCC's promulgation of a new regulation that imposes prescriptive requirements on custody activities for digital assets, at a time when state-chartered entities already have a head start in engaging in these activities, would significantly hinder national banks from providing custody services for this emerging asset class.


The ANPR contemplates that a new regulation for non-fiduciary custody activities could mirror the requirements in part 9 for fiduciary custody activities. Doing so would subject non-fiduciary activities to the same regulatory standards as fiduciary activities, thus potentially leading to confusion from banks about how to align the applicable standards under state fiduciary laws, which differentiate fiduciary and non-fiduciary conduct, with federal standards administered by the OCC. For example, dual control requirements, such as the requirements in section 9.13 of the OCC’s regulations, are best suited for either physical securities held in a vault or scenarios in which the fiduciary is exercising discretionary authority over client assets. These requirements do not translate well to non-fiduciary custody activities, including the process of settling custody trades, which is performed based on the instruction of an authorized person of the client. For non-fiduciary custody services, national banks should have more flexibility to manage risks without being subject to dual control requirements.

The ANPR also suggests that it may be desirable to establish minimum safekeeping and segregation standards, akin to the standards established in Europe in directives relating to investment activity (MiFID), investment funds offered to the public (UCITS), and alternative investment funds (AIFMD).28 However, it is important to note that these European directives, particularly the UCITS and AIFMD rules, apply to depositaries (who either engage in custodial activities or engage a third party to do so) and reflect a significantly broader role for a depositary/custodian than is the case for U.S. non-fiduciary custodians in respect of, for example, U.S. mutual funds. These European

27 See, e.g., New York State Department of Financial Services, tit. 23, Part 200, Virtual Currencies (authorizing a New York state-licensed entity with a BitLicense to maintain custody or control of virtual currency on behalf of others).

28 84 Fed. Reg. at 17970.
directives impose a broad, expressly fiduciary role on the depository, including oversight over the fund’s investment manager, transfer agent, and fund accountant. They also impose oversight responsibilities with respect to assets not held in custody that are more commensurate with those of a trustee under U.S. law. The safekeeping and segregation standards in these directives correspond to the distinct fiduciary role played by the depository/custodian.29

Additionally, these European rules impose prescriptive requirements that well exceed regulatory obligations in the United States and often conflict with the way custodial services are provided in the United States under U.S. law. For example, implementation of European standards into the U.S. legal and regulatory frameworks for custody activities would not be feasible for investment types such as private equity funds or loan participations, which are routinely reflected on custodians’ books and records as memo positions. The same would be true for rules regarding segregation of assets: the requirements of the European directives, as well the EU’s Central Securities Depository Regulation and other custody related requirements of UK law with respect to the segregation of assets are based on the assumption that clients are better protected if their assets are segregated throughout the chain of custody than they are by omnibus accounts. This is simply not the case under U.S. law as the UCC clearly provides that shortfalls in a custodian’s holdings of its clients’ securities entitlements are shared across its client base as a whole without regard to whether they are held in segregated or omnibus positions.30 The European rules also apply a standard of care that nearly makes the depository/custodian absolutely liable in the event of a loss of securities held in custody. This standard of care is not consistent with U.S. practice for custody – or for that matter – fiduciary relationships. As such, application of the EU rules to custodial activities in the U.S. via prescriptive regulations could create unintentional negative consequences for national banks and their customers – including potentially increased costs and decreased service offerings – without commensurate benefits.

5. Regulation Could Unduly Burden National Banks as Compared to Custodians That are Not Federally Chartered.

Non-fiduciary custodial services in the United States are provided by a number of different types of financial institutions, only some of which are national banks or federal savings associations subject to OCC regulation. As a result, any prescriptive and/or conflicting regulations adopted solely by the OCC, would run a substantial risk of contributing to an unlevel playing field between national banks and savings associations and other providers of custody services. This is so for two reasons. First, a new OCC regulation along the lines described in the ANPR could add needless complexity to the compliance obligations of national banks that provide custody services as compared with their competitors. As our letter demonstrates, the OCC’s own framework, together with the other applicable regulatory regimes, are sufficient for the effective supervision of national bank custodians and the protection of their customers. A new regulation could add complexity, making it harder to conduct the bank’s custody business, without improvement in either bank supervision or customer protection. Meanwhile, other providers of custody services could continue to operate under existing well-established standards that have been long known to, and understood by, their customers.

Second, an unnecessarily complex regulatory framework also is more expensive. It would subject national banks to increased administrative costs and burdens, including the costs and expenses associated with instituting new policies and procedures, enacting modifications to business and operational models, reviewing current contracts to assess compliance and renegotiating such contracts as necessary, engaging in client outreach, and ongoing monitoring for compliance purposes. Banks would need to consider these increased costs in determining how to price and/or modify services, exacerbating the potential for such banks to operate at a significant competitive

29 We note that the European directives are applied universally to all custodians in the EU providing a depository function, so the playing field for custody providers to funds subject to the directive is level for all providers.

30 See U.C.C. § 8-603(b).
disadvantage. Any rulemaking that has such a detrimental and selective impact within the market could potentially decrease healthy competition and create uncertainty for clients and custodians.

Given these concerns, a new regulation regarding non-fiduciary custody activities is potentially counterproductive to accomplishing the OCC’s principal objectives for a potential rulemaking, including helping to clarify the role of a national bank acting as a non-fiduciary custodian.

III. Conclusion

The Bank Policy Institute appreciates the OCC’s interest in ensuring that its regulations keep pace with state law developments and that national banks, have a legal and regulatory framework that enables them to compete with state-chartered institutions. However, for the reasons stated in this letter, we respectfully request that the OCC reconsider its intent to modify the definition of “fiduciary capacity” in parts 9 and 150 and to promulgate a new OCC regulation for non-fiduciary custody activities of national banks and federal savings associations.

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The Bank Policy Institute appreciates the opportunity to comment on the ANPR. If you have any questions, please contact the undersigned by phone at 646-736-3960 or by email at gregg.rozansky@bpi.com.

Respectfully submitted,

[Signature]

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