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March 9, 2007

Ms. Nancy M. Morris  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-9303

Re: Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles;  
Accredited Investors in Certain Private Investment Vehicles; File No. S7-25-06, 72  
Federal Register 400 (January 4, 2007).

Dear Ms. Morris:

The American Bankers Association (“ABA”) appreciates the opportunity to comment on the Securities and Exchange Commission’s (“Commission”) proposed rules governing certain pooled investment vehicles. Many of our member institutions act as managers to various pooled funds that could be affected by the proposals.

The ABA, on behalf of the more than two million men and women working in U.S. banks, represents every category of banking institution in this rapidly changing industry. The ABA membership includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks (collectively referred to as “banks”), making it the largest banking trade association in the country.

#### ANTIFRAUD PROPOSED RULE

The proposal is intended to implement the Commission’s statutory authority under Section 206(4) of the Investment Advisers Act, 15 USC 80b-6(4), to enforce certain antifraud provisions against advisers for fraudulent acts or practices committed against current and prospective investors in any registered investment company or any pooled investment vehicle that falls within the exceptions of Investment Company Act (“1940 Act”) Sections 3(c)(1) or 3(c)(7). Proposed Rule 206(4)-8 is intended to clarify the Commission’s ability to bring enforcement actions to protect current and prospective investors in pooled vehicles.

Only those banks and bank-affiliated firms that are subject to the Commission’s investment advisory jurisdiction would be subject to the proposed rule. Thus, banks that have registered investment advisory affiliates that advise registered mutual funds and 3(c)(1) and 3(c)(7) pooled investment vehicles would be subject to the new rule, as would those banks that advise registered mutual funds.

As the Commission recognizes, the new rule would not affect those entities that do not fall within the definition of “investment adviser.” Accordingly, any bank, thrift or savings bank that advises a 3(c)(1) or 3(c)(7) pooled investment vehicle would not be subject to the Commission’s investment advisory jurisdiction, and we would encourage the Commission to make this clear in its adopting release.

Congress has consistently exempted banks from the Commission’s investment advisory jurisdiction in recognition of the fact that banks and the pooled investment vehicles they manage are already subject to extensive regulation and oversight by federal and state regulators. For example, banks managing pooled investment vehicles do so as part of their trust powers granted to them by their primary banking regulator. That regulator subjects the bank to periodic and extensive examinations for compliance with fiduciary laws and principles established under federal and state law. For larger institutions, bank examiners work on-site throughout the year. Smaller institutions are examined no less frequently than every 18 months. In their examination of bank trust department, the banking regulators closely inspect, among other things, any self-dealing and other conflicts of interest, advertising of the funds, audits and financial reports, valuation dates, general fund management, the written plan of the fund, and management fees and expenses.<sup>1</sup>

The proposal also solicits comments on whether to extend the scope of the rule to other Section 3(c) funds. In response, we strongly feel that there is no need to add another level of regulation to other funds, in particular, Sections 3(c)(3) or 3(c)(11) funds. These funds are managed within trust departments for the benefit of their trust and fiduciary clients. These funds are not open to the general public and as discussed above, these funds and their advisers are extensively regulated by the banking regulators for compliance with federal and state fiduciary law. Moreover, these transactions are already subject to the Commission’s antifraud jurisdiction under Section 10(b)(5) of the Securities Exchange Act of 1934. With all of these safeguards in place, there is no need to extend the proposal any further.

#### ACCREDITED INVESTOR STANDARD

Under the newly-created “accredited natural person” standard, an individual wanting to invest in a Section 3(c)(1) fund must meet the existing criteria under Regulation D as well as have \$2.5 million in investments, excluding real estate. This new threshold is not only burdensome to meet, but could hurt sophisticated investors by denying them an opportunity to diversify their portfolios. With no empirical evidence to show that these funds pose an increased risk to investors, the Commission will have decreased the universe of potential investors by over 80 percent.<sup>2</sup> Indeed, the percentage of eligible households under this proposal would be less than when Regulation D was first promulgated in 1982. Since that time, due to the benefits of the Internet and greater media coverage of financial news, investors have surely become *more* sophisticated not less so.

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<sup>1</sup> See, OFFICE OF THE COMPTROLLER OF CURRENCY, COLLECTIVE INVESTMENT FUNDS: COMPTROLLER’S HANDBOOK (October 2005), <http://www.occ.gov/handbook/CIFfinal.pdf>.

<sup>2</sup> On page 406, the proposal estimates that the number of eligible investors would decrease from 8.47% to 1.3% of households in the United States.

If the Commission decides to adopt this new financial standard, the ABA strongly encourages the additional adoption of a grandfather provision for existing investors. Under the Commission's proposal, investors that do not meet the new threshold may remain in the fund, but may not make additional capital contributions. For investors in this group who have already taken the time to make these investments, their ability to make additional investments should not be unconditionally taken away. Furthermore, many financial institutions would find it overly burdensome to block ineligible investors from further investments while still tracking and administering their investments and accounts.

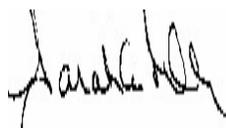
We also note that this investor sophistication standard is one of a growing number of such definitions. Others include: Qualified Client; Qualified Purchaser; Qualified Institutional Buyer; Qualified Eligible Person; Eligible Contract Participants; and under the proposed Regulation R, High Net Worth Client. All of these standards are potentially confusing for investors and financial institutions to navigate. Before adding to the list, the Commission should strive to rationalize all of these standards so that they appropriately complement each other.<sup>3</sup>

In response to the concerns mentioned above, we suggest that the Commission consider creating an exemption from any higher qualification of investor if the advisor of the fund voluntarily agrees to register and make periodic filings with the SEC. We also strongly urge the Commission not to extend this new standard to other exempt funds, including Section 3(c)(3) funds. As fiduciaries to the investors in common trust funds, banks have a fundamentally different relationship with these investors than advisers to 3(c)(1) funds have with their funds' underlying investors. Furthermore, banks acting in this capacity are already subject to extensive federal and state regulation and examination that protect the investors they serve.

#### CONCLUSION

The ABA appreciates the opportunity to offer our comments on the proposed rule. We hope our thoughts and recommendations will help the Commission develop an effective rule that does not present new and unnecessary difficulties for the banking industry and for its customers. If you have any questions or comments with respect to the issues raised in this letter, please do not hesitate to contact the undersigned or Phoebe Papageorgiou at (202) 663-5053 or [phoebep@aba.com](mailto:phoebep@aba.com).

Sincerely yours,



Sarah A. Miller

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<sup>3</sup> The Commission should also consider the international concerns of creating yet another standard. In a report issued with several other financial trade associations, the ABA Securities Association highlighted the importance of rationalizing sophisticated investor concepts in the U.S. and Europe. ABASA ET AL., THE TRANSATLANTIC DIALOGUE IN FINANCIAL SERVICES: THE CASE FOR REGULATORY SIMPLIFICATION AND TRADING EFFICIENCY (2005), <http://www.aba.com/ABASA/default.htm>.