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November 25, 2013

Division of Investment Management
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Attention: Douglas J. Scheidt, Esq.
Chief Counsel and Associate Director

Re: **ABA Retirement Funds; American Bar Association Members/ Northern Trust Collective Trust**

Dear Mr. Scheidt:

On behalf of the ABA Retirement Funds (the "ABA RF") and the American Bar Association Members/Northern Trust Collective Trust (the "Program's Collective Trust"), we respectfully request that the Staff of the Division of Investment Management of the Securities and Exchange Commission (the "Commission") affirm that it will not recommend enforcement action to the Commission against the ABA RF or the Program's Collective Trust under section 5 of the Securities Act of 1933 ("1933 Act") if the Program's Collective Trust files a post-effective Registration Statement on Form S-1 to remove the units of beneficial interest in the Program's Collective Trust from registration under the 1933 Act, and thereafter ceases to register such interests under the 1933 Act. It is our opinion, as set forth below, that the ABA RF, as sponsor of the ABA RF Program (the "Program"), is an entity described in paragraph (a)(3)(ii)(A) of Rule 180 promulgated under the 1933 Act. Accordingly, as set forth below, we believe that the Program's Collective Trust can rely on Rule 180 in connection with the issuance of units of beneficial interests therein to all employee benefit plans that currently invest in the Program's Collective Trust as well as all employee benefit plans that in the future adopt the Program and thereupon invest in the Program's Collective Trust.

I. STATEMENT OF FACTS

A. Introduction

The ABA RF is an Illinois not-for-profit corporation organized in 1963 by the American Bar Association (the "ABA") as a professional association for the purpose of sponsoring a tax-qualified retirement plan program for adoption by individual lawyers and law firms who are members of the ABA or members of state or local bar associations represented in the ABA's House of Delegates (such individuals and employers being referred to herein collectively as "Members"). The ABA RF's Board of Directors (the "Board") consists of nine members elected by the Board of Governors of the ABA. The ABA RF has a paid staff of four persons. The ABA RF's sole source of revenue is a cost-based fee charged against the assets of the Program's Collective Trust and any investment return on the ABA RF's corporate reserves.

The Program is a comprehensive retirement program that provides pre-approved, tax-qualified forms of employee pension benefit plans, a wide variety of investment options made available through the Program's Collective Trust and a self-managed discount brokerage platform for the investment of assets of the tax-qualified employee benefit plans that participate in the Program, together with related recordkeeping and administrative services.[1] As of June 30, 2013, the Program's Collective Trust assets totaled approximately $4.1 billion.

The Program is described in more detail below.

B. Operation of the ABA RF

1. In General

The operations of the ABA RF are conducted in a manner wholly consistent with its above-described purpose. Such operations consist of maintaining the documents relating to the pre-approved, tax-qualified retirement plans sponsored by the ABA RF, reviewing the performance of the vendors engaged by the ABA RF to conduct the Program's operations (as described below) and determining whether and when to replace such vendors. In operating the Program, the ABA RF employs not only the expertise of

[1] Participation in the Program and, hence, investment in the Program's Collective Trust, are limited to retirement plans maintained by lawyers, law firms, and other entities only if determined by the Board to be closely associated with the practice of law, such as state and local bar associations, legal aid societies and other law-related professional associations. It is believed that virtually all such other entities are organized as corporations and hence are not relevant to the analysis contained in this request.

its Board and staff, but also outside counsel and, when appropriate, independent consultants.

2. The Board

The members of the Board are distinguished lawyers who during their professional careers have participated in activities sponsored by or related to the ABA. Such individuals are elected by the ABA Board of Governors based, in part, on experience or expertise relating to the ABA RF's activities. For example, in recent years the Board has included a former President of the New York State Bar Association, a federal judge, a former general counsel of one of the largest federal financing agencies and current or former Chairs of the Employee Benefits Committee of the ABA Section of Taxation. The members of the Board serve without compensation as part of their personal commitments to be of service to the legal profession.

Because of the fiduciary duties imposed on the Board by the Employee Retirement Income Security Act of 1974 ("ERISA"), the Board is actively involved in the oversight of the activities of the Program. The Board holds quarterly Board meetings during which the Board receives in-person reports from the ABA RF staff, from the ABA RF's legal advisors and from the various vendors (described below) retained by the ABA RF to operate the Program. In addition, there are eight standing committees of the Board that oversee the various activities of the ABA RF and the Program vendors, and each member of the Board generally serves on several Board committees. The Board committees hold telephonic meetings between the quarterly Board meetings in order to carry out their duties. In 2012, for example, there were 23 meetings of Board committees. From time to time, when necessary or appropriate, the Board will direct the ABA RF staff to hire independent consultants to assist the Board regarding significant matters.

The Board has adopted and maintains a strict conflict of interest policy. Although Illinois not-for-profit corporate law requires only that directors of a not-for-profit corporation disclose to each other when they have an interest in a transaction proposed to be engaged in by the corporation, because the duties of the Board members are subject to the fiduciary requirements of ERISA, the ABA RF conflicts policy requires not only such disclosure, but also requires recusal of directors who have an interest in a vendor or potential vendor to the Program from voting on, and in some cases, from engaging in discussions about, the retention, termination or compensation of any such vendors.

The ABA RF further enhances its governance by the retention of independent public accountants to provide each year an opinion that the ABA RF's financial statements fairly present the ABA RF's financial position in accordance with United States generally accepted accounting principles.

3. ABA RF Staff

The Board also is responsible for engaging, evaluating and determining the compensation of the ABA RF staff. The Executive Director is the member of the ABA RF staff with the expertise and experience necessary to carry out the policies set by the Board. The position of Assistant Executive Director was created approximately six years ago in response to the growing workload as the Program grew in assets and complexity. Two other staff members provide administrative support to the Board, the Executive Director and the Assistant Executive Director.

As stated above, the Board determines the compensation of the ABA RF staff. All the staff members are compensated on a salaried basis. There is no incentive compensation program related to the size or growth of the Program. Rather, the Board establishes each year annual objectives to be satisfied by staff members in the performance of their duties. These include, for example, monitoring compliance of Program vendors with contractual requirements and benchmarking the Program with other retirement plan products, but do not include considerations specifically relating to the growth of the Program.

4. ABA RF Fees

As indicated above, the ABA RF is paid a cost-based fee borne by the participating plans, which is charged against and paid from the Program's Collective Trust assets. This fee is fully disclosed to adopting employers, who approve such fee in connection with their adoption of the Program. This fee is in an amount determined by the ABA RF to cover its operating costs and to allow it to maintain reasonable corporate reserves. Consistent with both prior authority under ERISA and newer ERISA regulations, the ABA RF can change its fee only upon not less than sixty days' prior notice to the adopting employers.[2] Because there are no withdrawal penalties or other restrictions on an adopting employer's right to withdraw from the Program, an adopting employer that objects to a fee change can withdraw its plan from the Program before any such fee change takes effect.

The ABA RF's fee schedule has historically been applied in "break points" based on the value of assets held by the Program's Collective Trust, so that as the value of assets so held grows larger, whether by the addition of new plans or market performance, the marginal rate of the ABA RF's fee is reduced. The ABA RF's current fee schedule, which became effective in April 2012, is: (a) .075% on the first $3 billion of the assets of the Program's Collective Trust; (b) .065% on the next $1 billion of the assets of the

[2] 29 C.F.R. §2550.408b-2. No other consent is required for such a change.

Program's Collective Trust; and (c) 0.00% on assets of the Program's Collective Trust in excess of $4 billion.[3] Thus, the ABA RF Fee currently is effectively capped with respect to assets of the Program's Collective Trust in excess of $4.0 billion.

The ABA RF actively monitors its costs and its revenues and from time to time adjusts the fee schedule to reflect current costs and revenues. For example, in 1995, after the Program had experienced a period of growth in assets, the ABA RF reduced its fees by approximately 10%. In December, 2011, the Board authorized a further modification of its fee schedule to eliminate any fees on assets in excess of $4 billion.[4] Moreover, the ABA RF monitors the reasonableness of its reserves, consistent with the ABA RF's purpose. For example, in 1996, the Board determined that, notwithstanding its 1995 fee reduction, the ABA RF's reserves had become larger than the amount the Board believed necessary, and, accordingly, the ABA RF paid approximately $200,000 to the Program's Collective Trust to enable it to immediately pay down the remaining installments of certain expenses related to the transition of the Program to State Street Bank and Trust Company then being amortized and charged against the Program's Collective Trust. The ABA RF has represented to us, after consultation with and approval by the Board, that it will use its reasonable efforts to limit its corporate reserves to an amount not in excess of approximately three times its annual operating costs.

C. The Program

The Program consists of the Plans (as defined below), the Conduit Trusts (as defined below) and the Program's Collective Trust.

1. The Plans

Lawyers and law firms who elect to participate in the Program may do so through their own individually designed retirement plans ("Individually Designed Plans"). Lawyers and law firms also may participate in the Program by adopting a plan established in accordance with one or both of two master plans sponsored by the ABA RF: the American Bar Association Members Retirement Plan and the American Bar Association Members Defined Benefit Pension Plan (collectively, the "ABA Members Plans" and together with the Individually Designed Plans, the "Plans"). As sponsor of the Program, the ABA RF is responsible for the design of the Program and the maintenance of the ABA Members Plans. The ABA Members Plans are classified under

[3] The fee is expressed at the annual rate. The fee is accrued daily and is paid to the ABA RF monthly based on the value of the Program's Collective Trust assets as of the end of the last business day of the preceding month.

[4] Prior to that time, the fee schedule for assets in excess of $4 billion was .035% on assets between $4 - $5 billion, .025% on assets between $5 - $6 billion and .015% on assets in excess of $6 billion.

Internal Revenue Service ("IRS") procedures as "master plans" designed to allow qualified employers to establish and maintain employee benefit plans that are qualified under section 401(a) of the Internal Revenue Code (the "Code"). From time to time, the IRS has determined in IRS opinion letters, the most recent of which were issued on March 31, 2008 and on March 31, 2010, respectively, that the forms of the ABA Members Plans are qualified under section 401(a) of the Code and that the Conduit Trusts are exempt from federal income tax under section 501(a) of the Code. The trustees of Individually Designed Plans must, in order to participate in the Program, represent that such plans are qualified under section 401(a) of the Code and provide copies of IRS determination letters confirming such qualification. An overwhelming majority of the employers participating in the Program do so through adoption of the ABA Members Plans.

Most lawyers engaged in the private practice of law do so through unincorporated forms of business entities such as sole proprietorships, partnerships or entities treated for federal income tax purposes as partnerships. Sole proprietors or partners are not common law employees of such entities, but are employees within the meaning of section 401(c)(1) of the Code.[5] Thus, plans that include any such individuals, including most of the plans investing in the Program's Collective Trust, are considered so-called "H.R. 10" or "Keogh" plans.[6]

2. Program Services/Vendors

In addition to maintaining the ABA Members Plans, the ABA RF engages vendors to provide the services necessary for the operation of the retirement plans that participate in the Program, such as financial reporting, participant account recordkeeping, tax reporting, and selection of suitable investment options. Adopting employers, by executing the plan/trust documents, confirm, pursuant to the terms of such documents, that the ABA RF, consistent with the purpose for which it was formed, has the exclusive authority to engage the various vendors to perform such functions, including the trustee of the Program's Collective Trust, currently Northern Trust Investments ("NTI"), a wholly-owned subsidiary of Northern Trust Company ("Northern Trust"),[7] the

[5] Section 401(c)(1) of the Code defines "employee" for purposes of section 401(a) of the Code as including "self-employed" individuals, such as the owner of a sole proprietorship or a partner in a partnership.

[6] Such designations refer to H.R. 10 sponsored by Congressman Keogh, enacted in 1962, that added section 401(c)(1) to the Code. Before then, only common law employees, not self-employed individuals, could be covered by plans described in section 401(a) of the Code.

[7] Pursuant to the Fiduciary Investment Services Agreement ("FISA") between Northern Trust, NTI and ABA RF, Northern Trust is engaged to serve as trustee of the Collective Trust. In accordance with the FISA, Northern Trust has entered into a master services agreement with its wholly-owned subsidiary NTI

recordkeeper for the Program, currently ING Institutional Plan Services, LLC ("ING"),[8] and the discount brokerage services provider of the self-managed discount brokerage option, currently TD Ameritrade, Inc. Because assets of the Plans are subject to ERISA, the ABA RF's authority to engage and replace Program vendors is subject to the fiduciary duty requirements of ERISA.[9] To satisfy those duties, the ABA RF, through its Board, its staff and, when appropriate, the use of independent consultants, monitors the performance of such vendors, and in so doing, the ABA RF carries out duties that ERISA would otherwise impose on the adopting employers.[10] For example, pursuant to the ABA RF's contract with Northern Trust, Northern Trust is required to develop a Program investment policy that specifies the investment options to be provided by the Program's Collective Trust, as well as the investment objectives and performance benchmarks of such options. Such policy is subject to review and acceptance by the ABA RF, as are any changes thereto proposed by Northern Trust from time to time. In this manner, the ABA RF monitors the Program's investment offerings so that only appropriate investment options are offered. Moreover, the Program's investment policy is distributed to all the adopting employers and is available on the Program's website. Unlike the situation with respect to most retirement plan programs currently on the market, the Program makes all its investment options available to all adopting employers; the employers cannot limit the availability of any of the investment options under the Program's Collective Trust, thereby assuring that all the adopting employers (and their employees) have the full benefit of the Program's investment offerings.

3. The Conduit Trusts

Assets of ABA Members Plans invested under the Program are held in trust in accordance with the provisions of the American Bar Association Members Retirement Trust (the "Master Trust"), which is adopted by each employer that adopts an ABA Members Plan, and assets of Individually Designed Plans invested under the Program are

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pursuant to which NTI carries out Northern Trust's obligations to act as trustee of the Collective Trust and perform related duties.

[8] ING also is responsible for marketing the Program.

[9] Certain plans that cover only a sole practitioner (or such practitioner and his or her spouse) but no common law employees are not, by themselves, subject to ERISA. The assets of such plans constitute less than 1% of the total Program assets and are treated by the Program as subject to ERISA's fiduciary protections. *Cf., Yates v. Hendon*, 544 U.S. 1 (2004) (holding that self-employed individuals participating in plans subject to ERISA, although not "employees" for purposes of ERISA, are nevertheless entitled to the protections of ERISA).

[10] For example, several times during the tenure of State Street Bank and Trust Company as trustee of the Program's Collective Trust from 1992 to 2010, the ABA RF solicited bids or other indications of interest by other vendors to determine whether to retain State Street. The last such review ultimately resulted in the engagement of Northern Trust. During 2012, the ABA RF engaged an independent consulting firm to review Northern Trust's performance, including its compliance with the Program's investment policy.

held in trust in accordance with the provisions of the American Bar Association Members Pooled Trust for Retirement Plans (the "Pooled Trust"), which is adopted by each employer that sponsors an Individually Designed Plan that participates in the Program. Such assets are held in trust for the exclusive benefit of individuals and employees (collectively with their beneficiaries, "Participants") of adopting employers. Pursuant to the FISA, Northern Trust has served as trustee of each of the Conduit Trusts since July 1, 2010. The Conduit Trusts hold only units issued by the Program's Collective Trust and the assets held in the Program's self-managed discount brokerage option, and such trusts have been determined by the IRS to be tax-exempt trusts under section 501(a) of the Code.

The Conduit Trusts provide an administrative convenience for the maintenance of the Program and have no economic substance separate and apart from the Investment Options made available under the Program's Collective Trust. The trustee of the Conduit Trusts exercises no discretion with respect to the investment of the assets contributed thereto in accordance with the applicable Plan. All such assets are invested in accordance with the investment allocation instructions of each specific Participant. At the time the assets are contributed under the Plans and received by or on behalf of the trustee of the Conduit Trusts, the assets are immediately passed through to the Investment Options (as defined below) made available under the Program. The Participants have a beneficial interest only in those specific Investment Options. The Conduit Trusts are not separate investments for Participants, and the Conduit Trusts do not alter the nature of, or risk associated with, the underlying Investment Options. In a no action letter dated June 7, 2010, the Commission Staff most recently indicated that it would not take enforcement action if the Conduit Trusts were not registered under the 1940 Act and if the interests therein were not registered under the 1933 Act.[11] Because no changes are being made to the structure or function of the Program, we are not requesting any relief on behalf of the Conduit Trusts. The relationship of the Conduit Trusts to the Plans, Participants and the underlying Investment Options will not change as a result of the requested relief.

4. The Program's Collective Trust

The Program's Collective Trust consists of a series of bank-maintained collective trust sub-funds made available from time to time thereunder (the "Funds"). These Funds, together with self-managed brokerage accounts made available to Participants, are referred to as the "Investment Options." The Program's Collective Trust issues units ("Units") representing pro rata beneficial interests in each of its Funds to the Plans (through the Conduit Trusts). The Program's Collective Trust has relied on the exclusion from the definition of "investment company" contained in section 3(c)(11) of the

[11] ABA Retirement Funds Program, SEC No-action Letter (avail. June 7, 2010).

Investment Company Act of 1940 (the "1940 Act"), and has relied on the exemption from registration provided by Rule 180 under the 1933 Act for issuances of Units to plans of employers who certify to their satisfaction of the conditions imposed by Rule 180 and has registered Units under the 1933 Act for issuances to plans of employers who do not provide a certificate regarding their satisfaction of such conditions. The Conduit Trusts are the only permitted investors in the Program's Collective Trust.

The Program's Collective Trust is maintained by Northern Trust pursuant to the FISA. The FISA (1) obligates Northern Trust, in relevant part, to develop and maintain the previously described Program investment policy and to operate the Program's Collective Trust in a manner consistent with such policy, (2) specifies the fees payable to Northern Trust and (3) requires that Northern Trust accept complete fiduciary liability under ERISA for its activities as trustee. In accordance with the FISA, Northern Trust designated NTI as the trustee of the Program's Collective Trust on July 1, 2010. Northern Trust generally cannot terminate the FISA without providing to the ABA RF twelve months' advance notice, with an effective date no earlier than June 30, 2015, but the ABA RF can terminate the FISA at any time upon six months' notice.[12] Pursuant to the FISA, Northern Trust is entitled to receive a fee borne by the Plans, which is charged against and paid from the Program's Collective Trust, and which cannot be increased without the ABA RF's consent.

The investment performance of the Funds offered by the Program's Collective Trust is regularly disclosed to the adopting employers (and their employees) in a variety of ways. For example, quarterly performance reports are sent by United States mail to all Program participants. Monthly performance reports are posted to the Program's website, as are so-called quarterly "fund fact profiles" that provide additional disclosures regarding the various Funds.

II. APPLICABLE LAW

A. The 1933 Act and Rule 180

Section 3(a)(2) of the 1933 Act, in relevant part, exempts from registration "any interest or participation . . . in a collective trust fund maintained by a bank . . . issued in connection with (A) a stock bonus, pension or profit sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code . . ., other than any plan described in clause (A) . . . (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code . . .," *i.e.*,

[12] The FISA further provides that if Northern Trust provides a notice of termination, the ABA RF has the unilateral right to extend the term of the FISA for up to one year after the effective date of such notice, thereby providing ample time for selection of and transition to a successor.

H.R. 10 Plans. The statutory exemption, by its term, thus applies only to Code section 401(a) plans that cover only common law employees.

Section 3(a)(2) of the 1933 Act also states: "The Commission, by rules and regulations or order, shall exempt from the provisions of section 5 of this title any interest or participation issued in connection with a stock bonus, pension, profit sharing plan or annuity plan which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purpose fairly intended by the policy and provision of this Act."

In 1981, the Commission promulgated Rule 180 pursuant to this authority. Rule 180 makes the section 3(a)(2) exemption applicable to H.R. 10 plans if:

> (a)(1) The plan covers employees, some or all of whom are employees within the meaning of section 401(c)(1) of the Code, and is either: (i) a pension or profit-sharing plan which meets the requirements for qualification under section 401 of the Code, or (ii) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of the Code;
>
> (2) The plan covers only employees of a single employer or employees of interrelated partnerships; and
>
> (3) The issuer of such interest, participation or security shall have reasonable grounds to believe and, after making reasonable inquiry, shall believe immediately prior to any issuance that:
>
> > (i) The employer is a law firm, accounting firm, investment banking firm, pension consulting firm or investment advisory firm that is engaged in furnishing services of a type that involve such knowledge and experience in financial and business matters that the employer is able to represent adequately its interests and those of its employees; or
> >
> > (ii) In connection with the plan, the employer prior to adopting the plan obtains the advice of a person or entity that
> >
> > > (A) is not a financial institution providing any funding vehicle for the plan, and is neither an affiliated person as defined in section 2(a)(3) of the Investment Company Act of 1940 of, nor a person who has a material business relationship with, a financial institution providing a funding vehicle for the plan; and

(B) is, by virtue of knowledge and experience in financial and business matters, able to represent adequately the interests of the employer and its employees.

The person described in paragraph (a)(3)(ii) is sometimes referred to as an "independent expert", although such term appears only in the adopting release for the rule but not in the rule itself.[11][13] In a subsequent no-action letter, the staff of the Commission indicated that bank-maintained collective trust funds could satisfy the requirement of paragraph (a)(3) of Rule 180 by obtaining a certificate from the plan's sponsor confirming that the condition in either paragraph 3(i) or 3(ii) has been satisfied. The staff has indicated that such confirmation is to be provided at the time the investment is offered.[14]

B. ERISA

The applicability of ERISA also is an important feature of the Program.[15] Because of its discretion to engage, retain and terminate the trustee of the Program's Collective Trust, the ABA RF's activities are subject to ERISA. In relevant part, ERISA requires that, as a fiduciary, the ABA RF carry out its duties:

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying the reasonable expenses of administering the plan

(B) with the care, skill, prudence and diligence that a prudent man, acting in a like capacity and familiar with such matters would use the conduct of an enterprise of a like character and with like aims.[16]

This standard of care is sometimes referred to as the "prudent expert" standard of care, and generally is considered to impose a higher standard of care than common law fiduciary standards.

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[13] SEC Release No. 33-6363 (Dec. 1, 1981).

[14] Huntington National Bank-Collective Trust Funds Program, SEC No-action Letter (avail. Feb. 8, 1988) (not recommending enforcement action if Rule 180 certificates are provided before investment, rather than before adoption of the plan).

[15] *See, generally*, "Protecting Investors; A Half Century of Investment Company Regulation," Division of Investment Management, United States Securities and Exchange Commission (1992), Chapters II.C., V.A., VI.B and V.F.

[16] Section 404(a)(1) of ERISA.

Moreover, ERISA contains additional prohibitions against self-dealing, stating that a fiduciary "shall not (1) deal with assets of the plan in his own interest or for his own account, (2) . . . act in a transaction on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or (3) receive any consideration for his own account from any party dealing with such plan."[17]

III. DISCUSSION

A. The Program's Status Under the 1933 Act; Effect of Recent Changes

The Program was established long before the adoption of Rule 180. Because the Program's funding vehicle (then a group annuity contract issued by The Equitable Life Assurance Society of the United States ("Equitable")) included H.R. 10 plans, it did not qualify for the section 3(a)(2) exemption from registration. Therefore, the Program's funding vehicle registered the offer and sale of its units of beneficial interests under the 1933 Act.[18] Although the Program could have changed its method of operating to take full advantage of the Rule 180 exemption following its adoption in 1981 by requiring all participating employers to each separately certify to their satisfaction of the conditions imposed by Rule 180, the Program has not done so primarily because to enforce such a condition would have required forcing non-complying employers to withdraw from participation in the Program's Collective Trust, a result inconsistent with the Program's purpose. At least since 1992, employers who have adopted the Program have been requested, but have not been required, to provide Rule 180 certificates. Thus, as noted above, today the Program's Collective Trust issues both Units that are registered under the 1933 Act and Units that, in reliance on Rule 180, are not registered under that Act.

Recent changes to the Program and applicable law have caused the ABA RF to revisit the applicability of Rule 180 to the Program. First, prior to 2009, all the necessary Program services -- trustee, investment, marketing, discount brokerage and recordkeeping-administration -- were provided by a single vendor and its affiliates. Prior to 1992, this vendor was Equitable, and from 1992 through May 1, 2009, this vendor was State Street Bank and Trust Company. Each of these financial institutions provided,

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[17] Section 406(b) of ERISA.

[18] Prior to the promulgation of Rule 180, virtually all collective trusts avoided registration under the 1933 Act by prohibiting investments by H.R. 10 plans and thus were entitled to rely on the section 3(a)(2) exemption. At present, the ABA RF is aware of only one other registered program that apparently does not rely on Rule 180, a retirement program offered to members of the American Dental Association through a group annuity contract for which AXA Equitable Life Insurance Company files a registration statement on Form N-3.

during their respective tenures, not only the Program's funding vehicle but also provided such other services. Effective on and after May 1, 2009, the ABA RF began the process of "unbundling" the Program's services by engaging different vendors to provide the different Program services, with the result that the financial institution that provides the Program's Collective Trust is now separate from and not affiliated with the vendors providing other Program services, as described in Section I.C.~~2.~~2 of this letter. This "unbundling" of the Program's services has enhanced the ABA RF's flexibility to select, monitor and change the financial institution that serves as trustee of the Program's Collective Trust, because such a decision no longer will affect the ongoing provision of the Program's non-investment services. Second, the Department of Labor has adopted new regulations, effective last year, imposing substantial new investment performance and fee reporting and disclosure requirements of the type required by the 1933 Act on employee benefit plan service providers and sponsors, including the Program's Collective Trust.[19]

B. Applicability of Paragraph (a)(3)(ii)(A) of Rule 180

Paragraph (a)(3)(ii)(A) of Rule 180 describes the person who may provide advice to the sponsor of an H.R. 10 plan for purposes of complying with Rule 180. Paragraph (a)(3)(ii)(A) provides that such person cannot be the financial institution that provides the funding vehicle or be an affiliate of or have a "material business relationship" with such financial institution.

1. The ABA RF is Not the Financial Institution Providing the Funding Vehicle for the Program nor an "Affiliate" of the Financial Institution Providing the Funding Vehicle for the Program.

The ABA RF clearly is not the financial institution providing the Program's funding vehicle. Rather, the trustee of the Program's Collective Trust, which currently is NTI, as delegatee of Northern Trust, is the financial institution providing the funding vehicle for the Program. As an affiliate of the ABA, the ABA RF could not be, and is not, affiliated with a financial institution such as Northern Trust within the meaning of section 2(a)(3) of the 1940 Act.[20] Thus, the only remaining issue under paragraph (a)(3)(ii)(A) of Rule 180 is whether the ABA RF's engagement, as sponsor of the

[19] *See* 29 C.F.R. §2550.404a-5. *See also* Department of Labor, SEC No-action Letter (avail. Oct. 26, 2011).

[20] Section 2(a)(3) of the 1940 Act defines "affiliated person" of another person generally as (A) a person who owns or otherwise controls at least 5 percent of the voting power of such other person, (B) a person under common control with such other person, (C) an officer, director, partner, copartner or employer of such other person or (D) in the case of an investment company, a member of its advisory board.

Program, of the provider of the Program's funding vehicle is a "material business relationship" with such provider within the meaning of paragraph (a)(3)(ii)(A) of Rule 180.

2. The ABA RF's Engagement of a Financial Institution to Provide the Funding Vehicle for the Program Does Not Create a "Material Business Relationship" with such Institution Within the Meaning of Paragraph (a)(3)(ii)(A) of Rule 180.

Rule 180 does not define the term "material business relationship." The "material business relationship" condition and the reference to section 2(a)(3) of the 1940 Act were added to Rule 180 in connection with its final adoption to clarify the independence requirement applicable to the person or entity described in paragraph (a)(3)(ii)(A). The Commission commented:

> "Affiliated person" has been defined in the rule to include those persons defined in section 2(a)(3) of the Investment Company Act of 1940 . . . as well as persons having a material business relationship with the financial institution providing the funding vehicle for the plan. Thus, for example, a controlling shareholder, an officer, a partner or an employee of, or a salesman for, either a firm managing the funding vehicle for the plan or a firm distributing the interests or securities of such funding vehicle would not qualify as an independent expert for purposes of the rule. The Commission's intent is to assure that the unsophisticated employer and its employees be *represented by, or at least obtain the advice of*, an expert which has *no conflict of interest in providing such representation or advice*." (Emphasis added.).[21]

The ABA RF's role as Program sponsor does not include any of the disqualifying relationships described by the Commission with the financial institution providing the funding vehicle for the Program (currently, Northern Trust). Based on the Commission's explanation, quoted above, of the overall purpose of the conditions imposed by Rule 180, the material business relationship condition is aimed at persons who are engaged by or otherwise have a material financial interest in the financial institution that provides the relevant funding vehicle. The ABA RF does not, and in fact legally cannot, distribute or market interests in the Program's Collective Trust. Moreover, the ABA RF receives no fees, compensation or other economic benefit directly or indirectly from the financial

[21] SEC Release No. 33-6363 (Dec. 1, 1981). At the same time, the Commission eliminated a proposed requirement that such person or entity be independent of the employer. *Id.*

institution it has engaged and thus has no conflict of interest. Instead, it is the ABA RF, acting as an ERISA fiduciary on behalf of the adopting employers, that engages such financial institution to serve as trustee of the Program's Collective Trust. It is the ABA RF that negotiates and consents to the trustee's fees, not the other way around. The ABA RF can terminate such institution as trustee of the Program's Collective Trust upon six months' notice, while, as described in Section I.C.4 of this letter, the trustee's termination rights are more limited.

Our conclusion that there is no "material business relationship" within the meaning of paragraph 3(a)(ii)(A) of Rule 180 between the ABA RF and the trustee of the Program's Collective Trust is consistent with the Commission's interpretation of the very similar phrase "material business or professional relationship" used in section 2(a)(19) of the 1940 Act in a very analogous context. Under paragraphs (A)(vii) and B(vii) of section 2(a)(19) of the 1940 Act, a director of a mutual fund will be deemed an interested person of the fund and, hence, not independent, if the Commission issues an order finding that during a statutorily set period, "a material business or professional relationship" existed between the director and certain specified parties. In SEC Release No. IC-24083 (October 14, 1999), the Commission cited to the legislative history of section 2(a)(19) of the 1940 Act, as follows:

> "The legislative history..., indicates that a business or professional relationship would be material if it 'might tend to impair the independence of [a] director.' The legislative history also states that '[o]rdinarily, a business or professional relationship would not be deemed to impair independence where the benefits flow from the director of an investment company to the other party to the relationship. In such instances, the relationship is not likely to make the director beholden to that party. '"[22]

In Release No. IC-24083, the staff gave as examples of relationships that might lead to a director being considered "interested" those involving the director receiving favored treatment, or where significant economic benefits from the relationship would flow to the director (or where the director may have the expectation that significant economic benefits would flow to the director in the future). The staff indicated that "a director ordinarily would not be considered to have a material business relationship with [an] investment adviser simply because he is a brokerage customer who is not accorded special treatment."[23] The staff further noted that issues of material relationships must be

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[22] Release No. IC-24083, citing H.R. Rep. No. 1382, 91st Cong., 2d Sess. 14 (1970); 91st Cong., 1st Sess. 33 (1969) (footnotes omitted).

[23] Release No. IC-24083, citing H.R. Rep. No. 1382, 91st Cong., 2d Sess. 15 (1970); S. Rep. No. 184, 91st Cong., 1st Sess. 34 (1969).

analyzed based on the particular facts of each case to determine whether a director's interests and relationships might tend to impair independence.

Given the similarity of the phrase "material business relationship" used in Rule 180 to the (slightly broader) phrase "material business or professional relationship" contained in section 2(a)(19) of the 1940 Act and the reference contained in paragraph (a)(3)(ii)(A) of Rule 180 to the 1940 Act definition of "affiliate," this legislative history should inform the staff's interpretation of the term "material business relationship" as used in Rule 180. The benefits of the relationship between the ABA RF and the trustee of the Program's Collective Trust clearly flow *from* the ABA RF *to* the provider of the Program's Collective Trust, not the other way around. Accordingly, such relationship cannot be viewed as impairing the ABA RF's independence or creating a conflict of interests, just as in the case of the independent directors described in the above-cited legislative history and regulatory guidance.

3. The ABA RF Conducts its Diligence Before Engagement of the Trustee of the Program's Collective Trust.

Rule 180 does not require that an "independent expert" have any particular status under the federal securities law, such as being a registered investment advisor or a broker-dealer, or that such person follow any particular process for rendering its advice. For example, it would not be unusual for a sponsor of an H.R. 10 plan to consult with the sponsor's general business advisor, such as an attorney or accountant, regarding the propriety or wisdom of investment in a collective trust fund, especially given the recognition by paragraph (a)(3)(i) of Rule 180 to the inherent expertise of such persons. Thus, such "independent expert" does not, solely by providing any advice regarding the investment vehicle, necessarily take on any liability under the federal securities law. In addition, the "independent expert" contemplated by Rule 180 is not likely to be an ERISA fiduciary under ERISA.[24] The ABA RF, by contrast, clearly acts as an ERISA fiduciary in selecting and monitoring the financial institution that serves as trustee of the Program's Collective Trust.

[24] Department of Labor regulations, at 29 C.F.R. §2510.3-21, define "fiduciary," in relevant part, as a person who either (a) has discretion or control over plan assets, or (b) provides on a "regular basis," for a fee, advice regarding the purchase or sale of securities. An "independent expert" consulted to advise solely regarding an employer's proposed investment in a collective trust most likely would not be a fiduciary subject to ERISA, as so defined. In fact, in 2010, the Department of Labor proposed an amendment to its regulation defining fiduciary that, if adopted, would have included many "independent experts" as fiduciaries. *See* Definition of the Term "Fiduciary," 75 Fed. Reg. 65263 (Oct. 22, 2010). The Department of Labor has, however, withdrawn the proposed amendment. *See* Department of Labor News Release (Sept. 19, 2011.)

Moreover, in the Rule 180 adopting release, the Commission indicated that it is preferable, if not sufficient, that an independent party "represent" the interests of the adopting employer and its employees without necessarily providing "advice," and, hence, there is no requirement under Rule 180 that the "independent expert" consider or bring to the employer's attention, alternatives to any particular investment vehicle under consideration by the employer or that such person have any ongoing obligation to review the investment vehicle after initial investment.[25]

The ABA RF's representation of the Program's participating employers (and their employees) and its independence from the financial institution it engages to provide the Program's Collective Trust are demonstrated by the diligence conducted by the ABA RF *before* it engages an institution to be the trustee of the Program's Collective Trust as well as the ABA RF's periodic reviews of the performance of that institution thereafter, as described in Section I.B and I.C of this letter. For example, in 2007, the ABA RF engaged an independent consulting firm to assist it in conducting diligence regarding the services of State Street Bank and Trust Company, the then trustee of the Program's Collective Trust, and to determine whether another vendor would be preferable. After a year-long process and after considering a number of potential candidates, the ABA RF determined to engage Northern Trust to replace the prior trustee. This process is no less independent and likely more thorough than that of most other "independent experts" contemplated by Rule 180. Moreover, Rule 180, by its terms, requires only contemporary advice from an "independent expert" at the time of investment, without imposing any requirement of ongoing advice regarding the investment. By contrast, the ABA RF performs ongoing diligence on behalf of the participating plans and their participants, as required by ERISA. Thus, if circumstances in the future so warranted, the ABA RF would be free to, and in fact would, replace Northern Trust with another institution, after making a similar advance determination that such new institution was appropriate to be the trustee of the Program's Collective Trust.

4. The ABA RF's Fee Does Not Create a Conflict of Interest with the Trustee of the Program's Collective Trust.

Rule 180 is silent regarding the receipt of fees by the independent expert for providing its advice to an employer, and apparently fees for such advice are permissible

[25] As cited above, the Commission stated that the employer and its employees be "represented by, or *at least* obtain the advice" of a party without a conflict of interest with respect to the financial institution that provides the applicable funding vehicle. Not only does the ABA RF, as a controlled affiliate of the ABA, represent the interests of lawyers generally, as indicated in Section I.C.1 of this letter, but all the employers that adopt the Program explicitly delegate to the ABA RF the authority to engage the Program's various vendors on their behalf. The ABA RF, by such representation, provides more than the minimal "advice" referred to in Rule 180.

so long as their payment does not create a conflict of interest in favor of the financial institution that provides the funding vehicle.[26] The ABA RF's receipt of a fee from the plans participating in the Program, together with its not-for-profit status, enables the ABA RF to be wholly independent of the institution that, from time to time, is engaged by the ABA RF to serve as trustee of the Program's Collective Trust.

The ABA RF does not sponsor the Program for the purpose of earning fees. Rather, the ABA RF uses its fee solely to support its activities as the Program sponsor, including the periodic review of the performance of the trustee of the Program's Collective Trust. The ABA RF's fee is ongoing because its diligence on behalf of the adopting employers and their participants also is ongoing.

The ABA RF's fee is paid by the participating plans as charges against the assets of the Program's Collective Trust with the approval of the participating employers, not by authorization of, or subject to the approval or consent of, the trustee. The ABA RF fee is thus payable *without regard* to the entity that serves as trustee of the Program's Collective Trust and so is no different than fee that might be charged to an employer by a typical Rule 180 independent expert. On the other hand, the fee payable to Northern Trust is fixed by the FISA and thus cannot be changed by Northern Trust without the consent of the ABA RF, acting as an ERISA fiduciary. Comparable fee arrangements were in effect when State Street Bank and Trust Company served as trustee of the Program's Collective Trust, and such fee arrangements would be expected to continue in the event of the engagement by the ABA RF of another financial institution to replace Northern Trust, if such event became necessary or appropriate. Similarly, the differences under FISA between the ABA RF's termination rights compared to those of Northern Trust, as described in Section I.C.4 of this letter, demonstrate the ABA RF's control over the relationship with Northern Trust.

That neither the ABA RF nor its staff seeks to profit from the Program is demonstrated not only by the ABA RF's not-for-profit status but also by the fact that the ABA RF sets its fees solely to cover its costs of operations and the maintenance of reasonable corporate reserves). The Board, consisting of individuals who are not compensated for their services and who are independent of the trustee,[27] establishes the ABA RF staff's compensation by reference to typical employee evaluation processes, including market data regarding comparable positions, not directly or indirectly by reference to the size of the Program or growth in its assets in any particular year. In fact,

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[26] It is our experience that investing employers or plans pay compensation to their Rule 180 "independent experts."

[27] As stated in Section I.B.2 of this letter, the Board maintains a strict conflict of interest policy, so that any director with an interest in a Program vendor does not vote, and in some cases, does not participate in discussions, regarding such a vendor, including the trustee of the Program's Collective Trust.

the ABA RF is not in a position to engage in activities that could directly impact Program growth; it does not, and has represented in requests for no-action letters granted by the Commission's staff that it will not, engage in any marketing activities.

IV. EFFECT OF DEREGISTRATION UNDER THE 1933 ACT

Based on our opinion, as set forth above, that the ABA RF is an entity described in paragraph (a)(3(ii)(A) with respect to the Program's Collective Trust and subject to the issuance by the staff of the Investment Management Division of the Commission of the no-action relief requested herein, the Program's Collective Trust will file a Post-Effective Amendment to its most recent Registration Statement on Form S-1, removing the units of beneficial interest in the Program's Collective Trust from registration. The effect of deregistering the Units under the 1933 Act will result in significant savings for the Program. The Program shall thereafter use its most recent prospectus forming part of such Registration Statement, appropriately supplemented to reflect the deregistration of the registered units, as the initial disclosure document for the Program's Collective Trust, until a date in 2014, but no later than the date on which the Program's Collective Trust would have been required to deliver a new prospectus but for the deregistration contemplated herein, *i.e.*, April 30, 2014. The ABA RF has represented to us that Northern Trust has agreed that on or before such date, and at least once each year thereafter, the Program's Collective Trust will cause to be delivered to the Program's adopting employers a disclosure document (the "Program Disclosure Document"). The Program Disclosure Document will provide information about the Program's Collective Trust required to be disclosed to employers and participants by ERISA and will be in compliance with the applicable requirements of Items 1 through 8 of Form N-1A or any successor thereto. Should the ABA RF engage an entity other than Northern Trust to be the trustee of the Program's Collective Trust, it will require such successor trustee to comply with these disclosure requirements.

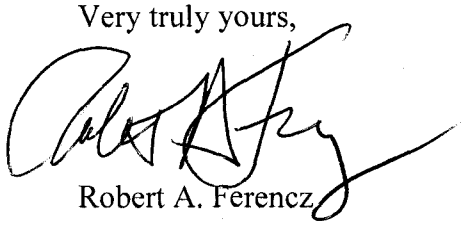
* * *

As set forth above, it is our opinion that the ABA RF is an entity described in paragraph (a)(3)(ii)(A) of Rule 180 with respect to the Program's Collective Trust. Accordingly, as set forth above, we believe that the Program's Collective Trust can rely on Rule 180 in connection with the issuance of units of beneficial interests therein to all employee benefit plans that currently invest in the Program's Collective Trust as well as all employee benefit plans that in the future adopt the Program and thereupon invest in the Program's Collective Trust. We respectfully request that the Staff of the Division of Investment Management affirm that it will not recommend enforcement action to the Commission against the ABA RF or the Program's Collective Trust if the Program's Collective Trust files a post-effective Registration Statement on Form S-1 to remove the

beneficial interests in the Program's Collective Trust from registration under the 1933 Act and thereafter ceases to register such interests under the 1933 Act.

Please feel free to call the undersigned or Andrew H. Shaw (312-853-7324) or Michael Hyatte (202-736-8012) if you have any questions or if you need any additional information. Your assistance in this matter is greatly appreciated.

Very truly yours,



Robert A. Ferencz

cc: Andrew H. Shaw
Michael Hyatte

RAF:cc