

**Commerce Bancshares, Inc.**  
Compliance Department, TB12-1  
922 Walnut St., P.O. Box 13686  
Kansas City, MO 64199-3686

January 14, 2011

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Definition of Fiduciary Proposed Rule,  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Delivered via email:  
e-ORI@dol.gov

RE: Definition of Fiduciary Proposed Rule – Request for Public Comment

Dear Sir or Madam:

Commerce Bancshares, Inc. (CBI) is a regional bank holding company with one bank subsidiary, Commerce Bank, N.A., and total assets of \$18.8 billion at September 30, 2010. The bank is a full-service bank, with approximately 370 banking locations in Missouri, Illinois, Kansas, Oklahoma, and Colorado. The bank provides investment management and other fiduciary services to employee benefit plans governed by ERISA. In addition, the bank serves as trustee of a bank collective fund that invests in commercial mortgages, and in connection with the commercial mortgage underwriting process the bank obtains appraisals of the underlying real property collateral. It should be noted that the trust asset is the note and the underlying real property is not an asset of the trust but merely collateral support for the trust assets.

We appreciate the opportunity to comment on the Definition of the Term "Fiduciary" proposed rule.

### **Addition of appraisals or fairness opinions in general - Oppose**

#### Costs Outweigh Benefits

Paragraph (c)(1)(i)(A) of the proposed rule adds "appraisals or fairness opinions concerning the value of securities or other property" to the list of types of advisory relationships that may result in fiduciary status under ERISA. While we understand that the rule is intended to further protect the interests of plans, participants, and beneficiaries, application of the rule would have the opposite effect.

As contemplated in your Regulatory Impact Analysis for the rule, additional costs to providers of appraisals or fairness opinions due to potential ERISA liability may compress the market for appraisal and valuation services. We believe that scenario is likely. More troubling, the most capable and reputable providers would be the first to leave because they likely enjoy excess demand from non-ERISA business. Plan fiduciaries charged with obtaining appraisals or valuations may be left with not only more expensive, but inferior valuation services to the detriment of plan participants and beneficiaries.

## Conflict of Laws

Also, with respect to valuations for private company Employee Stock Ownership Plans (“ESOPs”), assigning fiduciary status to providers of appraisals or fairness opinions may be incongruent with existing law. The Internal Revenue Code currently requires that the appraiser of a private company ESOP be independent. IRC § 401 (a) (28) (c). If fiduciary status is assigned to appraisers, the analysis of whether or not an appraiser is independent for I.R.C. § 401 purposes becomes increasingly complicated.

We oppose the proposed addition of appraisals or fairness opinions to the list of advice that may result in fiduciary status.

### **Limitation of the term "advice, or appraisal, or fairness opinion" - Request for clarification and expansion**

Under the proposed rule, the term "advice, or appraisal, or fairness opinion" does not include the provision of valuations used to comply with ERISA reporting and disclosure requirements, "unless such report involves assets for which there is not a recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries." Paragraph (c)(2)(iii).

In the case of our collective investment fund investing primarily in notes secured by commercial real estate, an appraisal is not expressly required by regulation. We perform an appraisal on the underlying properties as a part of our underwriting process and to satisfy a best practice requested by our regulator. If appraisals become cost-prohibitive or unavailable due to potential ERISA liability for appraisers, the appraisals or the fund itself may need to be discontinued.

We request clarification regarding whether the term "advice, or appraisal, or fairness opinion" includes valuation services involving property that secures assets of a plan. If the definition includes valuation services, we request an additional carve-out to exclude valuation services for property securing assets of a plan.

Additionally, we ask that you consider expanding the proposed limitations to include valuations used to satisfy best practices and other requests from functional regulators. This is good public policy because it enables existing fiduciaries to readily comply with regulatory best practices.

### **Conclusion**

Overall, we oppose the inclusion of appraisals and fairness opinions as part of the Fiduciary definition under ERISA. If appraisals and fairness opinions remain in the final definition, we ask for additional clarification and potential expansion of the proposed limitations.

Thank you for giving us the opportunity to comment.

Sincerely,

Commerce Bancshares, Inc.

Leslie K. Jones  
Trust Compliance Manager