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AMSOUTH

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: Regulation B, Release No. 34-49879, File No. S7-26-04, 69 Federal Register 39682 (June 30, 2004)

Dear Mr. Katz:

AmSouth Bank ("AmSouth") appreciates the opportunity to comment on proposed Regulation B recently issued by the Securities and Exchange Commission ("Commission"). AmSouth is a wholly owned subsidiary of AmSouth Bancorporation, a financial holding company with total consolidated assets of over $48 million. AmSouth is a full service bank with over 630 full service branches operating in the states of Alabama, Florida, Tennessee, Mississippi, Louisiana and Georgia. AmSouth offers brokerage services through its wholly-owned subsidiary, AmSouth Investment Services, Inc.

AmSouth has participated in the preparation of the comment letter submitted by the American Bankers Association and strongly endorses that letter's comments. Because of the thoroughness of the ABA's letter, we will focus on issues that are particularly important to AmSouth.

TRUST AND FIDUCIARY ACTIVITIES EXCEPTION

Regulation B offers several exemptions from the "chiefly compensated" condition of Section 3(a)(4)(B)(ii)(I) of the Securities Exchange Act of 1934. We are limiting our comments to the two exemptions that concern us most.

The exemption provided by Proposed Rule 722 requires a comparison of sales compensation to relationship compensation on an account-by-account basis. Banks meet the account-by-account test if no account has more sales compensation than relationship compensation. We believe the banking industry has, through various industry associations, made clear that it is not presently able to compare sales compensation to relationship compensation on an account-by-account basis and that it would be extremely expensive for banks to achieve that capability.

The exemption provided by Proposed Rule 721 permits banks to compare sales compensation to relationship compensation on a line-of-business basis. Banks meet the line-of-business test if sales compensation is no more than 11% of the total of sales and relationship compensation. We believe the line-of-business test, as proposed, is unduly burdensome and restrictive. It is unduly burdensome because the definition of relationship compensation requires banks to examine the total compensation received in the line of business and separate it into three categories: sales compensation, relationship compensation and other compensation. Although this may sound simple in theory, we believe that, practically speaking, it is not so simple. We believe that the Commission's goal of investor protection would be just as well served if the "chiefly compensated" test were to require "sales" compensation to be measured against total compensation. We also believe that 11% is an unduly restrictive limitation. Clearly the Commission is willing to permit sales compensation to approach 50% of a bank's compensation, as evidenced by the account-by-account exemption. We believe that the goal of investor protection is not enhanced by requiring a lower percentage when a line-of-business measurement is used. We believe that a line-of-business test that permits sales compensation of less than 50% of total compensation is a significantly more feasible exemption for banks and serves the Commission's interests as well as the account-by-account exemption.

With respect to the definition of "sales compensation," we believe that 12b-1 fees and shareholder servicing fees should not always be considered sales compensation. This seems to be a new position from the staff. The Division of Investment Management's website includes the following piece of investor education material discussing 12b-1 and shareholder servicing fees:

> **Distribution [and/or Service] Fees ("12b-1" Fees) —** fees paid by the fund out of fund assets to cover the costs of marketing and selling fund shares ***and sometimes to cover the costs of providing shareholder services***. "Distribution fees" include fees to compensate brokers and others who sell fund shares and to pay for advertising, the printing and mailing of prospectuses to new investors, and the printing and mailing of sales literature. ***"Shareholder Service Fees" are fees paid to persons to respond to investor inquiries and provide investors with information about their investments.*** (Emphasis added.)[1]

Although this is not binding precedent, it seems to be an acknowledgement by the staff that 12b-1 and shareholder servicing fees serve a purpose other than compensation for sales. In many cases where banks receive shareholder servicing fees (whether 12b-1 or non-12b-1) they act in a fiduciary capacity as investment adviser. We are unaware that

[1] http://www.sec.gov/investor/pubs/inwsmf.htm. See also, Release No. IC-16431 (53 FR 23258) at note 129 (when proposing amendments to rule 12b-1, the Commission stated that "rule 12b-1 does not specifically prohibit the payment of non-distribution expenses under a 12b-1 plan….").

the Commission has characterized the receipt of shareholder servicing fees by an investment adviser as the receipt of sales compensation requiring registration as a broker-dealer or otherwise imposed a limitation on an investment adviser's ability to receive these fees. Including shareholder servicing fees in the definition of "sales compensation" appears to be an about-face from the Commission's prior position and seemingly creates a disparity in the treatment of these fees in an investment advisory context. We urge the Commission to reconsider this definition.

NETWORKING EXCEPTION

We believe the definitions in Proposed Rule 710 interpret the networking exception provided in Section 3(a)4)(B)(i) too narrowly. In its present form, Proposed Rule 710 permits the payment of only one referral fee per customer per employee. This appears to be more restrictive than the language of the statute, which is fairly interpreted to impose a one-time per referral limit not a one-time per customer limit. Given the limitation on the value of referrals fees and that referral fees may not be conditioned upon the occurrence of a sale, a one-time per customer limit is unnecessary to affect the Commission's goal. A one-time per customer limit is also unduly burdensome. Such a restriction would require banks to keep detailed records tracking the identities of the customer referred and the referring employee, even for referrals that did not result in a transaction. At AmSouth, we have employees who have been with our company for over 30 years, and we have established, lost and reestablished customer relationships. We believe that requiring banks to ascertain that an employee is never paid a referral fee more than once for a particular customer is an unduly complex and unnecessary method of achieving the Commission's goal.

EMPLOYEE BENEFITS EXEMPTION

Proposed Rule 770 provides a conditional exemption for banks from the definition of broker to the extent that the bank effects transactions in mutual funds in an account for an employee benefit plan qualified under Section 401(a), 403(b) or 457 of the Internal Revenue Code ("qualified plans") for which the bank acts as a trustee or custodian. One of the conditions to the exemption is that any compensation received from mutual funds must be offset against the fees and expenses owed to the bank by the plan. We believe that the scope of the proposed rule is too narrow and that the condition requiring banks to offset fees owed by a plan with compensation received from the funds should be removed.

We believe the scope of Proposed Rule 770 should be expanded to encompass all employee benefit plans because Proposed Regulation B, in its present form, effectively leaves banks with no exemption available for many non-qualified plans. The industry has made clear that it is not presently prepared to utilize an account-by-account test for those instances where it acts in a fiduciary capacity and that it will be tremendously expensive for the industry to utilize this exemption. With respect to the line-of-business exemption, we believe many banks combine qualified and non-qualified plans into a single line of business and will find that their sales compensation exceeds the 11% proposed limit.

Assuming sales compensation were less than 11% in non-qualified plans, is the staff willing to grant no action letters addressing a bank's separation of non-qualified plans into a separate line-of-business from qualified plans? Even assuming no action protection is available, we believe many banks are receiving sales compensation when acting in non-fiduciary capacities and, to that extent, could not rely on the trust and fiduciary exception. The safekeeping and custody exemption is not available for many non-qualified plans because of the limitation of its use to grandfathered accounts and qualified investors.

Pushing out non-qualified plans to an affiliated broker-dealer is not an acceptable solution. We believe customers with qualified plans are potential non-qualified plan customers. To that extent, it makes sense for those customers to have one contact point with the bank. Pushing out non-qualified plans would require licensing of sales and/or customer service personnel (presumably 100% of the sales and customer personnel in the line of business), placing an additional compliance burden on the bank's affiliated broker-dealer. Alternatively, it seems banks would have to maintain two separate lines of sales/customer service personnel, which seems unduly difficult for bank customers and unduly expensive for banks. For these reasons, we urge the Commission to include all employee benefit plans within the scope of Proposed Rule 770.

Proposed Rule 770 conditions a bank's exemption upon the bank offsetting fees and expenses owed by the plan with any compensation the bank receives from a mutual fund complex. We believe that the language of the condition is too broad. "Any compensation" extends far beyond "sales compensation," which we believe to be the Commission's concern. Even if the condition is narrowed to sales compensation, the condition should not be imposed on all relationships a bank has with a plan. Although this condition might be appropriate where a bank is exercising its discretion over plan assets, we believe that this requirement is unnecessary in other instances[2] and will significantly change the way banks handle compensation from mutual funds today. We urge the Commission to remove this condition from Proposed Rule 770 or, alternatively, to limit the scope of the condition to cover only sales compensation and instances in which the bank is exercising its investment discretion over plan assets.

We recognize the effort that the staff has put in to preparing Regulation B and appreciate the time the staff has dedicated to communicating with the banking industry. However, we believe that Regulation B is unduly complex and burdensome. We urge the Commission to postpone implementation of Regulation B and to continue to engage in discussions with the industry to arrive at a workable solution.

Respectfully submitted,

Andrew R. Chambless
Vice President and Counsel

[2] See ERISA Advisory Opinion 97-16A (the "Aetna Letter") (available at *http://www.dol.gov/ebsa/programs/ori/advisory97/97-16a.htm*)