THE BANK OF NEW YORK

September 24, 2004

Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549-0609.

Attention: Mr. Jonathan G. Katz, Secretary

Re: Release No. 34-49879 (File No. S7-26-04): Regulation B

Ladies and Gentlemen:

The Bank of New York (the "Bank") appreciates the opportunity to comment on the various rules proposed to be adopted (the "Proposed Rules") by the Securities and Exchange Commission (the "SEC") under the Securities Exchange Act of 1934 (the "Exchange Act") as modified by the Gramm-Leach-Bliley Act (the "GLBA") and that are proposed to be contained in a new Regulation B.

As more particularly detailed below, we believe the Proposed Rules have very serious shortcomings, are extremely burdensome and in some cases are inconsistent with the GLBA, which introduced these exceptions. This letter does not address each of our concerns in detail, because we do not wish to duplicate the comment letter of The Clearing House Association L.L.C. (the "Clearing House Letter"), of which we are a member; the comment letter written by the Groom Law Group (the "Groom Letter") on behalf on ten banks, including our bank; and the comment letter written by the American Bankers Association (the "ABA/ABASA Letter"), each of which we endorse. We write separately to emphasize our overall and specific concerns about certain matters and to urge the SEC to act to cure the problems identified.

As discussed below in further detail, The Bank of New York believes that the Proposed Rules are overly complex. Their implementation will require banks to set up and operate expensive compliance systems. In order to monitor compliance adequately, the Proposed Rules will also require that we track certain data that we have never tracked before. The creation of these new compliance systems will impose a heavy burden in direct and indirect costs without providing any significant benefits or advancing a worthy policy objective. Although we understand that implementing Title II of the GLBA will impose certain expenses on banks, the Proposed Rules would impose an unnecessarily burdensome regime, which is not what Congress intended and which provides no material benefit to our clients.

We read the statute as allowing us to continue performing certain traditional functions that we have been performing for many years. For instance, we believe that the statute permits bank custody departments to continue providing order taking to their customers as an accommodation and to sweep deposit funds into money market funds that do not charge a front end or deferred sales charge. The Proposed Rules, however, take the position that the statute does not permit banks to conduct these and other traditional banking activities, but that the SEC will permit banks to continue certain of these activities by exemptive rule. The Bank of New York does not agree that the GLBA permits this approach. In our view, the Proposed Rules should be revised so that banks may continue performing the traditional bank activities contemplated by Congress and recognized in the GLBA without having to apply for exemptions, or risk having the exemptions withdrawn.

We therefore urge the SEC to amend the Proposed Rules to reflect the banking industry's many serious concerns (as outlined in this comment letter and in the Groom Letter, the Clearing House Letter and the ABA/ABASA Letter) in order to avoid undue disruption of our ability to deliver important, traditional banking products and services to our customers.

We understand that the SEC staff believes that the issues raised by NASD Rule 3040 should be resolved after completion of final SEC rules implementing Title II of the GLBA. Considering that the effect of many provisions of the Proposed Rules would be to require more bank employees to become associated persons of a broker-dealer, potentially dramatically increasing the scope of Rule 3040 problems, we disagree and urge that these issues be resolved as part of the same process.

Bank Fiduciary Activities

The Proposed Rules' interpretation of the statutory exception from the definition of "broker" for banks engaged in trust and fiduciary activities is of particular concern to The Bank of New York, for which the corporate, pension and personal trust businesses are key, strategic businesses. We are a world market leader for corporate trust services with a portfolio of over 90,000 trust and agency appointments representing more than $1 trillion in outstanding securities. The personal trust business, in June, 2004, representing $11 billion in trust assets, is also an important business for the Bank.

The Bank of New York is concerned by the lack of a simple approach to implementing the "chiefly compensated" requirement in the Proposed Rules. We do not believe that compliance with this requirement should be monitored on an account-by-account basis, nor do we find support for such an interpretation of the term "chiefly compensated" in the GLBA. Performing the "chiefly compensated" calculation on an account-by-account basis would be both difficult and expensive for the Bank, because we are unable to rely on our existing systems for the determination without providing any corresponding benefit to warrant the cost. New technology will need to be developed to ensure compliance with the test. Because of the time and expense involved, both in development and ongoing monitoring, it would be unduly burdensome to require determination of the "chiefly compensated" test on an account-by-account basis.

Instead, we suggest that the correct interpretation of the statute is that compliance is to be measured at least at the level of a business unit or department. In that regard, The Bank of New

York views the 10% limit in the new line-of-business alternative to the account-by-account method to be too low. Revenues that the SEC considers in the Proposed Rules to be "sales compensation" constitute a principal component of the revenues received by certain of our fiduciary businesses, such as the corporate trust business. The proposed limit is all the more inappropriate if, as the release accompanying the Proposed Rules (the "Release") seems to indicate, revenues derived from activities that are permitted under another exemptive rule (such as Rule 12b-1 fees received from money market mutual funds purchased by corporate trust customers) but that meet the definition of sales compensation must nevertheless count towards the 10% limit.

We understand that if we monitor compliance with the "chiefly compensated" test on an account-by-account basis, we are not required to treat Rule 12b-1 fees received in respect of shares of money market mutual funds sold pursuant to Proposed Rule 776 as sales compensation under that test. Because of the amount of Rule 12b-1 fees received by our corporate trust department, and because our corporate trust accounts are currently organized under lines of businesses that include both trusts under indentures and other types of trust and fiduciary accounts (as well as non-fiduciary accounts), our bank would be forced to use the account-by-account method for all trust and fiduciary accounts in our corporate trust department. We will have similar problems in delineating lines of business in other areas as well. We urge the Commission to include substantial administrative hardship in its consideration of whether there is a corresponding public benefit advanced by the proposed rule.

Moreover, the approach taken by the SEC, whereby so-called "unrelated compensation" must be excluded from the "chiefly compensated" calculation, is unduly burdensome. We believe that sales compensation should be measured against all revenues received by a bank from its trust and fiduciary activities. This would simplify our task of complying with the "chiefly compensated" test in that only sales compensation, rather than three different types of compensation, would have to be monitored.

For these reasons, we believe that the line-of-business exemption should be revised to provide banks with additional flexibility to offer a meaningful alternative to the account-by-account method. This benefit could be obtained by raising the permitted limit on sales compensation to 25% of total compensation and by not requiring that revenues from activities that are permitted under another exception or exemption be deemed to be sales compensation for purposes of the line-of-business computation.

In addition, "relationship compensation" should not be limited to fees received directly from the customer or the account. Banks often are paid by a third party, and should not be penalized as a result.

Finally, when a bank is required to waive fees under ERISA or other laws, such as state fiduciary laws, because the bank or an affiliate is being compensated separately, the separate compensation should count as relationship compensation even if it otherwise would be deemed sales compensation.

Custody and Safekeeping – Limitation on Order-Taking

The Bank of New York is one of the largest global custodians in the world, with assets under custody of approximately $8.7 trillion at the end of the second quarter of this year. Historically, an important aspect of the business has been taking orders to facilitate securities transactions for custody clients. This service is provided not as a substitute for a brokerage business, but as an accommodation and convenience for clients. Certain customers utilize bank custodians because they provide customer support services not available elsewhere such as principal and interest accounting and the like.

We believe that one of the fundamental purposes of the custody exception in the GLBA was to preserve the custody business for banks and to permit banks to continue to provide custody services to clients as they have done for many years. An integral element of custody services has always been – both before and after adoption of the federal securities laws – providing order taking and other services incidental to custody and safekeeping. This is evidenced by the reference in the GLBA to individual retirement accounts and other retirement accounts[1], where securities would routinely be acquired or disposed of, and by the requirement in the statute that custody trades be executed through a registered broker-dealer.[2] Thus, we strongly believe that the custody order-taking exemption should not be limited to "qualified investors" and to preexisting customers, but should be available to all bank custody customers. Absent such a change, rather than permitting banks to remain in the custody business and provide all the traditional bank services that their clients demand, the Proposed Rules will have the effect of making it more difficult for clients to deal with banks and thereby threaten the continued viability of the bank custody business. This certainly cannot be what Congress had in mind when adopting the so-called "custody exception."

If the Proposed Rules are not amended accordingly, however, we urge that they at least be revised to broaden the scope of the custody order-taking exemption to permit taking orders from (i) any account managed by a registered investment advisor; (ii) any account where the customer is an "accredited investor," as that term is defined in Regulation D under the Securities Act of 1933; (iii) any self-directed individual retirement account; and (iv) any account managed by an "accredited investor." We believe that the final SEC rules implementing Title II of the GLBA should also at least permit a bank to take orders for the purchase and redemption of investment company securities for any custody account that wishes to hold mutual fund securities.

The Bank of New York also is very concerned by the conditions to the order-taking exemption that could restrict the Bank's ability to market its fiduciary products and services because of the risk that an order received from a bank custody customer might be deemed to have been "solicited" pursuant to Proposed Rule 760(a)(3). We view these conditions as unnecessary and burdensome, and request that the SEC limit its prohibition on solicitation of a bank's custody department order-taking to the custody department. Moreover, those restrictions should not apply to the solicitation of the purchase or redemption of shares of money market mutual funds as permitted by the sweep exception.

[1] Section 3(a)(4)(B)(viii)(I)(ee) of the Exchange Act.

[2] Section 3(a)(4)(C) of the Exchange Act.

We also note that under the SEC's proposed definition of the term "account for which the bank acts as a custodian," a custody account would have to be established "by written agreement between the bank and the customer, which at a minimum provides for the terms that will govern the fees payable, rights, and obligations of the bank" regarding the various tasks performed by a bank acting as a custodian. We are concerned that it is possible to read this provision as requiring that a bank offer all of the listed services. We do not agree with such a reading because a bank should be entitled to decide for itself which custody support services it will offer. Also, this definition will require the Bank to re-document unnecessarily its custody relationships with customers. It will also require the Bank to review every custody account to ensure compliance. Because no explanation is provided for imposing this new provision and because this will be a further burden we should not have to bear in implementing the Proposed Rules, we request that this new definition be eliminated.

The Bank views the restrictions imposed by the SEC on the ability of bank custody departments to take orders to purchase and sell securities for accommodation purposes as an attempt by the SEC to contest the very nature of the custody business. We see no basis in the GLBA for this and we consider many of the restrictions in Proposed Rule 760 to be unrelated to "effecting transactions in securities" but rather to be more related to basic bank services. We therefore urge the SEC to revise this custody order-taking exemption to allow banks to continue performing limited order-taking services as an accommodation for custody customers.

We urge the Commission to scrutinize with particular care proposed rules which would (a) reverse long-standing practice; (b) intrude on the competitive marketplace; (c) deprive customers of services; (d) impose unwarranted burdens; and thereby (e) pick favorites among segments of the financial services industry. The custody provisions of the Proposed Rule we have discussed warrant rejection as inconsistent and unauthorized by the statute.

Networking: Employee Compensation

The Bank of New York wishes to stress its strong support for the proposal made by The Clearing House to the SEC's Division of Market Regulation by letter dated April 16, 2004 for an exemption that would allow banks to pay referral fees that are higher than would be permitted under the SEC's definition of "nominal," under circumstances different from those permitted by the SEC pursuant to the networking exception under the GLBA, to unregistered bank employees for the referral of certain corporate, institutional, governmental and not-for-profit customers.

We also support The Clearing House's proposal in its comment letter that banks should be allowed to pay referral fees of up to $100 for referrals by non-retail personnel of customers that are not natural persons or that are natural persons who are "accredited investors" as defined in Regulation D under the Securities Act of 1933.

Finally, we stress that the discussion in the Release on bonus plans is of particular concern to the Bank because it results in the SEC's regulation of employee compensation plans far afield from the securities brokerage business, which is intrusive and unnecessary given that such plans are already examined by federal bank regulatory authorities. This result fundamentally contradicts functional regulation and is a matter of significant concern for The Bank of New York. We believe that so long as we do not use bonus plans to pay referral fees that go beyond the scope of the networking exception, our bonus programs should not be subject to rules promulgated by the SEC.

Dual Employees

Contrary to the principle of functional regulation, which was fundamental to the GLBA, footnote 289 to the release accompanying the Interim Final Rules suggests that the SEC expects the NASD to use NASD Rule 3040 to cause bank-affiliated broker-dealers to become involved in overseeing, and keeping records regarding, the bank activities of registered personnel of broker-dealers, and in doing so for the NASD to become involved in overseeing such activities. This will impose unnecessary duplication of supervision and record-keeping between banks and broker-dealers because broker-dealers are required to approve and record transactions that need to be processed by bank trust systems, which are different from broker-dealer systems. The Bank of New York is especially concerned with dual employee arrangements involving bank fiduciary employees, where one of the effects of Rule 3040 would be to require that transactions be recorded on incompatible systems (the broker-dealer's system and the Bank's trust system). We do not believe that there is a practical way to comply with Rule 3040 in the manner that the SEC is interpreting the Rule when banks opt for such dual employee arrangements.

The intent of Rule 3040 was not to cause the NASD to examine the activities of banks. Rather, by requiring prior notice of "private securities transactions" by registered personnel, Rule 3040 seeks to prevent registered personnel from conducting unlawful unregulated activity "off the books." The prospect of regulation by the NASD will be a disincentive to banks to cause their employees to become registered with a broker-dealer. This is contrary to the clear intent of the GLBA.

To address this concern, The Bank of New York requests the cooperation of the SEC in obtaining an amendment to NASD Rule 3040 as outlined in the Clearing House letter.

Sweep Accounts

Under section 3(a) (4) (B) (v) of the Exchange Act banks are allowed to sweep deposit funds into "no-load" money market mutual funds. We note that the Proposed Rules have not changed the approach taken in the Interim Final Rules in respect of the definition of no-load. Under Proposed Rule 740(c)(1), a mutual fund satisfies this no-load requirement only if its charges for sales promotion expense and personal service or the maintenance of shareholder accounts do not exceed 25 basis points of average net assets.

This provision is particularly troublesome in light of the prohibition on payment of interest on funds deposited in demand deposit accounts. Leaving aside the issue whether the SEC should amend the definition of the term no-load, The Bank of New York firmly believes that to require banks to change their current practices in respect of sweep accounts goes against the intent of the GLBA, as demonstrated by its legislative history. The House Report on the GLBA states that the sweep exception "has the effect of permitting banks to continue investing depositors' funds into no-load money market funds."[3] Moreover, Senator Gramm and

[3] H.R. Rep. No. 106-74, pt. 3, p. 167 (emphasis added).

Representative Leach, the Chairmen of the Senate and House Banking Committees, have indicated in letters to the SEC that they did not intend this provision to change current practice.

To the extent that a mutual fund's charges for sales promotion expense and personal service or the maintenance of shareholder accounts exceed 25 basis points of average net assets, the Release indicates that banks could charge a sweep fee directly to their customers while continuing to rely on the no-load exemption. If the total fee incurred by a bank customer may be higher if part of the fee is charged directly by a bank, we see no rationale for prohibiting the same total fee only because it is charged entirely against fund assets. In fact, such a requirement would harm customers. Requiring banks to charge sweep fees at the account level will be administratively burdensome; it will thus increase the cost for banks to provide the sweep service; and this increase in costs will be borne by bank customers.

For these reasons, we urge the SEC to provide an exemption whereby a bank will not be deemed a "broker" if it effects sweeps into money market mutual funds without a front end or deferred sales charge (whether or not they meet the definition of no-load that the SEC is proposing). The Bank of New York would not object to this exemption being conditioned on certain disclosure requirements relating to the fee structures of money market funds into which funds are deposited, similar to the disclosure requirements contained in Proposed Rule 776.

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The Bank of New York would be pleased to discuss any of the points made herein in more detail. If you have any questions, please contact me at (212) 635-1643.

Sincerely yours,

/s/ J. Michael Shepherd

J. Michael Shepherd
Executive Vice President and General Counsel