STATE STREET

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

RE: File Number S7-26-04—Proposed Regulation B

Dear Mr. Katz:

This letter is submitted on behalf of State Street Bank and Trust Company, a state chartered member bank of the Federal Reserve System headquartered in Boston, Massachusetts ("State Street" or the "Bank").

State Street is a wholly owned subsidiary of State Street Corporation, a New York Stock Exchange listed company and a financial holding company registered under the Bank Holding Company Act of 1956, as amended. State Street Corporation also controls State Street Global Markets, LLC, a wholly owned broker-dealer registered under the Securities Exchange Act of 1934, as amended ("Exchange Act"), which offers global trading facilities for almost exclusively institutional customers.[1]

I. State Street's Activities

With more than $9.1 trillion in assets under custody and more than $1.2 trillion in assets under management as of June 30, 2004, State Street is the world's

[1] State Street Global Markets, LLC, does not underwrite securities, enter into selling agreements with securities issuers, or render investment advice.

largest custodian and institutional fund manager. State Street operates in 24 countries and more than 100 markets worldwide.

State Street's core custody services include trade clearance and settlement, safekeeping, and asset servicing. Its investment management services include the design and implementation of sophisticated investment strategies and a range of separate accounts, mutual funds, collective investment funds, and exchange traded funds. Approximately 85 percent of State Street's total revenue was derived from investment servicing activities in 2003, with the remaining 15 percent coming from investment management services.

The Bank serves an almost exclusively institutional base of customers, including domestic and foreign banks and other depository institutions, mutual funds, insurance companies, investment advisers, corporate treasurers, pension plan sponsors, endowments, partnerships, state and local governments, foreign governments, and other non-retail customers. The Bank has no retail delivery system and is not engaged in a retail banking business.

As a world class custodian and investment manager with a predominant focus on securities processing and investment servicing, State Street plays a critical role in the functioning of the domestic and global capital markets and occupies a unique niche in the U.S. financial services industry. Our comments on Regulation B reflect this unique role of State Street.

II. General Comments

State Street appreciates the Commission's invitation to comment on proposed Regulation B. We are concerned, however, that the 60-day comment period provided is insufficient to provide comments with the degree of specificity requested by the Commission. While we have analyzed Regulation B and its potential effect on State Street, we are not certain that we have fully identified all of the potential implications for the Bank and its customers. We are continuing our review and analysis of the proposal, and are available to meet with the Commission's staff to provide additional input and greater detail.

In general, we are concerned that the adoption of Regulation B as currently drafted will significantly impact State Street's ability to efficiently deliver traditional banking services to its customers, a result clearly at odds with Congressional intent in the Gramm-Leach-Bliley Act. While Regulation B would allow State Street to continue offering most of the services it currently offers, it would significantly affect the manner in which it offers them and impose significant new compliance burdens on its activities. We are concerned that the Commission's proposal uses a statutory provision intended by Congress to exempt traditional bank securities activities from broker-dealer regulation to impose a highly complex new regulatory regime for banks. The result will be an unnecessary compliance burden for banks and their customers, including State Street's customer base of highly sophisticated institutional investors.

We urge the Commission to reconsider its Regulation B proposal, particularly as it relates to the provision of banking services to sophisticated institutional customers. As proposed, Regulation B would impose a high compliance burden on banks serving such customers, provide little or no increase in investor protection to such customers, and risk disruption of global capital markets.

As discussed in our comments, we believe the most appropriate way to address these concerns is to create a general exemption for banks from the definition of "broker" in the Exchange Act with respect to transactions for qualified investors when the bank is acting in a trust, fiduciary, or custodial capacity, or refers such customers to a broker-dealer. In the event the Commission is not inclined to grant a general exemption, our comments address numerous areas of Regulation B where changes are necessary to minimize the disruptive effects of the Regulation on bank services to qualified investors. Certain of these changes may be needed in any case.

III. Suggested Changes

State Street believes that numerous changes are necessary to ensure that Regulation B is workable consistent with Congressional intent. Our suggested changes are summarized below and are described in detail in the attached Appendix. We urge the Commission to:

General Exemption for Qualified Investors

- **Adopt a general exemption for banks from the definition of "broker" in the Exchange Act with respect to transactions for qualified investors.** Specifically, we request an exemption for banks to the extent that a bank: (i) effects securities transactions for qualified investors in conjunction with the provision of securities processing, investment servicing, or investment management services while acting in the capacity of fiduciary, trustee, or custodian; or (ii) has a contractual arrangement with its own broker-dealer affiliate involving the referral of qualified investors for brokerage services.

- Amend or clarify the definition of "qualified investor" to include investment advisers (including advisers to mutual funds), clients of qualified investors in certain circumstances, trusts, collective investment funds of banks, other unregistered collective investment vehicles, off-shore investment vehicles and managers of such vehicles, and other entities as may be appropriate.

- Revise the definition of "qualified investor" to allow a qualified investor that is a corporation or natural person to have \$10 million, rather than \$25 million, in invested assets.

Custody Exemption

- State that "Nothing in Subpart F shall limit the general exception for securities safekeeping and custody activities as provided in 15 U.S.C. 78c(a)(4)(B)(viii) with respect to settlement activities."

- Confirm that the statutory safekeeping and custody exemption permits a bank to provide securities clearance and settlement services for employee benefit plans, regardless of whether the bank is acting as a directed trustee or custodian, and to receive fees from the plans for such services, and confirm that these activities are not considered to be "order taking."

- Permit a bank custodian to charge qualified investors for order taking.

- Permit a bank custodian to take orders for mutual fund purchases and redemptions from employee benefit plans and non-qualified investors and to charge for such services and/or receive fees from mutual funds in connection with such transactions.

- Provide an exemption from the requirement that trades be executed through a broker-dealer for banks that match transactions for qualified investors.

- Allow banks to take orders for accredited investors.

- Provide a technical clarification regarding the receipt of mutual fund fees in the custody exemption.

- Allow a bank to receive administrative service fees from investment advisers of mutual funds.

- Clarify the definition of "account for which the bank acts as a custodian" to include accounting services and to phrase the list of custody services in the disjunctive.

- Clarify the status of a bank as a named custodian that delegates custodial functions.

- Allow a bank acting as directed trustee and performing only custodial functions to rely on the custody exemption.

- Allow a bank to elect to rely on whichever exemption would pose the least compliance burden for the bank.

- Interpret the statutory custody exception to allow banks to arrange for or facilitate the sale of rights in connection with corporation actions when the shareholder is a qualified investor.

- Allow a bank acting under the custody or trust and fiduciary exemption to route securities transactions through an electronic order taking facility registered under the Exchange Act.

Trust and Fiduciary Activities Exemption

- Provide a blanket exemption from the chiefly compensated test in the trust and fiduciary activities exemption with respect to accounts of qualified investors.

- Allow banks to comply with the chiefly compensated test on the basis of a simple 5:5 ratio applied on a bank-wide basis.

- Retain the exclusion from the definition of "sales compensation" of administrative service fees paid to a bank by an investment adviser to a mutual fund.

- Clarify that the definition of "relationship compensation" includes compensation earned from trust and fiduciary activities that are encompassed within the bank exemption from the definition of "dealer."

- Revise the line-of-business calculation in the chiefly compensated test to reflect that banks may structure their compensation arrangements on the basis of broad customer relationship or product lines.

- Confirm that the definition of "relationship compensation" includes relationship compensation from grandfathered trust accounts.

- Extend the cut-off date for grandfathered accounts in the trust and fiduciary activities exemption to the effective date of the Regulation.

- Allow other types of trust and fiduciary accounts to be grandfathered in the trust and fiduciary activities exemption.

- Confirm that banks acting as transfer agents are not required to register as broker-dealers and are not required to comply with the trust and fiduciary activities exemption.

Networking Exemption

- Exempt bank arrangements with broker-dealers involving the referral of bank customers that are qualified investors.

- Clarify that a bank does not come within the definition of a "broker" and need not rely on the networking exemption when it does not receive a share of the brokerage commissions earned by an affiliated broker-dealer for effecting transactions for the Bank's customers.

Employee Benefit Plan Exemption

- Adopt a general exemption for employee benefit plan accounts.

- Eliminate the offset and other requirement in the exemption for employee benefit plans.

- Expand the types of employee plan accounts eligible for the exemption.

Money Market Fund Exemption

- Broaden the exemption for money market mutual funds to include other short-term instruments.

- Eliminate the requirement that a qualified investor obtain a financial product or service not involving securities.

Regulation S Transactions

- Expand the exemption for foreign transactions to include transactions for foreign investors in securities registered in the United States.

* * * *

In conclusion, State Street again wishes to emphasize the importance of avoiding any disruption in its ability to service the investment needs of its institutional base of customers who are major participants in the global capital markets. We believe that a general exemption from the definition of "broker" with respect to qualified investors would be consistent with Congressional intent and would accomplish the goals of Regulation B without any lessening of the investor protection purposes of the Securities Exchange Act.

We appreciated this opportunity to comment on proposed Regulation B and would be pleased to answer any questions you may have concerning any of our comments in this letter.

Sincerely,

Charles C. Cutrell, III, Esq.
Executive Vice President and
General Counsel

APPENDIX

State Street's detailed comments on Regulation B are as follows:

I. General Exemption for Qualified Investors

For the reasons that follow, State Street requests the Commission to adopt a general exemption from the definition of "broker" in the Exchange Act for banks to the extent that a bank: (i) effects securities transactions for qualified investors in conjunction with the provision of securities processing, investment servicing, or investment management services while acting in the capacity of fiduciary, trustee, or custodian; or (ii) has a contractual arrangement with its own broker-dealer affiliate involving the referral of qualified investors for brokerage services.

As noted in our letter, almost all of State Street's customers are institutions. Nearly all of these institutions are "qualified investors" as that term is defined in the Securities Exchange Act of 1934.[2] A "qualified investor" generally includes banks, mutual funds, and corporations with invested assets of $25 million or more.[3]

State Street is concerned about the effect of Regulation B on its ability to continue serving the needs of qualified investors with the degree of low cost efficiency that has become its hallmark. Various provisions of the Regulation appear designed to promote customer protection but impose regulatory restrictions or requirements that are unnecessary or inappropriate in the case of qualified investors receiving global custody, securities processing, and investment management services. State Street's services are in the nature of rapid high volume back office, wholesale services designed to facilitate securities transactions effected by institutional third parties rather than to augment or accommodate any retail banking relationships. The investor protection provisions in the Regulation seem misplaced when applied to these institutional customers who are highly able to select services and negotiate competitive fees from their banks or other service providers.

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[2] 15 U.S.C. § 78c(a)(54).

[3] Most of State Street's qualified investor customers have substantially in excess of $25 million in invested assets. As discussed below, we believe the definition of qualified investor needs to be broadened to include additional categories of entities.

Moreover, the disruptive effects of the Regulation on the Bank's services to institutional customers will harm retail investors to the extent that those institutional customers serve the broader retail investing public. Most of the Bank's institutional customers are financial intermediaries that rely on the Bank's services to facilitate the efficient processing of transactions and custody of assets for their own customers.

State Street's relationships with its qualified investor customers tend to be multi-faceted and often complex. The Bank typically acts in a number of different capacities and provides a variety of services to a single qualified investor. In State Street's experience, it would not be unusual for a single employee benefit plan to offer mutual funds, a sweep function, individually managed portfolios, company stock, and investment manager accounts. A different Regulation B exemption might apply to each type of service, making compliance with the Regulation cumbersome and burdensome.

As a matter of customer convenience and operating efficiency, the Bank generally serves its customers on a relationship basis whereby a single unit or division of the Bank is responsible for being knowledgeable about the customer's business and endeavoring to meet all of the customer's needs as they may arise or evolve over time. The Regulation will require the Bank effectively to dissect each customer relationship in order to comply with the various exemptions that might apply to a single qualified investor. For example, the Bank's compensation with respect to qualified investors typically is based on a customer's entire relationship with the Bank. The various provisions of Regulation B that impose restrictions on the type of fees a bank may receive for various services will require State Street to renegotiate its compensation arrangements at numerous points in its customer relationships.

The Regulation will require the Bank to adopt extensive new systems for tracking customer services and compensation that do not necessarily correspond to the Bank's existing organizational structure or customer service model. Existing customer relationships will be disrupted to the extent it becomes necessary to fragment customer relationships across artificial divisional lines in order to facilitate compliance with the Regulation.

Even in those areas where no adjustment in the Bank's activities or customer relationships is necessary to comply with the Regulation, the burden of restructuring the Bank's books and records and preparing compliance reports in order to demonstrate compliance will be substantial and costly, with no corresponding increase in investor protection.

We also are concerned that certain of the restrictions in Regulation B will result in disparate treatment of the Bank's qualified investor accounts for which the Bank performs functionally identical services. For example, as discussed below, the functions the Bank performs as directed trustee for employee benefit plans are indistinguishable from the functions it performs as custodian for such plans. Yet, it appears that the Bank must comply with the "chiefly compensated test" in the trust exemption with respect to the former and the custody exemption with respect to the latter, with the potential that the Bank could be exempt in one case but not the other.

Because of the nature and scope of the services State Street provides to qualified investors, and the high level of sophistication of these investors, we are requesting the Commission to include a broad exemption for qualified investors in Regulation B. Specifically, we request the Commission to exempt banks from the definition of "broker" in the Exchange Act when they (i) effect securities transactions for qualified investors in conjunction with the provision of securities processing, investment servicing, or investment management services while acting in the capacity of fiduciary, trustee, or custodian; or (ii) enter a contractual arrangement with an affiliated broker-dealer involving the referral of qualified investors for brokerage services.

At a minimum, we urge the Commission to eliminate all restrictions on the solicitation of qualified investors, the products that may be offered to such customers, and the Bank's compensation arrangements relating to products and services provided to such customers. We further urge the Commission to exempt accounts of qualified investors from the "chiefly compensated test" in the trust and fiduciary activities exemption.

We also urge the Commission (if it does not create a general exemption for qualified investors) not to limit a bank's ability to choose which exemption to rely on for any particular activity under Regulation B. A bank should have the flexibility to select which exemption best fits its activities, customer relationships and organizational structure without regard to the legal or tax status of a particular account.[4] We note that qualified investors are accorded different treatment from retail investors under the securities laws in recognition of their level of sophistication, which makes them highly capable of protecting their own interests

[4] Certain of the Regulation B exemptions limit a bank's ability to rely on other exemptions that may provide greater flexibility for the bank. For example, as discussed below, a bank may not use the custody exemption for transactions it effects in a trustee capacity or for transactions for certain employee benefit plan accounts.

in the securities markets. Regulation B will impose a costly compliance burden disproportionate to the minimal investor protection benefits to be gained for qualified investors. Moreover, the complexity of the Regulation seems particularly inappropriate in the case of qualified investors in light of Congressional intent to exempt banks from securities regulation with respect to their traditional securities activities.

As noted below, we believe the definition of "qualified investor" is not broad enough and needs to be amended to include registered investment advisers, including advisers to mutual funds, among other entities.

Because of the nature and scope of State Street's services for institutional investors, and the important role of these investors as major participants in the domestic and global securities markets, any increased compliance burdens posed by Regulation B necessarily will affect the capital markets to the extent the Bank's ability to service the needs of these customers is impaired. We urge the Commission to carefully consider the effect of Regulation B on banks such as State Street whose operations and activities are critical for the efficient functioning of the capital markets, and to provide appropriate relief in the form of the general exemption we have requested.

II. Safekeeping and Custody Exemption

As noted, State Street is the world's largest custodian of financial assets, with more than $9.1 trillion in assets under custody as of June 30, 2004. Accordingly, State Street will be uniquely affected by the safekeeping and custody exemption in Regulation B.

A. Settlement Services

The settlement of securities transactions is one of the most important functions that State Street performs as a custodian. The imposition of any Regulation B compliance requirements on this critical component of the Bank's activities would result in operational and compliance costs that could impair the efficiency of the settlement processing system and, because of State Street's key role in that system, adversely affect the functioning of the U.S. securities markets.

"Settlement" involves the electronic receipt of trade instructions, the transmission of this information to agent banks and depositories, automated pre-matching of instructions and resolution of discrepancies, and final exchange of payments for securities. Settlement thus is in the nature of a back office processing service that does not raise any of the investor protection issues that Regulation B is intended to address.

As we read proposed Regulation B, it is not intended to, nor would it, limit the statutory exception for securities settlement activities. Because of the importance of this activity to State Street and the functioning of the U.S. capital markets, we request that the Commission include an explicit statement to this effect in the Regulation itself or in the Federal Register notice accompanying the final Regulation. We request that the statement read as follows: "Nothing in Subpart F shall limit the general exception for securities safekeeping and custody activities as provided in 15 U.S.C. 78c(a)(4)(B)(viii) with respect to settlement activities."

We also request the Commission to confirm that the statutory safekeeping and custody exemption permits a bank to provide securities clearance and settlement services for employee benefits plans, regardless of whether the bank is acting as a directed trustee or custodian, and to receive fees from the plans for such services. We request confirmation that these activities are not considered to be "order taking."

B. Order Taking Activities

Subpart F of proposed Regulation B reflects the Commission's interpretation of the statutory custody exception as not permitting a bank to accept orders for securities transactions. We believe the Commission's interpretation is inconsistent with the intent of Congress and does not reflect an accurate understanding of the custody business of a major custodial bank, such as State Street.

State Street takes orders for securities transactions from its custody accounts in a number of contexts, nearly all of which are designed to take advantage of operating efficiencies attendant to the role of the custodian as the recordkeeping entity in the transaction and to reduce settlement risk. In its capacity as custodian, State Street does not give investment advice or otherwise initiate trades but acts solely on the instructions of its customer which, in nearly all cases, is an institution such as a mutual fund, pension fund, fund manager, insurance company, or corporate treasurer.[5]

For example, State Street places mutual fund orders for defined contribution plans on an omnibus basis.[6] In the typical situation, the plan recordkeeper will collect and aggregate mutual fund purchase and redemption orders from plan participants throughout the day. At the end of the day, the recordkeeper will send State Street instructions to place the aggregated trade orders with various mutual funds. State Street places the trades directly with the fund transfer agent (either directly or through the National Securities Clearing Corporation's Fund/SERV system) in its own nominee name acting as custodian or directed trustee for the plan. State Street acts on an omnibus basis and has no contact with the plan participants.[7] The plan recordkeeper is responsible for maintaining subaccounting records relating to the individual plan accounts.

State Street also places mutual fund trades for accounts of wealthy persons, family companies, and other small companies that use the Bank's services in order to consolidate their investments with a single custodian.[8] In such cases, the customer may have numerous money managers, which may or may not have custodial capabilities. The customer benefits from the ability to maintain all of its invested assets in a single custody account. Acting as custodian, State Street can provide consolidated holdings reporting, consolidated 1099 tax reporting, consolidated income collection and reconcilement, consolidated risk analysis, and comparative performance monitoring and reporting if the customer uses multiple money managers.[9]

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[5] State Street does not explore market prices or analyze the possibilities of market movements in the way that a broker-dealer would do because the customer's instructions are to trade at the market price which, in the case of a mutual fund (which constitute most of State Street's trades for plan accounts), is that day's net asset value. A customer's decision to give State Street order instructions reflects the customer's deliberate decision on whether or not to use a broker in that particular transaction. When price matters, the customer will use a broker-dealer (and pay a brokerage commission).

[6] In some cases, the plans might not be qualified investors.

[7] State Street's custody role for employee benefit plans is consistent with the intent of the Employee Retirement Income Security Act of 1974 ("ERISA"), which contemplates that plan assets will be held—not by brokers—but by banks.

[8] In some cases, the customer may not come within the definition of "qualified investor." We understand that this activity may not qualify for the custody exemption with respect to employee benefit plan accounts that are described in the special purpose exemption in section 242.770 of Regulation B. The difficulty of complying with section 242.770 is discussed *infra*.

[9] The Bank also can provide corporate action tracking and securities litigation class action tracking on a consolidated basis.

State Street places mutual fund orders in these instances because it cannot act as custodian for these investments otherwise. A custodian cannot take custody of the fund shares without purchasing the shares directly and opening an account with the fund in nominee name. A mutual fund's system cannot have two names on its account (i.e., the broker and the custodian). It must be one or the other. This situation results solely because of the way in which mutual funds are purchased and redeemed. If a customer wants to maintain a single custodial account for all of its mutual fund investments, the mutual funds must be held by the custodian in nominee name.

The Bank is not in the business of selling mutual funds when it executes mutual fund transactions for its custody accounts. It has no selling agreements with mutual funds, unlike a broker-dealer. The Bank does not provide investment advice but rather merely take instructions from the customer or, more typically, the customer's money managers. Most broker-dealers—including State Street's own broker-dealer affiliate—are not capable of performing, or do not wish to perform, the custody services needed in these situations.[10]

The conditions of the general custody exemption in Regulation B will severely impair State Street's ability to continue providing custody services to the extent that the Bank's compensation for its services no longer may include a charge for order taking. Currently, State Street's fees for its custody services necessarily reflect order taking not only to cover the Bank's transaction costs (which include staffing and account reconciliation, among other things) but to earn a business profit on a core business activity.

Transaction-based fees or fees based on transaction volume are both necessary and appropriate for a global custodian serving primarily qualified investors.[11] State Street's custody charges generally are based on the net asset value of the account. An account with an active investment manager that initiates a significant volume of trades, however, requires more services and costs more to maintain from a custody and settlement perspective. The fee schedules for qualified investors tend to be heavily negotiated by those investors and tailored to

[10] Broker-dealers frequently are not equipped to act as custodians for other kinds of transactions also, such as those involving foreign securities or private placements. Many broker-dealers cannot hold foreign securities because they do not participate in foreign markets and also do not participate in private placement transactions because such transactions do not occur in electronic format.

[11] We note that it is a standard practice for plan recordkeepers to adjust their fees based on transaction volume.

the particularities of an account and the specific services used. State Street's custody customers pay custody fees commensurate with the services rendered.

Compliance with the other conditions in the custody exemption also will be burdensome and would not meaningfully enhance the investor protections afforded to the Bank's qualified investor customers under the securities laws. In particular, the requirement to route orders through a registered broker-dealer will affect State Street's ability to offer certain services.

In most instances, State Street transfers transactions for execution to a registered broker-dealer, a mutual fund transfer agent, or the National Securities Clearing Corporation's Fund/SERV service. These methods of execution are permitted by Regulation B. In some instances, State Street routes transactions through an electronic order taking facility registered under the Exchange Act, which is not a permitted method of execution under Regulation B. As long as the facility is registered under the Exchange Act, we see no reason why it should not be a permitted method of execution. Accordingly, we request that Regulation B be amended to allow a bank to execute transactions through a registered electronic trading facility in lieu of a broker-dealer or fund transfer agent.

In some instances, State Street does not route orders to a broker-dealer, mutual fund transfer agent, or registered trading facility but executes the transaction itself. For example, State Street takes orders in connection with cross-trading activities of mutual funds pursuant to Rule 17a-7 under the Investment Company Act of 1940. State Street also matches certain types of orders for employee benefit plan accounts pursuant to a prohibited transaction exemption under ERISA.[12] These transactions do not require a broker-dealer and the necessity of routing the transaction through a broker-dealer would be inefficient and add unnecessary costs to the customer.

As a preeminent provider of trade clearance and settlement services, State Street is a leader in the industry goal of attaining T+1 and straight-through processing ("STP").[13] We note that the Commission earlier this year released a Concept Release requesting comment on methods to improve the safety and operational efficiency of the U.S. clearance and settlement system and to help the U.S. securities industry achieve STP. STP involves the integration of execution and settlement systems in order to lessen settlement time, promote efficiency,

[12] DOL Prohibited Transaction Exemption 89-9 (Feb. 24, 1989). State Street does not, and is not permitted by the exemption to, charge for these matched transactions.
[13] 60 Fed. Reg. 12,922 (2004).

increase capacity, and reduce risk in the markets.[14] In accordance with the Concept Release, as execution and settlement increasingly evolve to become part of a seamless process, the Commission should consider whether it will be feasible or necessary in all cases to require a bank custodian to direct trades to a registered broker-dealer for execution. Specifically, we request the Commission to create an exemption from the broker execution requirement for banks that match transactions for qualified investors in appropriate circumstances, such as those described above, in connection with the bank's safekeeping and custody services.

As noted above, we are urging the Commission to provide a more general exemption that would allow the Bank to continue to place orders for securities transactions on behalf of qualified investors unimpeded by the proposed regulatory restrictions in Regulation B.

C. Qualified Investor Requirement

State Street does not believe that the definition of "qualified investor" adequately covers all of the instances in which it engages in order taking for sophisticated institutional customers. The definition in section 3(a)(54) of the Exchange Act does not appear to include investment advisers, for example, including investment advisers of mutual funds and many types of trusts. Moreover, the definition includes only registered investment companies and not unregistered investment vehicles, such as collective investment funds and hedge funds. State Street's customers include a large number of investment advisers and investment vehicles that are not registered investment companies, including off-shore funds. We do not believe that any regulatory purpose is served by preventing these customers from using State Street's order taking functions in connection with custody services.

[14] STP has been described by the Securities Industry Association as follows: "STP refers to the seamless integration of systems and processes to automate the trade process from end-to-end trade execution, confirmation and settlement—without the need for manual intervention or the re-keying of data. Specifically, the STP scope for the industry is from Notice of Execution (NOE) through to settlement for institutional trading. For retail and corporate actions, the STP scope is broader. For individual firms, STP is also defined more broadly, and encompasses the streamlining of the operational infrastructure—front-, middle-, and back-office—of all industry participants (broker/dealers, investment managers, custodians, and clearance/settlement utilities). . . . STP is widely regarded as a necessary next step toward improving processing efficiency, reducing risk, increasing capacity, improving functionality and service, as well as gaining cost efficiencies in the securities industry." Securities Industry Association website at http://www.sia.com/stp/other/Glossary. *See also* 69 Fed. Reg. at 12,922 n.3.

Moreover, in the case of corporations and customers that are wealthy individuals,[15] we see no regulatory purpose to be served by preventing the Bank from placing orders if the customer falls short of the $25 million in assets required to meet the definition of "qualified investor." In circumstances where the Bank's core custody business involves placing a substantial volume of orders for institutional investors every day and the Bank has no retail business, it seems pointless to impose an artificial asset limit on the institutional customers that are eligible for the Bank's services and indeed arguably places those customers at a competitive disadvantage.

We note that the definition of "qualified investor" in section 3(a)(54) of the Exchange Act reduces from $25 million to $10 million the amount of invested assets a qualified investor must have in order for a bank to be exempt from the definition of a "dealer" when it buys or sells asset-backed securities in transactions with such an investor for its own account. This provision reflects a recognition by Congress that a less stringent definition of qualified investor may be appropriate in certain circumstances when a bank is effecting securities transactions.

Accordingly, we urge the Commission to either eliminate altogether the $25 million in assets requirement or adopt a definition of "qualified investor" under which a custodial customer that is a corporation or natural person would need to have $10 million in invested assets rather than $25 million in order to take advantage of the Bank's order placing services.[16]

We also urge the Commission to define "qualified investor" for purposes of Regulation B to include clients of investment managers in certain circumstances. State Street has arrangements with investment managers that are registered investment advisers to act as custodian for the investment managers' clients[17] and in that capacity to receive and execute (through a registered broker-dealer or mutual fund transfer agent) trade instructions from the investment managers on behalf of such clients. The Bank does not provide investment advice to, solicit business from, or have any direct contact with the investment manager's clients, other than to perform custody and, in some cases, accounting services in

[15] State Street has a relatively small number of customers that are wealthy individuals.

[16] The Commission may want to consider allowing a bank to take orders on behalf of accredited investors (as defined in Rule 501(a) of Regulation D under the Securities Act of 1933) who are not qualified investors, subject to the restrictions in the proposed custody exemption, while exempting qualified investors from the restrictions in the Regulation.

[17] A relatively small portion of these accounts are individual retirement accounts for which the Bank acts as directed trustee but performs only custodial functions.

connection with the trading activity directed by the investment manager and, in most cases, to provide statements to the clients. The Bank serves as custodian for these customers because Rule 206(4)-2 under the Investment Advisers Act of 1940 prohibits the investment manager from acting as custodian. That Rule requires a "qualified custodian" such as a bank to hold assets of clients of registered investment advisers. The investment managers (not the Bank) direct and review the transactions in these accounts. Accordingly, no investor protection concerns should be raised by State Street's activities in this regard.

The Bank also acts as a custodian and places orders for some non-qualified investor customers of the Bank who are not referred by an investment manager but who nevertheless have appointed an investment manager(s) to give the Bank instructions on their behalf. In such cases, the Bank accepts trade orders from the investment manager(s) and not from the customer. We request that these customers similarly be treated as "qualified investors" for purposes of Regulation B.

D. Mutual Fund Fees

Under Regulation B, a bank relying on the exemption for order-taking in a custodial account must be able to demonstrate that it does not charge compensation for effecting securities transactions that varies based on whether the bank accepts an order, other than 12b-1 fees or other fees paid by an investment company for personal service or the maintenance of shareholder accounts. As a technical comment, we believe the language of the Regulation should read 12b-1 fees "and/or" the other fees since a bank may receive both types of fees.

We also believe that the Regulation should be amended to allow a bank to receive service fees from the investment adviser of a fund since it is a common practice for fund advisers to pay such fees directly from their own assets rather than charge fund assets. When these fees are paid as compensation for bona fide shareholder services provided by the Bank, and are not paid to a broker that has a selling group or dealer agreement with the fund, we believe the fees are distinguishable from revenue sharing payments designed to increase promotion of the fund, which were addressed by the Commission in a separate release earlier this year.[18] In the employee benefit plan world, clients are often given the choice of paying custodian fees or having their custodian receive fees, including 12b-1 fees, from the mutual fund. ERISA requires both reasonableness of fees and fair disclosure.

[18] *See* Exchange Act Release No. 49148 (Jan. 24, 2004), 69 Fed. Reg. 6437 (Feb. 10, 2004).

E. Definition of Custody Account

Regulation B defines an "account for which the bank acts as a custodian" to include an account established by a written agreement providing terms governing seven specific services: safekeeping of securities, settling trades, investing cash balances, collecting income, processing corporate actions, pricing securities positions, and providing recordkeeping and reporting. These activities are listed in the conjunctive, implying that the bank may need to perform all of the services in order for the account to be considered a custody account for purposes of the exemption.

State Street may not perform all seven of the enumerated services for each of its custody accounts. For example, the Bank may not process corporate actions or price securities positions for every account. In many cases, the Bank provides only recordkeeping services and none of the other services. Accordingly, we recommend that the Regulation be revised to change "and" to "and/or".

The definition of custody activities does not include accounting services, which are an important part of State Street's custody services. For example, State Street provides mutual fund shareholder accounting services for custody accounts. The Bank also provides fund accounting services to mutual funds and other customers, and insurance regulatory accounting services to insurance companies.[19] Accordingly, State Street recommends that the definition of custody activities in Regulation B be modified to include accounting services. More generally, because the financial services industry always is evolving, we suggest adding a phrase such as "or similar services" to allow the exemption to evolve as business practices evolve.

State Street currently acts as a named custodian or trustee for individual retirement accounts and qualified plan accounts that are opened directly by account holders with mutual funds or broker-dealers and that generally are not qualified investors.[20] For all of these accounts (in the aggregate, approximately four million accounts), the Bank delegates the custodial and trustee functions to

[19] The Bank believes that it is the only entity in the U.S. financial services industry that provides insurance regulatory accounting services. In some cases, accounting records produced by the Bank are used by the insurance company as orders to be placed with mutual funds. Because no broker-dealer has the capability to provide such accounting services, the Bank also places these orders in connection with such services as a matter of operating efficiency for the insurance company.

[20] Types of accounts include individual retirement accounts, custodial accounts under 26 U.S.C. §403(b)(7), and qualified retirement plans under 26 U.S.C. §401(a).

the mutual fund's transfer agent or to the broker-dealer, which handles all purchases and redemptions of the fund's shares and provides all of the account administration services for the accounts. The Bank does not handle any orders for any of these accounts. Nevertheless, because it is the named custodian or trustee, the Bank is concerned that it would be deemed to be taking orders for purposes of Regulation B and thus would be prevented from continuing to provide this service to mutual fund or broker-dealer customers. Accordingly, we request the Commission to amend Regulation B to provide that a bank acting solely as a named custodian or trustee is entitled to rely on the statutory exemption and is not subject to Regulation B, provided that it delegates to a third party such as a registered transfer agent or broker-dealer all order-taking activities.

F. Directed Trustee Accounts

State Street accepts trades (on an omnibus or large dollar basis) as directed trustee for a large number of employee benefit plan accounts.[21] The Bank does not make investment recommendations or give investment advice in connection with these trades as a true fiduciary for purposes of section 3(21) of ERISA. Investment managers have the discretion to select brokers to execute their trades on behalf of employee benefit plan accounts or to give orders directly to the custodian bank.

Despite its custodial function, however, State Street technically cannot rely on the custody exemption in Regulation B for this activity because it has the label of "trustee." The custody exemption specifically states that a bank may not rely on the exemption for accounts for which the bank acts as a trustee. Moreover, the custody exemption specifically states that a bank may not rely on the custody exemption to effect securities transactions in open-end investment companies for employee benefit accounts that are described in the special purpose exemption proposed in section 242.770 for certain employee benefit accounts. These limitations create a major compliance burden for State Street.

As noted above, State Street generally serves its customers on a relationship basis whereby a given unit of the Bank will endeavor to meet all of a client's various investment servicing needs as they may arise over time. For example, a single unit of the Bank may provide all of the services required for a corporate customer's defined benefit plan, defined contribution plan, voluntary employee beneficiary association ("VEBA"), executive compensation plan,

[21] The Bank also performs a similar function as directed trustee for a limited number of non-ERISA accounts of qualified investors.

charitable foundation, endowment, and even corporate cash. The pricing for these services often is done on an integrated basis, reflecting the customer's overall relationship with the Bank. The necessity of identifying and tracking the "relationship compensation" and "sales compensation" derived from the Bank's directed trustee services is particularly burdensome in this context to the extent the Bank would be required to rely on the trust exemption. Moreover, the need to provide the disclosures required by proposed section 242.770 and to offset fees received from mutual funds for employee benefit accounts will create further compliance issues.

Because the Bank's directed trustee services functionally are custodial in nature, like most major custodian banks, State Street's operating unit that services custodial customers also services directed trustee customers, and is separate from its discretionary trustee businesses. Accordingly, if the Bank were required to rely on the trust and fiduciary activities exemption or the employee benefit plan exemption for its directed trustee clients, State Street would face the unnecessary burden of implementing the requirements of multiple exemptions for accounts within the same business unit that otherwise are functionally indistinguishable (such as executive compensation plans and VEBAs, for example).

The need to maintain records and comply with as many as four different exemptions under Regulation B with respect to a single customer relationship or "account" will be extremely burdensome and add significant costs without any meaningful additional investor protection for qualified investors. State Street does not believe that any regulatory purpose is served by requiring it to rely on the trust and fiduciary activities exemption or the employee benefit plan exemption rather than the custody exemption, particularly since its customers are qualified investors. We urge the Commission to acknowledge that, under ERISA, the third party fiduciary directing the trade has the responsibility to decide the best form of trade execution, whether it be through a broker or custodian. Accordingly, we urge the Commission to amend Regulation B to allow a directed trustee for qualified investors to rely on whichever functional exemption (including custody) would pose the least compliance burden for the bank, absent a general across-the-board exemption for qualified investors.[22].

[22] As noted below, we also support a general exemption for all employee benefit plan accounts.

G. Exemption for Corporate Actions

The statutory custody exception allows a bank to exercise warrants and other rights respecting securities on behalf of customers. It has been State Street's long-standing practice also to arrange for or facilitate the sale of rights in connection with existing securities holdings of its customers, which always are qualified investors. We request the SEC to interpret the statutory exception to allow banks to arrange for or facilitate the sale of rights in connection with corporate actions when the shareholder is a qualified investor.

III. Trust and Fiduciary Activities Exemption

State Street is one of the world's premiere investment managers with $1.2 trillion in assets under management. The Bank manages financial assets through its various divisions. The Bank will need to rely on the trust and fiduciary activities exemption in Regulation B in order to continue these historical activities, absent a general exemption for qualified investors.

A. Chiefly Compensated Test

The "chiefly compensated" test in Regulation B is exceedingly complex and would impose a major compliance burden on the Bank. The chiefly compensated test serves no reasonable regulatory purpose in the case of qualified investors and can be eliminated as to such investors without undermining the purposes of either the Gramm-Leach-Bliley Act or the Exchange Act. Accordingly, State Street urges the Commission to adopt a blanket exemption from the chiefly compensated test for banks to the extent they effect transactions on behalf of qualified investors.

Short of a blanket exemption, we believe that the statutory language of the Gramm-Leach-Bliley Act can be read to allow the chiefly compensated test to be applied in a simple manner on a bank-wide basis without the need for the complex regulatory regime created in Regulation B. A simple 5:5 ratio applied on a bank-wide basis, for example, would be consistent with the statutory language and would reduce the compliance burden of the Regulation.

The 1:9 ratio applicable to the line-of-business method of determining compliance with the chiefly compensated test is overly restrictive and will be burdensome to comply with. For example, a bank using the line-of-business method is required to maintain procedures reasonably designed to ensure that, before opening or establishing an account for which it will act as trustee or fiduciary, the bank reviews the account to ensure that the bank is likely to receive more relationship compensation than sales compensation with respect to that account. (The Regulation does not indicate what steps a bank must take if the bank is not likely to receive more relationship compensation than sales compensation with respect to the account.) Moreover, as noted above, in the context of relationships with institutional investors, fees often are heavily negotiated and based on the full scope and nature of the relationship, making it difficult to perform an assessment of the type of compensation for a particular "account." The need to review compensation on an account-by-account basis for Regulation B purposes represents a major intrusion into the account opening process and will result in a pervasive compliance burden.

B. Definition of "Sales Compensation"

We note that the definition of "sales compensation" by its terms does not include service fees paid by the investment adviser of a mutual fund to a bank that performs administrative services in connection with the investment of trust and fiduciary assets in the fund. We believe that the exclusion of such fees from the definition of "sales compensation" should be preserved in the final Regulation.

Such fees, which typically are paid by a fund adviser to a bank for administrative services pursuant to a services agreement, in fact are not sales compensation, just as similar fees paid by a fund directly would not be sales compensation under Regulation B. Nor are such fees "revenue sharing" payments which generally are paid regardless of whether the recipient performs any services.

Because of the conflict of interest involved, a bank generally is prohibited by fiduciary law from receiving service fees from a mutual fund or its adviser in connection with the investment of fiduciary assets in the fund, absent authority in the fiduciary instrument or state law. Most of the states have amended their laws in recent years to provide specific statutory authority for bank trustees to receive mutual fund service fees, subject to disclosure requirements and reasonableness standards, and the application of the Prudent Investor Rule. The Department of Labor also has interpreted ERISA to permit bank fiduciaries for employee benefit plans to receive fees for performing services for mutual funds in which plan assets are invested and has given advice to plan fiduciaries on disclosure of fees.[23]

The SEC should not interfere with the ERISA or state trust law framework governing the receipt of service fees by bank fiduciaries by characterizing such

[23] *See* ERISA Advisory Opinions 97-16A and 2003-09A.

fees as "sales compensation" in Regulation B. Such fees are compensation for the performance of bona fide services and do not constitute distribution fees or sales commissions.

We note that the definition of "sales compensation" specifically excludes fees when paid by an investment company for administrative services of the type enumerated in section 242.724(i)(6)(i)-(vii) (the "seven services"). Such fees, when paid by a fund adviser, similarly are not "sales compensation." It is a common practice for fund advisers to waive all or a part of fund level fees in order to reduce the expenses of the fund, and fund advisers often compensate banks directly for performing administrative services pursuant to a services agreement rather than imposing a charge on the fund's assets. The exemption for employee benefit plan accounts recognizes that it is common for a bank to receive service fees from a "fund complex" which is defined to include a fund's investment adviser.

C. Definition of "Relationship Compensation"

The definition of "relationship compensation" in Regulation B includes a flat or capped per order processing fee equal to not more than the cost incurred by the bank in connection with executing securities transactions for trustee and fiduciary customers.[24] Regulation B defines a flat or capped per order processing fee to include the "direct marginal cost of any resources of the bank that are used for transaction execution, comparison, or settlement for accounts for which the bank acts in a trustee or fiduciary capacity if the bank makes a precise and verifiable allocation of these resources according to their use."

As noted above, State Street's fees for directed trustee services reflect charges based on the volume of order taking for a given account. State Street's fees also are relationship based and highly negotiated. The requirement for State Street to make a "precise and verifiable" allocation of resources used for transaction execution, comparison or settlement in order for its compensation for directed trustee accounts to qualify as "relationship compensation" is completely inconsistent with the way that State Street negotiates and charges for its services and would be extremely burdensome to comply with. It would be very burdensome for the Bank to estimate and verify the precise costs it incurs in connection with charging per order processing fees for depositories, external brokers, investment managers, and other institutional customers in its global network operating in more than 100 countries. In the case of qualified investors,

[24] This definition is derived from the statute.

which comprise State Street's almost entire customer base, we fail to see what regulatory purpose is served by this requirement.

A blanket exemption from the chiefly compensated test for banks with respect to qualified investors would avoid the imposition of an unnecessary regulatory burden.

As we read the definition of "relationship compensation" in the Regulation, it would include compensation earned by the bank in connection with trust and fiduciary activities that are encompassed within the bank exemptions from the definition of "dealer" under the Exchange Act.[25] We believe that this treatment should be preserved in the final version of the Regulation. Otherwise, the amount of relationship compensation available to offset sales compensation at many banks would be substantially reduced and many banks might not be able to meet the chiefly compensated test.

D. Line-of-Business Calculation

The ability to comply with the chiefly compensated test on a line-of-business basis is an improvement over the earlier Interim Final Regulations published in 2001.[26] The definition of "line of business" is unduly narrow, however, and, in describing a line to mean "an identifiable department, unit or division," appears to be based on organizational structure rather than on the functional lines that many banks have chosen for their operations.

Some of State Street's "lines of business" may be based on customer relationship or product lines rather than departmental or division lines. Of relevance to this analysis, several divisions of the Bank perform fiduciary services. A bank should not be forced to restructure its historical operations simply to satisfy an arbitrary "line of business" definition in Regulation B. We recommend that the definition of "line of business" be modified to include broad customer relationship or product lines as an option for complying with the chiefly compensated test, along with business lines.

[25] 15 U.S.C. 78c(a)(5). This was not the case under the Final Interim Regulations. We note that a bank acting as a discretionary trustee or fiduciary is deemed to be a "dealer." Although Regulation B clearly assumes that the definition of "broker" also applies when a bank acts in such a capacity, it is unclear why the definition of "broker" applies to exempt "dealer" activities.

[26] 66 Fed. Reg. 27,760 (2001).

E. Exemption for Existing Trust Accounts

The exemption from the chiefly compensated test for existing living, testamentary, or charitable trust accounts is helpful. We believe the exemption should be expanded to include other types of trust accounts including, for example, reinsurance trusts held for insurance company customers, Nuclear Decommissioning Trusts, Black Lung Trusts, Medical Insurance Trusts, supplemental benefit trusts, and certain group trusts.

As we read the Regulation, relationship compensation derived from the exempted trust accounts will be included as “relationship compensation” in the chiefly compensated equation. This treatment should be preserved in the final version of the Regulation.

We also believe that the exemption should be revised so that the cut-off date for the accounts to qualify for the exemption is the effective date of Regulation B, or at least the date the rule becomes final, rather than July 30, 2004, in order to simplify compliance. Rules with much less impact on a bank’s operations have had more flexible grandfather periods.

F. Transfer Agent Services

State Street is a registered transfer agent for a number of mutual funds. The definition of “fiduciary capacity” for purposes of the trust and fiduciary activities exemption includes acting as a transfer agent. The question thus arises as to whether State Street must comply with the terms of that exemption in order to continue its transfer agent activities.

It is well understood in the law that a transfer agent is not a fiduciary, whether under ERISA, state trust law, or otherwise.

Nonbank transfer agents are not required to register as broker-dealers under the Exchange Act. Accordingly, banks acting as registered transfer agents similarly should not be subject to registration as broker-dealers and should not need to rely on the trust and fiduciary activities exemption or any other exemption under Regulation B. No reasonable regulatory purpose would be served by requiring a bank to comply with the trust and fiduciary activities exemption in order to act as a transfer agent. The bank could simply transfer the activity to a nonbank, non-registered broker-dealer affiliate to avoid complying with Regulation B, but should not be forced to undergo a meaningless but highly disruptive exercise that may result in the loss of customer relationships.

Accordingly, we request the Commission to expressly confirm that banks acting as transfer agents are not required to register as broker-dealers and are not subject to Regulation B with respect to such activities.

IV. Networking Exemption

State Street's broker-dealer affiliate, State Street Global Markets, LLC ("SSGM"), serves an almost exclusively institutional customer base and provides brokerage services to the Bank's qualified investor customers.[27] These customers often are referred to the broker-dealer by the Bank's employees who act as relationship managers for the customers.

SSGM at present does not pay any commission splits or other compensation to the Bank or its employees in connection with brokerage services provided to the Bank's customers. Accordingly, we do not believe that the Bank's relationship with its broker-dealer affiliate should cause the Bank to come within the definition of a "broker" under the Exchange Act. We request confirmation that this is the case, and that the Bank does not need to rely on the networking exemption for third party brokerage arrangements in GLBA or Regulation B.

At some time in the future, SSGM may want the flexibility to pay referral fees to the Bank's relationship managers who refer customers to it. In such case, all of the referred customers would be "qualified investors" (typically a mutual fund, corporate treasurer, state or local government, insurance company, or pension funds, for example).[28] The customer generally would be referred for global trading services and other specialized services. In such a case, we would anticipate that the amount of referral fees paid to an unlicensed relationship manager for referring a qualified investor would be substantially in excess of the nominal fees (i.e., $25 or one hour's pay) permitted under the networking exemption in Regulation B, and could be based on whether the referral results in a successful business relationship.

To the extent that referrals occur at present, they involve complex institutional relationships involving millions of dollars and require a comprehensive analysis of the customer's needs and a sophisticated and often multi-faceted response from the relationship manager. In order to make an

[27] SSgM does not underwrite securities, enter into selling agreements with securities issuers, or render investment advice.

[28] As noted above, State Street does not have a retail delivery system.

appropriate referral, the relationship manager may need to assemble a team of product experts and financial analysts and develop a program of services for the customer, of which brokerage may be only a small part. The result for the customer is a sophisticated solution, highly tailored to the customer's needs.

These referrals are fundamentally different from the case of a teller referring a retail banking customer to a broker-dealer. Among other things, they involve considerably more time and expertise on the part of the referring employee and generally occur with less frequency than referrals in a retail environment.

It is our understanding that the limitation on referral fees in the networking exemption was intended to protect retail customers from inappropriate, over-zealous referrals by bank tellers and other unlicensed bank employees. In the case of a customer who is a qualified investor, however, the customer's level of sophistication protects against inappropriate referrals. The referring employee will not be a teller but a bank professional with a sophisticated understanding of the client's business and financial needs. Thus, the investor protection concerns that underlie the limitation on referral fees in the networking exemption are absent.[29]

The limitation on referral fees does not serve a valid regulatory purpose and should be eliminated in the case of qualified investors who are able to choose among service providers and use their own market strengths to negotiate fees commensurate with the services provided to them. If these customers choose to use a bank, their choice is based on their own cost/benefit analysis and is not a misguided default choice.

Accordingly, absent a general exemption with respect to qualified investors, we recommend that the SEC create an exemption for referral fees paid to non-licensed Bank employees who refer qualified investors to a broker-dealer.

V. Employee Benefit Plan Exemption

The exemption for employee benefit plan accounts is important for banks to the extent that a bank cannot comply with the chiefly compensated test in the

[29] The referral fee limitation arguably reduces investor protection when bank employees can earn higher fees for referring customers to banking products rather than referring customers to a broker-dealer for securities products that may better meet their needs.

trust and fiduciary activities exemption with respect to such accounts. State Street urges the Commission to extend the exemption to all types of employee benefit plan accounts, including governmental plans, non-U.S. benefit plans, stock bonus plans, money purchase plans, VEBA plans, other non-qualified compensation plans, and individual retirement plan accounts.

The exemption is conditioned on the bank offsetting or crediting any compensation it receives from a fund complex related to securities in which plan assets are invested against fees and expenses that the plan owes to the bank. State Street urges the Commission to eliminate the fee offset requirement in the exemption. The offset requirement is inconsistent with Department of Labor guidance under ERISA that does not require an offset or credit of mutual fund fees received by a plan service provider acting in a non-discretionary capacity, such as a recordkeeper.[30] State Street believes that the fee offset requirement is unnecessary to prevent conflicts of interest in light of the ERISA framework applicable to employee benefit plan accounts and adds an unnecessary compliance burden on banks.

Given the fiduciary framework applicable to employee benefit plans under ERISA, we do not believe that additional protections under Regulation B are necessary or appropriate and support a general exemption for employee benefit plan accounts.

VI. Exemption for Money Fund Investments

Regulation B includes an exemption for banks that effect transactions on behalf of qualified investors and certain other investors in money market mutual funds. While this is a welcome exemption, as noted earlier, we believe that banks should be exempt from Regulation B altogether with respect to transactions on behalf of qualified investors.

In any case, the exemption should not be limited to money market mutual funds but should include other short-term instruments that may not qualify as money market mutual funds and would not otherwise be exempt. These instruments might include, for example, a registered short-term bond fund, or a cash management fund for institutional investors that qualifies under Section 3(c)(7) of the Investment Company Act of 1940, or similar short-term unregistered vehicles, including funds holding foreign-denominated securities such as Euro-dollar CDs.

[30] *See* ERISA Advisory Opinions 97-16A and 2003-09A.

To qualify for the money market fund exemption, a qualified investor must have obtained from the bank a "financial product or service not involving securities." It is our understanding that this requirement can be met simply by the qualified investor opening a deposit account of a nominal amount with the bank. We believe this requirement has no legitimate regulatory purpose and would impose an unnecessary compliance burden that would be born mainly by the Bank's customers, who would be forced to open an unnecessary deposit account with the Bank or obtain some other product or service from the Bank that they do not need. Accordingly, we believe the requirement should be eliminated. Alternatively, we believe a qualified investor should be deemed to have satisfied the requirement if the customer obtains custody services from the bank.

VII. Exemption for Regulation S Transactions

State Street urges the Commission to expand the exemption for Regulation S transactions in Regulation B to include transactions for foreign investors in securities registered in the United States.

As Regulation S itself demonstrates, the requirements to register as a broker-dealer are more lenient with respect to non-U.S. than U.S. investors. As a result, it appears unduly burdensome to force banks to track the nationality of the investor to determine whether an exemption is available. This is all the more true with State Street, whose compliance burdens would be even more complicated given that many of its clients are multi-national companies and whose non-U.S. clients need less of the investor protections given that they are largely qualified investors.