September 1, 2004

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

Re: Regulation B, Release No. 34-49879, File No. S7-26-04, 69 Federal Register39682 (June 30, 2004)

Dear Mr. Katz:

The Massachusetts Bankers Association (MBA) appreciates the opportunity to provide comments on Regulation B, the broker "push-out rules" proposed by the Securities and Exchange Commission (SEC). Our Association represents all 220 state and federally-chartered banks and savings associations in Massachusetts.

Equally important, 47 of our banks provide trust services with $1.3 trillion under management, and hold $10.6 trillion in non-managed assets as of December 31, 2003. Our banks hold more than $6.6 trillion in custody assets alone. In addition, nearly 100 of MBA member banks offer investment services through a third-party broker-dealer relationship.

We believe that the imposition of Regulation B as proposed would create a number of significant and potentially disruptive impacts on Massachusetts banks. Many of our comments below are similar to those we expressed in July 2001, when this rule was first proposed and later rescinded for further review.

Before offering specific comments on three key areas; Trust and Fiduciary Exemption, Custody and Networking, we do appreciate the considerable amount of time and thought that you and the staff at the SEC have devoted to this issue over the past five years. Crafting a regulatory framework that seeks to properly balance the statute, realities of the customer marketplace and appropriate customer safeguards is a significant challenge, and unfortunately, the proposed Regulation B missed the mark. In fact, there appears to be a bias, hopefully unintended, toward non-bank providers of investment services. Let us explain.

Trust and Fiduciary Activities

Under Title II of Gramm-Leach-Bliley (GLBA), a bank that conducts securities transactions in connection with providing trust or fiduciary services, is exempt from having to push these activities out of the bank and into a registered broker-dealer if three basic conditions are satisfied. These include: a bank cannot publicly solicit brokerage businesses other than a general advertising that it offers trust services; that its compensation for conducting transactions must consist chiefly of an administrative or annual fee, a percentage of assets under management or a cap on fees that reflects the cost of conducting the transaction; and third, the bank must direct all trades of a publicly traded securities to a registered broker-dealer.

Our concerns with these provisions of proposed regulation B center on the expansive tests mandated to determine "chiefly compensated." While we understand that the SEC may be concerned that banks may try to use the trust and fiduciary exemption to transfer a full scale

securities brokerage operation into a trust department to avoid SEC oversight, we believe that argument is specious and fails to recognize the trust and fiduciary function within a bank.

We strongly believe that this section should be streamlined to establish a simple "chiefly compensated" test that would reduce the regulatory burdens that would be imposed if the proposed test was adopted. The test should be adopted on a lines-of-business basis, rather than the account-by-account method incorporated in the current proposal. Under the proposed rule, banks that choose to utilize the account-by-account exemption would have to invest considerable resources in software and systems to track compensation received from mutual funds and allocate that compensation to individual accounts. The proposed 9:1 ratio of "relationship" to "sales" compensation will be difficult for many banks to meet, if they choose to utilize the account-by-account alternative. At a minimum, the ratio should be far more reasonable, such as 2 or 3:1.

A related concern is the definition of "sales compensation." It is entirely too complex and requires multiple calculations and adjustments. For clarification purposes, we urge the SEC to clarify that soft-dollar research received from broker-dealers need not be allocated to individual accounts of lines-of-businesses.

Safekeeping and Custody Exemption

A second key concern is the language pertaining to custody and safekeeping. For many years banks have provided custody services, including the buying or selling of securities at a customer's direction – basically order taking. This practice is well documented in legislative history as well as in various reports and analyses prepared by the SEC and the Department of Treasury. Yet it is very apparent that the SEC is seeking to drastically curtail the ability of banks to provide these services, especially with respect to 401 (k) plan participants, self-directed IRA customers, registered investment advisers and charitable organizations. We fail to see either the legal basis for the SEC's proposal, or the need for such language and urge the SEC to remove this provision in Proposed Rule 760 from any final regulation.

As noted above, Massachusetts banks act as custodian for more than $6.6 trillion in assets, and the imposition of this language as proposed would have a significant impact on our member banks' ability to act as custodian. While the impact is obvious for our large custodians, the impact would be equally felt by our many smaller community banks that serve as custodian for many local charities and investment advisory firms.

Finally, the proposal would dramatically impact employee benefit plans. Since employee benefit plan participants do not satisfy the definition of "a qualified investor," the proposed Rule 760 would essentially prevent plan participants from communicating their investment orders to any bank retained by the plan sponsor. As of December 31, 2003, Massachusetts banks had nearly 19 million retirement accounts exceeding $4.150 trillion in assets. Although the SEC offers some exemptions to employee benefit plans under Rule 770, it will not work. Broker-dealers do not, for the most part, have the capabilities to provide participant loan services or prepare Form 5500 reports. If this proposed recommendation was adopted as presented, we believe it would force many customers to shift their business to broker-dealers over time and create an unfair competitive advantage for broker-dealers over banks.

How can these and many other shortcomings of proposed Rule 760 be rectified? We recommend that all custodial clients place mutual fund orders directly with bank custodians or non-fiduciary administrators; all employee benefit plans be exempt from Regulation B; and make any grandfather date prospective such as January 1, 2006 to allow sufficient time to modify systems and client agreements.

Small Bank Custody Exemption

We applaud the decision by the SEC to increase the asset threshold for small banks from the original $100 million to $500 million as stated in proposed Rule 761. This change will provide a substantial benefit to many of our community banks and we strongly urge the SEC to retain the language as written.

Networking Arrangements

Finally, we are deeply troubled by the proposed language regulating networking arrangements. The language limiting a referral fee to $15 in 1999 dollars (currently estimated to be about $17) or $25 is overly restrictive and imposes greater constraints on bank referral and compensation programs than those imposed on broker-dealers. Bank regulators have promulgated specific guidelines on compensation and referral fees for non-deposit products and we believe they are more than sufficient to address any issues that may arise regarding reasonable compensation.

In conclusion, we appreciate the opportunity to offer comments on and recommendations to the proposed Regulation B. We understand that some of our member banks will be offering more detailed comments on certain provisions of the proposed regulation and we urge your careful consideration of those recommendations. We also strongly endorse the lengthy comments offered by the American Bankers Association on behalf of the thousands of banks across the nation that offer trust and investment services.

We welcome the opportunity to respond to any questions you may have.

Sincerely,

David E. Floreen
Senior Vice President
Government Affairs and Trust Services