VIA EMAIL

September 1, 2004

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 5th Street, NW
Washington, DC 20549-0609

<u>Final Rules for Banks and Other Financial Institutions Under Section 3(a)(4) of the Securities Exchange Act of 1934 (the "Exchange Act"), File No. S7-26-04 ("Proposed Final Rules")</u>

Dear Mr. Katz:

Bank of America Corporation and its subsidiaries ("Bank of America") appreciate the opportunity to provide comments on the SEC's Proposed Final Rules implementing provisions of the Gramm-Leach-Bliley Act ("GLB Act"). Bank of America is one of the world's leading financial services companies and is the sole shareholder of Bank of America, N.A., the largest bank in the United States. Through the nation's largest financial services network, Bank of America provides financial products and services to 30 million households and two million businesses and also provides international corporate financial services for clients around the world.

Bank of America has actively participated in the formulation of comment letters on the Proposed Final Rules being submitted by the Clearing House Association L.L.C., the ABA Securities Association and the Securities Industry Association (the "Trade Associations"). We fully support the comments of the Trade Associations and, accordingly, we have limited our comments in this letter to those aspects of the Proposed Final Rules we believe deserve particular emphasis and amplification.

Bank of America appreciates the substantial efforts on the parts of the Commission and its Staff in developing and issuing the Proposed Rules. Bank of America appreciates the efforts of the Commission and its staff to improve upon the Interim Final Rules. However, we share the very serious concerns expressed by the Trade Associations about the validity and content of the Proposed Final Rules. Bank of America agrees that the Proposed Rules are inconsistent in many respects with Congressional intent and will create a burdensome and unwarranted regulatory regime. To summarize, we submit that the Proposed Rules for bank bonus plans are restrictive and counterproductive, the "chiefly compensated" safe harbor in the trust exemption is unnecessarily cumbersome and overly burdensome, the restrictions placed on sweep arrangements are inconsistent with Congressional intent, and the safekeeping and custody exemption is unnecessarily restrictive with regard to order taking.

I. Subpart A

Proposed Rule 710 – Networking Exception

In their effort to control compensation to unregistered bank employees for referral activities, the Proposed Rules impose restrictions that exceed the scope and intent of the GLB, and create unnecessary and unwarranted limitations on legitimate compensation plans.

A. Bonus Programs

In a move not contemplated by the GLB Act, the Proposed Rules would regulate bank bonus plans to the extent they include brokerage referrals or revenues. In practical effect, the Proposed Rules limit the inclusion of such referrals or revenues to bonus plans based upon the "overall profitability of [the] bank". For the reasons set forth below, we submit that this limitation is unnecessarily restrictive to achieve the directives and intent of the GLB.

- Bonus plans are a component of manager compensation. They are structured to support overall business objectives, including revenue and shareholder value growth, customer satisfaction, and deepening of customer relationships.

- They are not designed to drive any particular sales activity and, as such, represent no realistic threat of incentivizing unlicensed brokerage activity. While in a broad sense brokerage referrals or activities may be included, if present such metrics would represent only one of many factors in a bonus award.

- Bonuses are intended to compensate and reward managers for their contribution toward the specific goals of their business unit. As is common knowledge, the achievements and profitability of a specific unit may have no direct relationship to the overall profitability of the parent bank. By limiting inclusion to overall profitability of the bank, the Proposed Rules fail to recognize the real world of banking and financial institutions. Industry practice logically ties bonus programs to the responsibilities and authorities of the participating managers. Below the highest level of bank management, bonus plans are tied to lines of business, divisions, regions, and markets. Funding of the plans is likewise often determined by the financial performance of the relevant business unit. Banks should have the ability to structure bonus plans which recognize brokerage referrals and revenues along such units, provided that brokerage referrals at the individual employee level are not a metric. Such plans would not correlate bonus awards to an employee's investment referrals or activities, and would create no "salesman's stake".

B. Nominal Fee

- Banks should be allowed the flexibility to define nominal within the context of their respective incentive plans, so long as the incentive plans are neutral with respect to deposit and investment products. Such flexibility permits a business model which is not based on a salesman's stake, but on serving the needs of customers by referral to a broker/dealer, where appropriate.

- While ostensibly providing three alternative definitions of "nominal", the Proposed Rules in practice would limit banks to incentive plans adopting either the bank's base hourly rate or a flat fixed payment [$25, as proposed]. They undermine the ability to create referral incentives that are product neutral and encourage needs-based recommendations. This lack of flexibility will lead to two somewhat contradictory results, neither of which was contemplated by GLBA: depending on the overall structure of a bank's incentive plan, employees could be financially disincented from making a brokerage referral appropriate to a customer's profile and financial objectives; conversely, the structure of a particular plan, such as the flat fixed payment, might incent an employee to make a brokerage referral over more suitable bank products. Flexibility to neutralize such incentives serves the public interest and is consistent with the objectives of GLBA. We submit that the final Rules should permit such "product-neutral" flexibility.

- Under the Proposed Rules, the "nominal" value for fixed amount awards is set at $25. While we appreciate the rationale behind the alternative definition, we believe the amount proposed fails to recognize that "nominal" is a relative term among the differing levels of bank employees. The Commission has recognized this concept of relativity in the alternative definition of "base hourly rate of pay". In order to permit product-neutral recommendations, we submit that $25 would be appropriate and "nominal" for hourly employees, but that higher amounts, which we suggest could reach $100, be allowed for salaried employees.

C. "Readily Ascertainable" / "Fixed Dollar Amount"

- The Proposed Rules require that the compensation paid for a brokerage referral be a "fixed dollar amount" which is "readily ascertainable"; the Comments interpret these requirements to mean that, "at the time of the referral", the value or potential value of the referral must be known both to the referring employee and the bank. These requirements, particularly as expanded by the Comments, have the practical effect of requiring Bank of America, and we believe most banks, to exclude brokerage referrals from "points-based" or similar incentive compensation plans.

- As we and other banks have explained to the Staff on several occasions, points-based and similar plans typically do not permit the bank or the employee to know the specific value, if any, of a point or points until the end of the relevant reporting period. The total incentive potentially available to an employee is often not known until the end of the relevant period. The incentives available to employees often increase as established point thresholds or goals are met, and may be further influenced by other measures not related to sales activity. As the ultimate value of a point or points awarded for a brokerage referral is determined by the portion of total incentive received, divided by the total points awarded, it is impossible to know that value until the final calculations are performed at the close of the period.

- We submit that an alternative interpretation serves both the goals and intent of GLBA: that both the bank and employee know, at the time of a brokerage referral, that the incentive value will be "nominal", as defined by the definition adopted by the bank in the plan.

- We seek clarification that these requirements would not preclude the inclusion of brokerage referrals into incentive plans incorporating goals, thresholds or other non-sales related measures. As mentioned, points-based and similar plans generally require that pre-established point-thresholds be met before any incentive is awarded and may determine incentive payments based on overall sales activity, as well as other non-sales related measures. As such, an employee could make brokerage referral and receive the designated plan points, but ultimately receive no incentive for the referral because the threshold or other performance expectations were not met. While we do not believe that the Proposed Rules preclude such a plan, we ask for clarification to that effect.

- We further request clarification on whether the Proposed Rules would preclude referral incentives paid through points-based or similar plans which incorporate other, non-referral, conditions to payment or the amount of payment, such as client satisfaction, leadership behaviors and review scores; and whether there can be any discretion in the payment decision under the plan based upon such factors. As none of the conditions could increase the referral compensation above "nominal," and as the practical effect in most cases would be to reduce the amount paid to the employee, we believe that such conditions would be consistent with GLB and would present no risk to the investing public.

D. <u>One-Time</u>

- We appreciate the purpose of the "one-time" limitation on referral incentives. We submit, however, that the limitation should be defined to permit banks to include referral activity in periodic non-cash recognition programs for associates. As the Commission is aware, banks periodically conduct programs designed to recognize employees who make significant contributions. The criteria in the programs may overlap the products or activities, including brokerage and other referrals, within the bank's incentive plans. The awards in such programs are generally non-cash. Where combined with other activities or products, including deposit products, and where non-cash, we believe that banks should be permitted to include brokerage referrals as a metric in such programs. To do so would neither create a "salesman's stake" nor inappropriately incent an unregistered employee.

E. <u>Payment Limited to Employee Making the Referral</u>

- As discussed above, bonus plans frequently are designed to encompass business units such as lines of business, divisions, regions and markets. Incentive plans may likewise focus upon such units. As applied to managers, such plans often adopt as metrics the activities of the supervised employees within the relevant business unit[s], and track the covered activities of those employees. As such, brokerage referrals by supervised employees may form a part of the metrics for managers' plans, and therefore represent a component of any award.

- Managers' plans should be permitted to encompass all legitimate activities of their supervised employees and of the business unit for which they are responsible. Managers carry the responsibility of ensuring that all laws, regulations and corporate policies are followed within their assigned business unit, and to preclude brokerage referrals from their incentive compensation base would be to artificially carve-out from such plans an important area of their responsibilities.

F. <u>Referral</u>

- The term "referral" should be defined to mean a bank employee arranging a securities-related contact between a registered broker-dealer and a bank customer or conducting any activity permitted under Section 3(a)(4)(B)(i) of the Exchange Act (15 U.S.C. 78c(a)(4)(B)(i)). Banks should be permitted to condition referral payments upon any activity permissible for unregistered associates under the regulation.

G. <u>Relationship Referrals</u>

- Banks should be able to pay for referrals of a bank customer meeting certain

minimum qualifications to a business unit or group of banking and brokerage professionals, where the resulting relationship could include both bank and brokerage products, without having to meet the definition of nominal in the context of a securities-only referral. Requiring banks to meet the definition of nominal in such cases, and to restrict payment contingencies to terms relating only to securities, would require banks to maintain separate processes for referral of the same customer to the same group of banking and brokerage professionals, and for the resulting referral payments.

II. Subpart B

Bank Trust and Fiduciary Activity Rules

We commend the Commission for the time the Staff have spent addressing the alternative proposals submitted by the industry. The Proposed Rules address several of the identified issues, including eliminating the definition of trustee, which created confusion for banks as to the types of trustee capacities covered by the exception; recognition that fiduciary capacity can include capacities not specifically listed in the exemption; and acknowledgement that all aspects of a bank's trust department do not have to be examined for compliance with fiduciary principles, neither those activities associated with effecting securities transactions. Despite these efforts, the Proposed Rules remain too complex and, if not amended, could require a reclassification of all revenue earned by our fiduciary unit in order to determine "chiefly compensated." We urge the Commission to look for a simpler approach, allowing banks to use existing procedures and systems to demonstrate how they are chiefly compensated. Such an approach is more consistent with the statutory language and intent, and would not disturb traditional fiduciary roles/functions.

A. Exclusion of Unrelated Compensation from Relationship Compensation

- "Unrelated compensation" should not be excluded from the calculation of relationship compensation. Excluding unrelated compensation (1) adds unnecessary complexity to a bank's task of monitoring compliance with the "chiefly compensated," precluding the use of existing revenue reports; and (2) is inconsistent with the terms of GLB. Unrelated fees often include non-securities transaction fees associated with servicing fiduciary relationships, but which are separately charged in order to tailor fees to the services provided to the account. Unrelated compensation could further include tax preparation or other servicing fees.

B. Proposed Rule 721(a)(2) – 9:1 ratio of relationship to sales compensation

- The proposal permits a bank to demonstrate it has complied with the chiefly compensated rules by showing that, during the preceding year, its ratio of

sales compensation to relationship compensation for each line of business was not more than one to nine and thereby avoid an account by account analysis.

- The proposal does not create a sufficient safe harbor, however, upon which banks can avoid an account-by-account review. Banks may be unable to perform the calculations necessary to demonstrate that more than 11% of its revenue from sales compensation with the degree of certainty required, or may still have to incur substantial investments in technology to determine that all fees have been properly characterized as unrelated compensation, sales compensation and relationship compensation.
- We strongly urge the Commission change its interpretation of the statue to allow "sales compensation" to be measured against total compensation or, alternatively, to increase the proportion of "sales" to 'relationship" compensation to 49 percent, as GLBA provides.

C. <u>Proposed Rule 721(a)(4) – Account by account analysis still required</u>

- It is unnecessary and unwarranted require an individual account analysis at the time of any change to the account's fee schedule. Fees are changed for many reasons, including waiver of fees, and adjustments for purposes of tax planning needs in family trusts. To the extent a Bank meets the 1:9 ratio of relationship compensation to sales compensation, it should not be required to carry out account level analyses simply because of a fee change.
- If banks relying upon the safe harbor in Rule 721 must engage in a "chiefly compensated" analysis every time an account is opened or its fee changed, additional safe harbors should be created for the exceptional circumstances in which an account may not meet the test for reasons associated with the account's specific needs.

D. <u>Proposed Rule 721(c) – Requirement that sales compensation from all accounts be used to determine compliance with safe harbor</u>

- The Commission should clarify that the limited exceptions may be relied upon by banks which otherwise meet the Rule 721 safe harbor and that any sales revenue earned under other exemptions should not have to be included in the chiefly compensated calculation of the line of business safe harbor.

E. <u>Proposed Rule 724(b) – Definition of Flat or Capped Per Order Processing Fee and Sales Compensation</u>

- We recommend the Commission amend Proposed Rule 724(b), which conditions a bank's ability to treat a fee as a "flat or capped per order processing fee" on "the bank mak(ing) a precise and verifiable allocation of these resources according to their use." The definition of sales compensation creates confusion as it characterizes any revenue above the flat or capped per

order processing fee (at no more than cost) as sales compensation. Proposed Rule 724(b), with its detailed accounting requirements, will make it unduly burdensome for banks to determine if any "sales compensation" has been received and, if so, how much.

- We suggest 724(b) should incorporate a more flexible standard that permits banks to demonstrate an average total cost for executing securities transactions, which can then be applied to all accounts. Such an average cost could be inclusive of personnel expenses, support services and other overhead beyond what is paid under any clearing arrangement.

F. Proposed Rule 724(i)(2) – Definition of Sales Compensation

- The Proposed Rules create additional issues as to what must be included in sales compensation. "Sales compensation" is a term created and defined by the Commission for purposes of implementing the Rule. It is not an industry term with a commonly understood meaning. While the Commission has struggled to provide the definitions in the various versions of the Rule, it is clear that banks will have a difficult time implementing the Rule. This is because banks have not had a reason to classify revenue as will be required by the Rule. Reclassification of revenues will be difficult, expensive and disruptive. This result is not required by the Act nor is it necessary to achieve functional regulation of brokerage activities. We believe a simpler approach to these definitions and the chiefly compensated test could have achieved the Commissions desired goal at significantly lower cost to the industry.

G. Exemptions for Qualified Retirement Plans

- The proposed exemptions to the "chiefly compensated" condition do not adequately accommodate arrangements under which banks provide "bundled services" for tax-qualified retirement plans. Under such arrangements, plans invest primarily in investment company securities, and fees for plan services generally are paid through investment company funds. Under the proposed rule, such fees paid by investment company funds would constitute either "sales compensation" or "neutral compensation;" and little, if any, compensation would meet the definition of "relationship compensation." Banks, which provide such bundled services would often not satisfy the chiefly compensated test. We recommend a broad exemption under Subpart B from the "chiefly compensated" condition for banks providing bundled services for tax-qualified retirement plans.

H. Dual Employees Rule 3040

- The Interim Final Rules (SEC Release No. S7-12-01) suggested that the Commission expected the NASD to use NASD Rule 3040 to cause bank-affiliated broker-dealers to become involved in overseeing the bank activities of registered personnel of broker-dealers and to oversee such activities. This contradicts the theory of functional regulation that is fundamental to the GLB Act, *i.e.,* that bank activities should be regulated by the banking regulators. To address this concern, we request the Commission cause an amendment to NASD Rule 3040 that recognizes the functional regulation and oversight of banking regulators as to fiduciary transactions and not duplicate books and records of trades for the broker with whom a bank associate may be registered.

III. Subpart D

Sweep Accounts Exemption

Proposed Rule 740(c)(1) – Restriction to Sweeps into No-Load Money Market Mutual Funds

- The legislative history of GLB states that "it was the intent [of the Congress] that such term [no-load] be construed to ensure that existing bank sweep activities not be disturbed by the law." (*See* Letter from Chairman James A. Leach to Arthur Levitt, Chairman of the Securities and Exchange Commission, dated January 2, 2001. *See also* H.R. Rep. No. 106-74, at 167.) Senator Phil Gramm also indicated he did not intend this provision to change current practice. (*See* Letter from Chairman Gramm to Chairman Levitt, dated February 6, 2001: "At the time Congress enacted the Title II broker-dealer exemptions, Congress did not intend that rules, definitions, or interpretations would be changed in a way that would limit the current activities preserved by the exemptions."

- The Proposed Rules would, in fact, change current practice by only permitting banks to sweep client assets into money market funds where the sales promotion, personal service, or account maintenance fees charged by the money market funds employed do not exceed 25 basis points. Fees for sweep services would be charged directly by the bank at the customer account level. The net effect of this requirement is that the total expenses to the customer are unchanged. Provided customers receive appropriate disclosures, we submit it should not matter if the fee is embedded in the mutual fund charges or added as a bank transaction fee.

- We recommend the Commission either revise the definition of "no-load" money market funds, or adopt an exemption whereby banks will be exempt from the definition of "broker" to the extent that they sweep funds into money

market mutual funds (regardless of fees), provided appropriate fee disclosures are provided to customers.

- Under Section 3(a)(4)(B)(v) of the Exchange Act, banks are allowed to effect transactions in money market mutual funds "as part of a program for the investment or reinvestment of deposit funds." Referring to the legislative history of GLB, the Proposed Rules interpret the term "program" to limit the availability of the exception to "regular, automatic sweeps" and to prohibit a bank from effecting sweep transaction for a customer of another bank. We submit that both limitations are unwarranted and unnecessary: sweep exceptions should not be limited to regular, automatic sweeps, but should only be dependent on appropriate disclosures and /or fees charged to the customer; and sweep exemptions should also not be limited to banks' own customers.

IV. Subpart F

Safekeeping and Custody Exemption

We commend the Commission for removing from the custody rules: (1) the prohibition on use of dual licensed employees to effect transactions pursuant to the exemption; (2) the requirement that a bank employee effecting transactions in reliance on the exemption perform duties for the bank other than effecting transactions in securities; (3) the prohibition on custody employees receiving compensation based upon the level of securities-related assets gathered; and (4) the prohibition on bank employees receiving referral incentives under the networking exception if they also engage in order taking on behalf on custody customers.

In place of these earlier proposals, however, Proposed Rules 760 and 762 impose broader limitations: the order-taking exemption applies only to qualified investors and existing customers.

If it is necessary to limit the customers to whom a bank can offer such custody services, we urge the Commission to permit order taking (1) for accredited investors (i.e., a natural person with a net worth of more than $1,000,000 or with annual income of more than $200,000 or $300,000 if combined with spouse; or a company with more than $6,000,000 in assets); (2) for qualified purchasers (i.e., a company or natural person that owns more than $5,000,000 in investments or any person who invests more than $25,000,000 on a discretionary basis); and (3) for custodial IRAs and/or Health Savings Accounts.

A. Proposed Rules 760(a)(1) and (3) – Order Taking

- The Proposed Rules would place excessive limitations on fees for order taking. While the Proposed Rules would permit banks to receive Rule 12B-1 and shareholder servicing fees, a bank can only receive such fees from a mutual fund if it accepts orders to effect transactions "on the same terms for

any class or series of securities" of such mutual fund "that can reasonabl(y) be obtained by the bank for purchase or sale by bank customers." Provided banks offer custody to accredited investors and provide appropriate disclosures, these limitations are unnecessary.

B. Proposed Rule 760(a)(3) – Solicitation of Securities Transactions

- The proposed prohibition of custody solicitations through another bank department is overly restrictive. Appropriate divisions of a bank should be allowed to continue normal marketing of all bank services, including explanations of custody services available through the trust division.

C. Proposed Rule 762(a) – Definition of Account for which the Bank Acts as a Custodian

- Pursuant to the definition in Proposed Rule 762(a), 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." The Rule should clarify that the requirement is prospective, applicable only to new custodial accounts.

V. Subpart G

Special Purpose Exemptions

A. Proposed Rule 770 – Exemption for Transactions in Certain Employee Benefit Plans

- The conditions imposed by this Proposed Rule do not reflect for the services currently provided by banks to tax-qualified retirement plans, are unnecessary, and should be eliminated or modified substantially.

- We propose that the offset/credit requirement of Proposed Rule 770(a)(1) be eliminated since adequate oversight of compensation already exists under the Employee Retirement Income Security Act of 1974, as amended (ERISA). The proposed offset/credit will be difficult to administer due to omnibus trading in plans. Moreover, bundled service arrangements where mutual fund fees are used to reduce other plan expenses (without a "dollar for dollar" offset) are customary and preferred by plan sponsors. Rule 770 should additionally be expanded to permit transactions in non-investment company securities, at a minimum the securities of the plan sponsor, which are commonly held by such plans.

B. Proposed Rule 775 – Exemption for Transactions in Investment Company Securities

- Under the Proposed Rule, banks are allowed to purchase and redeem mutual fund shares directly through the issuer's transfer agent. However, Proposed Rule 775(2)(i) substantially limits the usefulness of this exemption by restricting its availability to transactions for which the transfer agent does not accept compensation paid in connection with the distribution of the securities, such as revenue sharing or Rule 12b-1 fees. Banks, or any other shareholder, are not in a position to know whether a fund's transfer agent receives compensation from the fund for the distribution of securities and will not be able to monitor compliance with this condition.

C. Proposed Rule 776 – Exemption for Transactions for Certain Investors in Money Market Funds

- We recommend that Proposed Rule 776(a) be revised to add short-term bond funds and short-term U.S. Treasury funds to the list of securities in which a bank may effect transactions.

- We further recommend that Proposed Rule 776(a)(1)(i) be expanded to include "accredited investors;" as that term is defined in Regulation D under the Securities Act of 1933. "Accredited investor" provides sufficient safeguards for investor protection. By expanding the proposal in this manner, the Commission would reduce the level of disruption to bank customers.

Bank of America again expresses its appreciation for the diligent efforts of the Commission and Staff, and for the opportunity to comment. We encourage the Commission and its staff to continue working with the banking industry and its regulators to finalize rules that are consistent with both the letter and intent of GLB.

Please contact the undersigned at (704) 388-6724 should you have any questions or require additional information regarding our comments.

Sincerely,

John H. Huffstutler

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Associate General Counsel