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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

Dear Sir:

Comerica Bank thanks you for the opportunity to comment on the Commission's proposed Regulation B. Comerica Bank is a full-service bank that owns Comerica Securities, Inc., a registered broker-dealer. As a full service bank, Comerica Bank has entered into an arrangement with Comerica Securities, Inc. under which the latter offers brokerage services to customers of the bank; the bank itself offers personal and institutional trust services, including custodial services and employee benefit plan services; and the bank provides its deposit customers sweep accounts. Accordingly, the bank and its employees would be directly affected by adoption of the proposed regulation.

As of June 30, 2004, Comerica Bank held total assets of more than $59 billion; it operates full-service branch offices in Michigan, California, Texas, and Florida.

We very much appreciate the opportunity to comment on the proposal.

NETWORKING EXCEPTION

The underlying statute expressly restricts the amount of incentive compensation that bank employees may receive "for any brokerage transaction". The proposed regulation would cap referral fees at a level we believe reasonable.

Bonus Programs

However, the proposal, in proposed Section 242.710 (b)(3)(iii), goes substantially beyond the payment of per transaction referral fees and would regulate bank bonus programs. That section includes within the definition of permitted payments "to the extent any portion of

the fee is paid other than in cash" payments under certain incentive programs. Many readers construe that as applying to bank-wide bonus programs as indeed does the Commission's narrative in the Notice of Proposed Rulemaking, yet payments under such programs are in cash and, thus, would appear not to be covered. The Commission's intent should be clarified in the regulation itself.

To the extent that it is the Commission's intent to cover such bonus programs, that would appear to go substantially beyond the literal language of the statute. The proposed regulation would cap, per referral, payments under such programs essentially at the greater of an employee's hourly pay or twenty five dollars. What is unclear is how this applies to bonus programs that do not take into account referrals, but rather compensate a banking organization's employees based on the profitability of the overall organization including that of a subsidiary broker-dealer to which some employees may or may not have made referrals. If an employee has made a referral, is his or her bonus to be somehow adjusted to ensure that the portion of the bonus attributable to the broker-dealer's results do not exceed nominal compensation per referral? Is an employee who has made no referrals not to receive any portion of a bonus attributable to the affiliated broker-dealer's performance? We and others have tried to construe the proposed regulation and apply it to these questions and come up with our own answers, but the Commission needs to clarify this expressly in the regulation if it is to apply to bank bonus programs.

TRUST AND FIDUCIARY ACTIVITIES EXCEPTION

"Chiefly Compensated"

The statute expressly provides that "activities" are exempt where the bank effects transactions in a trustee capacity or effects transactions in a fiduciary capacity in its trust department and is "chiefly compensated ... on the basis of" three (3) types of fees. Until the Commission issued the predecessor to this proposal, the conventional reading of that language suggested that a bank would need to perform a bank-wide analysis of its fees for these types of activities and ensure that more than 50% of the fees it received annually were of the three (3) types. We believe that the legislative history of the statute supports that construction, and we believe that case law supports the construction that, when the term "chiefly"is used in any statutory context, it requires a computation using two numbers resulting in a fraction greater than 50%.

However, the Commission, instead, has proposed that an extraordinarily expensive and impractical account-by-account analysis be undertaken and, if, in the case of any single account, the computation ever shows a preponderance of unfavored compensation, the exemption is inapplicable and the bank must register as a broker. To overcome the impracticability of such an analysis, the Commission has proposed a ten percent (10%) bank-wide (or line of business) test, in effect reading out of the statute the words "chiefly compensated" and the 50% test those words require, effectively reducing a 50% test to 10%.

"Unrelated Compensation"

The Commission has departed from the statutory language that provides the trust and fiduciary exception even further, introducing the concept of "unrelated compensation" that is to be subtracted from the denominator before any computation is performed, thus increasing the ratio that any bank would compute. The statute does not mention "unrelated compensation" and provides no suggestion that any compensation to the bank for performing its trust and fiduciary activities may not be considered when performing the "chiefly compensated" computation. Again, the Commission has departed from the plain language of the statute to reduce the scope of this exemption. The statute uses the term "chiefly compensated", not "chiefly compensated for securities activities".

Further, in broadly defining "unrelated compensation", the Commission has excluded from the computation legitimate ordinary fees that bank trust departments normally receive and indeed in a number of cases may be the prescribed form of compensation dictated by state law or by probate courts. Such fees include fees received for estate administration, fees for preparing estate tax filings, fees for preparing fiduciary tax filings, and fees for preparing income tax filings, as well as fees a trustee may properly charge for considering excessive numbers of requests for discretionary distributions and even fees for arranging home health care. These are perfectly legitimate fees charged by bank trustees in the ordinary course of their business for activities that are intrinsic to their administrative duties as a trustee or fiduciary. Yet, the proposed regulation deems them "unrelated" and excludable from the denominator in the computation of "chiefly compensated". These are not unrelated to serving as a trustee and fiduciary, and we are, of course, discussing the exemption for "trust and fiduciary activities".

Grandfathered Living, Testamentary, and Charitable Trust Account Exemption

We are appreciative that the Commission has proposed Section 242.720 which would exempt living, testamentary, and charitable trust accounts held as of July 30, 2004 from the "chiefly compensated" requirement. While the proposed rule would provide welcome relief for many existing accounts for which banks perform trust and fiduciary services, we believe that the proposed rule inadvertently may have omitted other types of similar accounts that

should be grandfathered, particularly estates, conservatorships, and guardianships. We respectfully requests that this proposed exemption be expanded to grandfather estates, conservatorships, and guardianships established before July 30, 2004.

Definition of "Investment Advisor"

One additional aspect of that portion of the proposed regulation that would implement the trust and fiduciary exemption that causes us considerable concern is the limited definition of the term "investment advisor if the bank receives a fee for its investment advice" in proposed Section 242.724(d). That term, in turn, is used to define, in part, the term "fiduciary capacity" in Section 3(a)(4)(D) of the statute. Section 3(a)(4)(D) defines "fiduciary capacity" to mean "in the capacity of a trustee ... or as an investment adviser if the bank receives a fee for its investment advice". Again, respectfully, it appears that the Commission has gone beyond the plain meaning of the statute to limit the scope of an exemption. The plain meaning of the statute is that an investment adviser receiving a fee for investment advice is acting in a fiduciary capacity for purposes of the statutory exemption. However, Section 242.724(d)(2) limits the exemption to those investment advisors having a responsibility to give advice "including selecting or making recommendations regarding specific securities". The purpose of the imposition of such a limitation is not apparent. The limitation to advice regarding specific securities disregards the fact that many advisers are paid for advice concerning asset allocation or on market trends or even to recommend or manage other investment advisers. It also disregards the fact that many advisers, while retaining overall investment responsibility for an account, may delegate to sub-advisors who then advise on specific securities. It also seems to start from the premise that providing investment advice makes one a broker unless the advice is as to specific securities, which seems unfounded.

Even more confusing is the prospect that a bank might be deemed a fiduciary under the Office of the Comptroller of the Currency's fiduciary activity regulation, Regulation 9 (12 CFR 9) and state prudent investor laws, but not under Section 3(a)(4)(D).

Proposed Section 242.724(d)(2) also directly contradicts two fundamental principles in the Uniform Prudent Investor Act which has been enacted in 42 states and governs investment standards for fiduciaries, those of total portfolio theory and of delegation. An expressly stated purpose of the Uniform Prudent Investor Act is that a "fiduciary's performance is [to be] measured on the performance of the whole portfolio, not upon the performance of each investment singly". Proposed Section 242.724(d)(2)'s requirement that responsibility be for advice that must include selecting or recommending specific securities would seem to subvert that purpose of Uniform Prudent Investor Act and would provide that a firm that gives only general portfolio advice could not be deemed a "fiduciary". Another of the stated purposes of the Uniform Prudent Investor Act expressly states that the act "allows the fiduciary to delegate investment decisions to qualified and supervised agents".

Under proposed Section 242.724(d)(2), a fiduciary who delegates and therefore does not make recommendations as to specific securities, as expressly permitted by the Uniform Prudent Investor Act, would cease to be acting in a fiduciary capacity as it would not be responsible for giving advice.

Line of Business

We very much appreciate the Commission's interest in providing the flexibility that would be afforded by permitting the "chiefly compensated" test to be applied on a line of business basis. However, we are concerned about the lack of clarity in the definition for what may constitute a line of business for this purpose. The proposed regulation seems to require that each line of business have "similar accounts" and hold them in a "similar capacity". However, what is specifically meant is not clear. For example, may there be a separate geographically-based line of business? May fully managed accounts in which the bank acts in various fiduciary capacities, such as trustee, personal representative, executor, guardian, or conservator, be deemed one line of business? Is there sufficient similarity between directed trustee accounts and fully managed trusteed accounts for them to be combined in a single line of business? May accounts in which the bank acts as trustee be grouped with accounts in which the bank acts as investment advisor? There are many possible lines of business that today may constitute an "identifiable department, unit, or division of a bank organized and operated on an ongoing basis for business reasons", but that may or may not be considered "similar accounts" in which the bank is acting in a "similar capacity" in the absence of further definition.

In any event, we are concerned that the effect of requiring that lines of business be organized by account type and account capacity may be for the Commission to govern how banks structure their activities, when banks should be free to manage their activities and structure them in any way that is lawful and maximizes performance in the judgment of its management which, after all is ultimately responsible for the bank's performance to both shareholders and regulators.

Accordingly, we respectfully request that the Commission decline adoption of the requirement that a line of business be organized by "similar types of accounts and for which the bank acts in a similar capacity".

Another question raised by line of business is whether a line of business may cross legal entities. The Commission in its 1934 Act reporting by line of business requires that be done. In modern corporations, affiliated legal entities are often managed as a single business unit, sometimes using dual employees or contractual servicing arrangements. The trust regulation applicable to national banks (12 CFR 9) recognizes these types of arrangements and takes them into account. These types of business management increase efficiency, and we hope that the Commission, when it finalizes Regulation B, will recognize as lines of

business those that cross legal entities and not impede the banking industry's efforts at maximizing efficiency.

SWEEP EXEMPTION

Relationship to Other Exemptions

We would request some clarification of the proposed sweep exemption as to how it relates to other exemptions, particularly the trust and fiduciary exemption and custody exemption. We believe that, consistent with the statute and the proposed regulation, a bank trust department may sweep deposit accounts into securities beyond those issued by no-load money market mutual funds without losing its exemption where such an activity falls under the trust and fiduciary exemption. Similarly, we believe that the bank's custody department may sweep deposits into securities other than no-load money market mutual funds without making the bank a broker because the custody exemption would apply. It would be helpful if the final regulation would clarify that.

Non-automated Sweeps

The statute expressly exempts the activity of a bank "effecting transactions as part of a program for the investment of funds" into no-load money market funds. The notice of proposed rulemaking specifically invites comment on the Commission's interpretation that the word "program" connotes regular automatic sweeps and invites comment on that interpretation. We respectfully disagree. We believe the word "program" is merely the noun used by the drafter to refer to the service of sweeping all of the funds out of a deposit account and investing those funds into an earning asset and that there is no evidence of intent to exclude from the exemption customer-directed or bank-directed transfers of all funds in an account on an ad hoc basis.

Sweeps became necessary as brokers began competing for deposit balances with banks that are subject to federal laws prohibiting the payment of interest on demand deposit accounts. Brokers were not and are not subject to similar restrictions and were able to pay interest on transaction accounts they offered, and banks devised sweeps as a mechanism to compete with brokers for such accounts by providing a mechanism by which bank depositors could earn a return on funds. As bank customers strive for a return on their deposited funds, they need to be free to manage their funds and direct their banks to sweep funds out of their accounts and into investments that yield a return. The statute now limits such sweeps to no-load money market funds. If the Commission limits the sweep exemption to regular automatic sweeps, customers would be deprived altogether of the ability they need to direct that sweeps be done even into no-load money market mutual funds.

Similarly, banks as fiduciaries sometimes need to sweep customer funds they receive in order to maximize the customer's return on otherwise idle cash. If the Commission's final regulation limits the sweep exemption to regular automatic sweeps, a bank striving to meet its fiduciary duty to invest idle cash by sweeping it into a no-load money market mutual fund would be precluded from doing so.

This is an important service that banks offer customers, and we understand that the intent of the statute was to preserve traditional banking services that banks have historically provided. This is one of those services. Indeed, we would suggest that, were the Commission to persist in the interpretation that the sweep exemption is limited to regular automatic sweeps, the effect would be to stop banks from providing this service altogether and thus to deprive the public of this service altogether. The provision of sweeps out of deposit accounts is an activity that cannot be "pushed out" of banks into affiliated broker-dealers because broker-dealers cannot lawfully take deposits.

Competitive Inequality

The definition of "no load" as limited to 25 basis points, including 12b-1 fees, as proposed, would only apply to banks and would not apply to brokers who will continue to be able to sweep idle customer balances into whatever investment vehicles they choose without limitation as to load or compensation, thus putting banks at an unfair competitive disadvantage. That will be the case even though brokers do no more than banks do in the case of such sweeps. While a simplistic defense of that apparent unfairness is that brokers are subject to regulation as brokers, while banks are not, it is not at all clear that broker regulation brings anything that makes broker sweeps more valuable or safer or conveys greater customer protection than bank sweeps. This argues for the Commission to adopt a less limited definition of "no load", permitting banks to receive the same 12b-1 fees that brokers may receive.

CUSTODY EXEMPTION

Order-taking

Again, we believe that the proposed regulation disregards the clear literal plain meaning of the statutory exemption in this case. The proposed regulation limits order-taking by custodians to orders from qualified investors and pre-existing customers. Thus, if the proposal were to be adopted as drafted, a bank custodian would not be able lawfully to take orders from many custody customers even without compensation. There appears to be no basis for such a limitation in the statute. Following the orders of the custody customer is intrinsic to the business of serving as a custodian and, if that customer directs the custodian to liquidate securities that are an asset held in custody, the traditional duty of the custodian is to do so.

The Commission may be reading the statutory custody exemption, which applies to "safekeeping and custody activities", too narrowly because there may not be a full understanding that there is a difference between safekeeping and custody, but rather may believe that the two terms, "safekeeping" and "custody", are synonymous. That is not the case. Clearly, safekeeping contemplates the mere holding of an asset. However, the Commission appears to believe that custody activities are the same. That is not true, and that is why the statute uses both terms. Custody contemplates more than safekeeping. It contemplates executing transactions at the request of the customer. If a custody customer directs the custodian to sell securities, the custodian, if the securities are publicly held, will not sell the securities itself; it will relay the sales order on to a registered broker. That should not be enough to make the custodian a "broker", any more than the telephone company or the Internet is a "broker" for relaying an order.

If the Commission adopts a final regulation that treats custody as safekeeping and prohibits general order-taking by custodians, banks will have little choice but to stop serving as custodians for many customers. Again, this would be in light of a statute that was intended to preserve the banking business as it existed when the statute was adopted.

Further, if banks cease to serve as custodians for securities, it would eliminate a substantial source of competition for brokers that serve as custodians. Without the pressures of that competition, such brokers would be free to increase prices and reduce service, all to the disadvantage of consumers of custodial services. Worse yet, if banks cease to serve as custodians for securities, they are not likely to continue to serve also as custodians of other types of property, such as real estate and restricted securities, and, since banks currently are the sole source of custodial services for such property, their departure from custodial markets would leave consumers of custodial services for such other types of property with no source of such services.

The Commission has proposed a definition of "account for which the bank acts as a custodian" that expressly reflects that it is customary for banks to take orders under such accounts. Proposed Section 242.762 (a)(1)(iii) expressly requires that, to qualify as a custodial account, the account agreement must obligate the bank to, among other things, engage in "investing cash balances as directed". That reflects a realistic understanding of the custody business; the proposed general prohibition of order-taking for custody customers does not.

EMPLOYEE BENEFIT PLANS

Offsets

The proposed regulation, Section 242.770(a)(1), limits an exemption for serving as trustee or custodian of employee benefit plans to those invested in open-end companies and only permits the offering of participant-directed brokerage accounts where the bank offsets any compensation it receives from a fund complex against fees and expenses the plan owes the bank. We suspect that the Commission would have no objection to those cases where, instead of an offset, the bank simply reduces its fees chargeable to the plan because the functional effect would be the same. It would be helpful if the Commission would clarify that.

We also presume that the Commission would have no objection where a bank did the offset or fee reduction globally instead of plan-by-plan, and we urge you to clarify that also would be permissible.

Thank you for this opportunity to express our views.

Best wishes,

Julius L. Loeser
Chief Regulatory Counsel

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