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By Electronic Mail

Mr. 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

Dear Mr. Katz,

Shaw Pittman appreciates the opportunity to present the views of an FDIC-insured depository trust company client relating to the Securities and Exchange Commission's (the "Commission's") proposed Regulation B regarding specific exemptions for banks from the definition of the term "broker" under Section 3(a)(4) of the Securities Exchange Act of 1934 (the "Act").

We appreciate the Commission's efforts to meet with the banking industry to understand their traditional banking and securities activities. However, we continue to have concerns with respect to certain aspects of the Commission's interpretation of the statutory exceptions and the proposed regulatory exemptions.

Because a complete discussion of these concerns would necessarily involve confidential and proprietary information relating to our client's current business and strategic plans, those concerns are addressed here in summary. We appreciate the Commission's willingness to meet with us in order to develop a more complete understanding of our concerns.

Our comments focus on provisions under proposed Regulation B relating to certain aspects of the employee benefit plan exemption, the safekeeping and custody activities exception, and the trust and fiduciary activities exception, as well as the requirements of Section 3(a)(4)(C) of the Act. Finally, we are concerned about the length of time in which members of the banking industry would be required to come into compliance with the provisions of any final rule adopted by the Commission.

1. THE EMPLOYEE BENEFIT PLAN EXEMPTION

Proposed Rule 770 would permit a bank acting as a trustee or a non-fiduciary administrator for certain employee benefit plans to effect transactions in securities of open-end investment companies for participants in those plans without the bank being required to register as a broker-dealer. We support the creation of an exemption related to employee benefit plans, as banks service large numbers of employee benefit plan accounts that would otherwise be disrupted without the proposed exemption. However, the exemption as proposed contains conditions that do not reflect the reality of today's marketplace and would serve to undermine banks' ability to rely on the exemption.

Permissible Investments. Proposed Rule 770 is limited to banks acting as trustee or administrator for employee benefit plans that invest only in shares issued by open-end investment companies. However, the reality of the modern marketplace is that plan fiduciaries must consider, and plan participants often demand, other types of investments for inclusion as plan options. Many employee benefit plans today include investments other than mutual funds, such as stable-value products, publicly traded stocks and bonds, limited partnerships, real estate investment trusts and collective investment funds. Plan fiduciaries and participants should not be constrained to investing in just one type of investment but should have the flexibility to choose among various types of investments to maximize the value to participants of their employee benefit plan accounts. Accordingly, proposed Rule 770 should be expanded to include a bank's activities with respect to employee benefit plans that invest in a broader range of securities. In this regard, it is important to note that Section 3(a)(4)(C) requires that any transaction in a publicly traded security be directed to a registered broker-dealer for execution or executed in an agency cross transaction. Thus, investors would continue to receive the protections provided under 3(a)(4)(C) with respect to execution of transactions in any publicly traded securities.

Offset. Proposed Rule 770 also requires that, in order to rely on the exemption, a bank must offset or credit any compensation that it receives from a mutual fund complex related to securities in which plan assets are invested (*e.g.*, mutual fund shareholder servicing fees) against fees and expenses that the plan owes to the bank. This requirement is more stringent than that provided for under the Employee Retirement Income Security Act of 1974 ("ERISA"), which may not require a direct offset, depending upon the bank's role. This difference between the Commission's proposed requirement and longstanding ERISA requirements and Department of Labor precedent is likely to create confusion and uncertainty in the marketplace. Further, proposed Regulation B appears to require a one-to-one ratio between fees collected for fund servicing and plan fees owed to a bank, which does not reflect plan sponsors' need for flexible pricing options. Banks are able to provide such flexibility to plans based on a variety of factors, including, but certainly not limited to, whether the funds selected by the plan sponsor may pay a servicing fee to the bank trustee or administrator. For example, a plan sponsor may select a fee schedule whereby the plan pays the bank its customary fees for the bank's trustee or administrator services. Alternatively, a plan sponsor may elect to invest plan assets in funds that pay the bank servicing fees (with all such fees fully disclosed to the plan sponsor), and the plan would have access to a fee schedule that provides for lower explicit fees to be paid to the bank, rather than effecting a one-to-one offset of fees that the bank receives from funds. This practice provides the trustee or administrator with a marketable "menu" of pricing options, while providing the plan sponsor with the flexibility required to meet its duties to the plan. Proposed Rule 770 should permit this flexibility by allowing trustees and administrators to offer services to plans in accordance with ERISA and relevant Department of Labor (or, in the case of non-qualified plans, Internal Revenue Service) precedent, rather than establishing a separate, additional and less flexible one-to-one offset requirement.

Qualified Plans. Finally, the application of Proposed Rule 770 is limited to plans that are qualified under section 401(a) or described in sections 403(b) or 457 of the Internal Revenue Code of 1986 (the "IRC") for which a bank acts as a trustee or a non-fiduciary administrator. In fact, many banks act as trustee or administrator for other types of tax-advantaged retirement accounts, such as Rabbi trusts, deferred compensation plans, and individual retirement accounts ("IRAs"). These types of tax-advantaged accounts are subject to a regulatory regime under the IRC or state law substantially similar to that to which qualified-plans are subject under ERISA. Banks offer the same types of services to all of these tax-advantaged accounts, often in the same departments and serviced by the same employees, and there does not appear to be a good business or regulatory reason to distinguish between the types of tax-advantaged employee benefit and retirement accounts or to segregate the lines of business. Proposed Rule 770 should be expanded to include such accounts.

2. THE SAFEKEEPING AND CUSTODY ACTIVITIES EXEMPTION

Section 3(a)(4)(B)(viii) provides an exemption from the definition of broker to the extent a bank engages in certain activities in connection with its safekeeping and custody business. The Commission has interpreted this provision of the Act to exclude a bank's order-taking services that may be offered in connection with its custodial accounts. Rather, the Commission has proposed Rule 760 to permit a bank to accept orders to effect securities transactions for custodial accounts that qualify under the exemption, so long as certain conditions are met.

While we support the Commission's proposed exemption to permit banks to receive certain types of compensation with respect to their safekeeping and custody activities, we are concerned with a number of conditions contained in proposed Rule 760. As written, the exemption is available for certain "grandfathered" custody accounts and accounts held for "qualified investors." Although this would permit banks to continue servicing their existing accounts, each of these conditions would make it nearly impossible for a bank to maintain or grow existing lines of business while complying with proposed Regulation B.

Grandfathered Accounts. Exempting grandfathered accounts (defined as accounts opened before July 30, 2004) does not adequately address banks' needs with respect to their existing business. Each bank, as a business, clearly needs to be able to open new accounts within its existing lines of business in order to be financially successful and to adequately serve existing customers. Allowing this exemption only for grandfathered accounts would not appear to permit a bank to open a new account at the request of an existing customer without losing the benefit of the exemption. In the case of existing relationships with investment advisers and other financial intermediaries, it would also not allow a bank to open a new account for a new advisory client of the financial intermediary at that intermediary's request without losing the benefit of the exemption. In effect, this rule would doom existing business lines to become shrinking pools of accounts (due to death of account owners, distributions, transfers, etc.), while preventing the opening of new accounts to replace those lost, much less allowing for growth.

Qualified Investors. With respect to the exemption for accounts for "qualified investors," (the definition of which includes most institutional investors, any corporation or natural person that owns and invests on a discretionary basis at least $25 million in investments, or any government or political subdivision, agency, or instrumentality that owns and invests on a discretionary basis at least $50 million in investments), our client expects that few new customers will meet the Commission's definition of a "qualified investor," and so this exemption provides no meaningful relief.

Mutual Exclusivity. We are also concerned that certain provisions of the safekeeping and custody activities exemption are mutually exclusive with respect to other exemptions. For example, a bank would not be able to rely on the custody exemption with respect to any employee benefit plan account for which it acts as custodian, because the safekeeping and custody activities exemption as written does not apply to banks' activities with respect to employee benefit accounts. This presents an impossibility when, for example, the bank acts as custodian for an employee benefit plan (for which the safekeeping and custody activities exemption would not be available), but the employee benefit plan invests in other than registered open-end investment companies (and so the employee benefit plan exemption is not available). A bank also could not rely on the custody exemption with respect to accounts for which the bank acts in a trustee or fiduciary capacity and may not be able to rely on the trust and fiduciary exemption due to the way in which the customer chooses to compensate the bank (*e.g.*, if the customer chooses for the bank to be compensated by fees paid from a fund's 12b-1 plan, rather than with advisory fees paid directly by the customer). We urge the Commission to carefully review the mutually exclusive provisions of each exemption and to reconcile those provisions to the greatest extent possible.

3. THE TRUST AND FIDUCIARY ACTIVITIES EXEMPTION

Section 3(a)(4)(B)(ii) of the Act provides an exemption from the definition of "broker" to the extent a bank effects transactions in a trustee or fiduciary capacity in a department regularly examined by bank examiners for compliance with fiduciary principles and standards, is chiefly compensated for such transactions by qualifying relationship compensation, and does not publicly solicit brokerage business outside of the trust context. We appreciate the Commission's efforts to provide interpretive guidance regarding this exemption, but there are a number of areas in which the guidance could be simplified or amended.

Fiduciary Capacity. We generally support the Commission's withdrawal of the earlier definition of "trustee capacity" from the trust and fiduciary exemption and the adoption of a broader range of fiduciary roles. However, the Commission should further expand the definition of "fiduciary capacity" to include a bank acting as a custodian for IRAs and other retirement plans. In support of this conclusion, we note that there is no difference in treatment under the IRC for a bank acting in the role of trustee or in the role of custodian for an IRA.

Line of Business. We also support the Commission's proposal to permit calculation of the "chiefly compensated" standard along business lines. However, we are concerned that the complexity of putting systems and controls in place to calculate and monitor the levels of the different types of compensation has been under-estimated by the Commission. In fact, our client is still in the process of reviewing its various fee schedules to assess how each of its fees would be characterized under proposed Regulation B and the impact on the proposed ratios. It is clear that substantial time and effort will be required to build systems and processes for "coding" a wide variety of sources of income according to the Commission's definition of sales, relationship, or unrelated compensation. Banks will also be required to build systems and processes to capture data regarding each type of income to ensure that they are operating within the

Commission's specified ratios. As a practical matter, banks will have to capture certain data on an account-by-account basis whether they seek to qualify for an exemption on a per-account basis or on a business-line basis simply because different customers may be charged different amounts of fees that are characterized differently.

Safe Harbors. While we support the creation of proposed safe harbors within the trust and fiduciary activities exemption (particularly in light of the complexity of the proposed chiefly compensated calculation), we are concerned about the extremely limited scope of those safe harbors. For example, two of the safe harbors can be relied upon only once every five years, while the other safe harbor can be relied upon only with respect to a small number of accounts. Banks will not have the luxury of waiting until the end of each year to measure income levels to determine whether they are in compliance with the rule or a safe harbor, but instead will have to engage in continuous monitoring of compensation levels to prevent inadvertent violations that exceed the safe harbors.

Fee Schedule Changes. In addition to the complexities of monitoring compensation levels, we are concerned that any change to a bank's fee schedule (whether initiated by a bank or a customer) would necessitate a specific review of the new fee to categorize it under the exemption as well as an adjustment and recalculation of compensation levels. This forces banks to anticipate the SEC's characterization of fees that are not specifically addressed in proposed Regulation B and project the effect of any fee schedule change to make sure that the change would not put them outside the acceptable levels of compensation for the exemption. Fee schedule changes and innovations should be accommodative of business and customer demands and, to the greatest extent possible, should not be guided by the fear of running afoul of regulatory requirements.

4. THE REQUIREMENTS OF SECTION 3(A)(4)(C)

Section 3(a)(4)(C) generally requires a bank to execute all transactions in publicly traded securities through a registered broker-dealer.

Mutual Fund Transfer Agent. Proposed Rule 775 would create an exemption to that requirement for mutual fund transactions executed with the fund's transfer agent or the National Securities Clearing Corporation. We strongly support the Commission's proposed exemption to permit banks to comply with Section 3(a)(4)(C) in this manner with respect to mutual funds.

Securities Transfer Agent. The Commission should expand this exemption to permit banks to comply with Section 3(a)(4)(C) with respect to other publicly traded securities by executing securities transactions with the issuer's transfer agent or other agent. Banks may offer services to investors with respect to investment programs, *e.g.*, dividend reinvestment programs, in which the bank transmits instructions directly to an issuer's transfer agent or other agent. (Because the bank has not been asked to represent the issuer and act as a transfer agent, the statutory exception set forth in Section 3(a)(4)(B)(iv) of the Act would not be available.) Because transfer agents with respect to securities are regulated as carefully as transfer agents with respect to mutual funds, there would not appear to be any fewer investor protections afforded if Proposed Rule 775 were to also permit banks to effect purchases and sales of securities through the issuer's transfer agent.

5. TIMING

We are concerned that the complexity of proposed Regulation B is not reflected in the length of time in which it is proposed that members of the banking industry come into compliance with the provisions of any final rule adopted by the Commission. There is no question that the proposal is very complicated, and that its implementation will require many banks to significantly restructure or transfer certain aspects of their business. Before they are able to decide on an appropriate course of action, each bank must identify its needs with respect to each line of business and evaluate multiple strategies for coming into compliance with the terms of any final rule. Some banks may be required to register as a broker-dealer, in which case they would need to bring their systems and processes into compliance with rules of the Commission and of the National Association of Securities Dealers, Inc. (the "NASD"). Some banks may need to acquire or affiliate with a broker-dealer, in which case they would be required to undergo thorough due diligence with respect to the broker-dealer (as well as upgrading their own systems and processes) and obtain NASD approval. Some banks may be required to transfer certain aspects of their business to a broker-dealer, which would also require due diligence as well as substantial re-working of systems and processes.

Proposed Rule 781 provides that banks would be required to comply with final rules by January 1, 2006. We believe that it could take as long as three years to fully evaluate the requirements of any final rule, to thoroughly review existing business lines in light of those requirements, and to identify, evaluate, select and implement the sweeping changes necessary to come into compliance. For this reason, we respectfully request that the Commission adopt a compliance date of January 1, 2008.

6. CONCLUSION

We appreciate the Commission's attention to these comments and respect the Commission's request for detailed data in an effort to effectively address our concerns with respect to proposed Regulation B. We are willing to meet with Commission staff to provide appropriate details in support of our concerns, and we look forward to doing so in the near future.

Please contact Cecelia Calaby (202.663.8984) or me (202.663.8296) if you would like further information.

Sincerely,

Lisa Byington