August 31, 2004

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549-0609

Re: Release No. 34-49879 (File No. S7-26-04): Regulation B

Ladies and Gentlemen:

SEI Private Trust Company ("SPTC"), a federal savings association chartered and supervised by the Office of Thrift Supervision ("OTS"), hereby submits the following comments to the Securities and Exchange Commission ("SEC") in connection with the SEC's proposed Regulation B ("Regulation B"), which among other things interprets the terms of the bank exceptions from the definition of "broker" under Section 3(a)(4) of the Securities Exchange Act of 1934, as amended ("Exchange Act").[1] These Exchange Act exceptions were codified through the enactment of the Gramm-Leach-Bliley Act of 1999 ("GLBA").

This comment letter will discuss the following issues of critical importance to SPTC and other similarly situated federal savings associations raised by Regulation B: (i) Rule 760 – Exemption from the definition of "broker" for banks effecting transactions in securities in a custody account ("Rule 760" or the "Custody Exemption"); (ii) Rule 770 – Exemption from the definition of "broker" for banks effecting transactions in securities in certain employee benefit plans ("Rule 770" or the "EB Exemption"); (iii) Rule 771 – Exemption from the definitions of "broker" and "dealer" for banks effecting transactions in securities issued pursuant to Regulation S ("Rule 771" or the "Regulation S Exemption"); and (iv) the meaning of "carrying broker" as used in the networking and custody exceptions of GLBA and the Custody Exemption under proposed Regulation B. (Rule 760, Rule 770, and Rule 771 hereinafter collectively referred to as the "Rules" or "Exemptions".)

Regarding these issues, SPTC requests that the SEC consider for incorporation and adoption the following revisions to Regulation B: (i) amend Rule 760, Rule 770, and Rule 771, respectively, to permit savings associations to rely on these Exemptions to the same extent that they may be relied upon by banks; (ii) amend Rule 760 to permit order-taking by banks and thrifts from any customer who qualifies as an "accredited investor" or who is regularly advised by a registered investment adviser or accredited investor; (iii) delete from Rule 760 the condition that a bank offer to customers securities transactions in mutual funds of a particular class or series on the same terms as any other class or series of such mutual fund; and (iv) defer the promulgation of any rule that defines the term "carrying broker" to a separate rulemaking procedure, in order to allow interested and affected parties to comment on any such proposed rule.

I. **Background**.

A. Organizational Structure of SPTC.

[1] See 15 U.S.C.A. § 78c(3)(a)(4) (West 1997 & Supp. 2004).

SPTC is a federal stock association and is chartered as a federal savings association limited to the exercise of trust and related powers; i.e., SPTC neither takes nor retains deposits (other than a single deposit of $500,000 – belonging to its parent company – to fulfill the requirement for federal deposit insurance), nor does SPTC use any of its funds to make loans. SPTC received its charter from the OTS effective January 2, 2001. As a limited-purpose federal savings association, SPTC acts as trustee (with and without investment discretion), administrator, and/or custodian for its customers.

SPTC is organized into three operational sectors: (i) the "Middle Office"; (ii) the "Back Office"; and (iii) "Client Reporting." Each of these sectors is described below as follows:

The Middle Office provides administrative, custody, and servicing support to a variety of clients, including registered investment advisers, banks, trust companies, corporate investors, registered and unregistered funds, hedge funds and hedge "fund of funds," foundations, and endowments (collectively, "Institutional Clients") as well as to individuals advised by persons who are either registered investment advisers or advisers exempt from registration ("Retail Clients"). (Institutional Clients and Retail Clients hereinafter referred to individually as "Client" and collectively as "Clients".) Types of accounts administered by SPTC through the Middle Office include personal trusts, charitable trusts, individual retirement accounts ("IRAs"), retirement plans, and custody accounts. The Middle Office's primary responsibilities include: (i) handling asset transfers from other custodians, (ii) processing securities and other account transactions (including the opening and closing of accounts), (iii) posting cash receipts, (iv) processing disbursements, trades, monetary changes, and fees, and (v) performing maintenance transactions (such as rebalancing and reallocation).

The Back Office serves as a central "processing utility" for the processing of transactions on behalf of financial institutions (e.g., banks, trust companies, credit unions) that are users of SPTC's services. The Back Office offers outsourcing services for clients which provide an integrated solution for outsourcing custody, securities-related processing operations, investment accounting, trust operations, performance reporting, and investment programs. The Back Office's operations are organized along functional lines. Primary processing areas include: (i) cash processing; (ii) securities-related processing, (iii) mutual fund-related processing, (iv) payment services, (v) reconciliations, (vi) fee processing, and (vii) mineral interest accounting. Back Office is a fully integrated operation that combines a proprietary technology system with SPTC's operational services.

The Client Reporting group handles tax preparation and tax, performance, and employee benefit reporting which is offered as an option for Middle and Back Office clients of SPTC.

B. Description of SEI's Custody Business.

The majority of SPTC's activities are centered on the provision of custody services, which SPTC has performed since its inception. SPTC acts as custodian or sub-custodian for Institutional and Retail Clients nationwide. As such, SPTC takes custody of securities, including but not limited to: (i) Depository Trust & Clearing Corporation-eligible municipal, corporate, and asset-backed bonds and equities, (ii) securities issued by the U.S. Treasury or by U.S. Government agencies or instrumentalities, (iii) mortgage pools, and (iv) international securities that are either American Depository Receipts or settled through Euroclear. The bulk of the assets under SPTC's custody thus consist of cash and readily marketable securities. SPTC generally does not hold real estate or personal property in its capacity as custodian.

Generally, SPTC's custody services include: (i) safekeeping; (ii) clearing-related functions; (iii) receipt, delivery, and/or disposal of securities; (iv) income collection and/or payment; (v) collection of paydowns on mortgage-backed assets; (vi) processing purchases and sales of the assets in accordance with client instructions and the collection of the proceeds of assets which are sold, redeemed, or which have matured; (vii) voting, forwarding, or otherwise handling proxies and other shareholder communications in accordance with client instructions; and (viii) providing other services customarily performed by custodians, provided that such activity is permitted under applicable federal banking laws and OTS regulations, and is approved by the SPTC board of directors. These activities are substantially the same as those custody and custody-related activities performed by banks and (as explained infra) are subject to the same regulatory requirements and oversight as those applicable to banks.

C. Impact of Regulation B on SPTC's Custody Business.

SPTC's custody business is substantial and a primary source of revenue for SPTC. As of March 31, 2004, SPTC administered over $120 billion in custody assets for both Institutional and Retail Clients, involving in excess of 225,000 accounts. This business would be materially and adversely impacted, however, if Regulation B were adopted as proposed. In particular, the inability for SPTC to rely on Rules 760, 770, and 771: (i) could compel SPTC to relinquish virtually all its custody accounts since such accounts typically rely on SPTC to receive and process orders for securities transactions; (ii) could almost entirely curtail SPTC's ability to receive new custody accounts since SPTC would be unable to accommodate customers' requests to receive orders for securities transactions, and (iii) could put SPTC at a competitive disadvantage with respect to banks and trust companies because, notwithstanding that it is subject to the same regulatory scheme and level of agency supervision, SPTC, unlike its bank and trust company competitors, would further be subject to the federal securities laws and SEC regulation. If Regulation B is adopted as proposed, SPTC would essentially be forced to choose between registration and regulation as a broker-dealer (which would involve significant operational costs and expenses) or divestiture of its custody business altogether. We therefore request that the SEC amend these Rules to permit savings associations to rely upon the exemptions afforded under them, as discussed below.

II. Extension of Exemptions to Savings Associations.

A. Custody Exemption.

The Custody Exemption is the SEC's response to the banking industry's concern that "order-taking," as interpreted by SEC staff, does not fall within the GLBA custody exception. The SEC has taken the position that "order-taking" (i.e., accepting orders from customers to purchase or sell securities) is "a core broker-dealer function and was not intended to be permitted under the [GLBA] custody exception."[2] SPTC continues to believe that order-taking, because it is a traditional activity in which bank custodians have engaged, was intended to be included as a permissible activity within the terms of the GLBA custody exception, and therefore, respectfully disagrees with the SEC's position that a bank custodian's acceptance of customer's orders per se triggers the registration provisions of the Exchange Act.[3] The SEC, however, has proposed the Custody Exemption which would allow banks to engage in order-taking involving eligible custody accounts under specified circumstances, without raising broker-dealer registration concerns under the Exchange Act.

The Custody Exemption as proposed, however, is not available to savings associations. The SEC explained in the Regulation B commentary that it was "unable to obtain sufficient information to determine whether thrifts directly engage in the types of securities activities covered by these proposed exemptions."[4] Nevertheless, the SEC

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[2] SEC Exchange Act Release No. 34-49879 (June 17, 2004).

[3] See Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 1999 U.S.C.C.A.N. 245, 258 (In repealing the broker exception applicable to banks, Congress "retained certain limited exemptions to facilitate certain activities in which banks have traditionally engaged. These exceptions relate to . . . safekeeping and custody services . . . . ").

[4] SEC Exchange Act Release No. 34-49879.

stated that it would solicit comment on whether thrifts engage in securities activities or transactions that would be covered by the Custody Exemption.[5]

At the outset, it should be noted that the SEC itself has recently acknowledged that savings associations provide custody services of the type contemplated by the Custody Exemption. In its commentary to the recently adopted amendments to the custody rule under the Investment Advisers Act of 1940, as amended ("Advisers Act"), the SEC specifically included savings associations as eligible to act as "qualified custodians" for funds and securities of investment advisers' clients, noting that savings associations are among those types of financial institutions that "clients and advisers customarily turn to for custodial services."[6] These amendments expressly contemplate that a qualified custodian would, at a minimum, be charged with safekeeping of the advisers' clients' securities and perform recordkeeping of client securities transactions occurring in the adviser's clients' accounts held by the savings association as qualified custodian.[7] Savings associations further are eligible to act as custodians for registered investment companies under Section 17(f) of the Investment Company Act of 1940, as amended.[8]

SPTC is among the banking industry's leading providers of custody services. As of March 31, 2004, SPTC administered over 225,000 accounts comprised of IRAs, defined contribution accounts, defined benefit accounts, and other retirement accounts. Collectively, these accounts are responsible for a significant portion of SPTC's annual revenue, including revenue derived from services related to the processing of securities transactions (e.g., securities movement and control fees). Although SPTC does not receive any appreciable revenue from order-taking and related activities, order-taking itself is an integral part of the "package" of custody and custody-related services that Clients expect institutions such as SPTC to offer, and without which a number of Clients would re-evaluate whether to remain with SPTC or look elsewhere to institutions that can offer such service.

SPTC is supervised and examined by the OTS with respect to its custody operations, including its securities-related activities arising out of such operations. As a federal savings association, SPTC is subject to essentially the same regulatory requirements and oversight applicable to national and state-chartered banks with which SPTC competes for custody business. In fact, the regulatory requirements specifically applicable to savings associations limited to trust and custody powers versus similarly situated banks are virtually identical in at least two respects: (i) Part 550 of the OTS' regulations, which govern a savings association's fiduciary activities, mirrors the regulatory requirements for national bank fiduciaries set out in Part 9 of the regulations of the Office of the Comptroller of the Currency ("OCC");[9] and (ii) through its membership in the Federal Financial Institutions Examination Council ("FFIEC") – together with the OCC, the Board of Governors of the Federal Reserve System ("Federal Reserve"), and Federal Deposit Insurance Corporation ("FDIC") – the OTS promulgates regulatory

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[5] See id.

[6] SEC Advisers Act Release No. IA-2176 (Sept. 25, 2003).

[7] See 17 C.F.R. § 275.206(4)-2(a)(3)(i) (2004) (An adviser must have a reasonable basis for believing that a qualified custodian sends an account statement, at least quarterly, to each of the adviser's clients for which the custodian maintains funds or securities, "identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions in the account during that period.").

[8] See 15 U.S.C.A. § 80a-17(f).

[9] See 12 C.F.R. Part 550 (Fiduciary Powers of Savings Associations), 12 C.F.R. Part 9 (Fiduciary Activities of National Banks).

guidance applicable to SPTC's trust and custody activities that have identical application to banks supervised by the OCC, Federal Reserve, and FDIC.[10]

Further, SPTC conducts its custody business in substantially the same manner as banks. As custodian, SPTC takes instructions from Clients regarding the investment and management of their respective assets. Consistent with those activities performed by bank custodians, SPTC typically forwards securities trades to a registered broker-dealer selected or approved by the Client for execution, clearing, and settlement. All such activity is regulated and examined by the OTS consistent with FFIEC guidelines and OTS policy. The OTS itself has also recently noted that savings associations' custody and securities activities are provided in the same manner as banks.[11] If thrifts were not granted parity with banks under Rule 760, then banks would obtain a substantial advantage over thrifts in competing for customers and assets to support their respective custody business.

SPTC believes that order-taking is an essential component of custodial activity for both banks and savings associations. The inability to accept Clients' securities orders consistent under the Custody Exemption will substantially impair SPTC's ability to effectively implement its role as custodian of Institutional and Retail Clients' assets. If Rule 760 is adopted as proposed, it is possible that a number of SPTC's Clients may transfer their custody accounts to a bank whose custody operations fit within the Custody Exemption, leading to a significant loss in SPTC's customer base and, despite the fact that savings associations are subject to the same regulatory scheme and requirements as banks, fostering an anti-competitive environment between banks and savings associations acting as custodians. Consequently, as one of the nation's leading providers of custody and custody-related services, and in order to preserve its existing and substantial Client base, SPTC requests that the Custody Exemption be made available to savings associations to the same extent and on the same terms as available to banks.

B. EB Exemption.

Rule 770 provides a conditional exemption for banks which serve as trustees or non-fiduciary administrators and effect transactions in shares of mutual funds for participants in employee benefit plans. Any bank relying on the EB Exemption would be required to offset or credit any compensation it received from a fund complex related to securities in which plan assets are invested against fees and expenses that the plan owes to the bank. Certain disclosure and other requirements would apply. The EB Exemption is intended to permit banks to continue providing services to employee benefit plans where, due to the structure of the compensation arrangement, such banks cannot meet the "chiefly compensated" requirement of the GLBA trust exception.[12]

As with the Custody Exemption, the SEC has asked savings associations to comment on their activity in this area in order to determine whether to include thrift institutions within Rule 770's coverage; SPTC's comments below specifically address this point. SPTC has also joined several other banks in commenting on certain of the

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[10] See, e.g., FFIEC, Uniform Interagency Trust Rating System, 63 Fed. Reg. 54,704 (1998) (interagency trust rating system used by federal banking agencies for evaluating the administration of fiduciary activities of financial institutions).

[11] See Statement of John E. Bowman, Chief Counsel, Office of Thrift Supervision, before the Senate Committee on Banking, Housing, and Urban Affairs (June 22, 2004) ("... banks and thrifts provide the same ... custody ... and other related investment and securities services in the same manner and under equivalent statutory authorities.").

[12] In particular, banks may be compensated through 12b-1 fees and other fees that fall within the "sales compensation" definition of the SEC's rule interpreting the GLBA trust exception. Since such compensation typically would be in excess of so-called "relationship compensation," a bank would not be able to satisfy the "chiefly compensated" portion of the GLBA trust exception's requirements.

terms and conditions of Rule 770 as well as the "chiefly compensated" requirement of the GLBA trust exception.[13] SPTC subscribes to the positions laid out in such letter to the extent that they apply to SPTC's activities.

SPTC acts as directed trustee and/or custodian of assets (collectively, "Plan Assets") of tax-qualified employee benefit plans (both defined benefit and defined contribution plans) under the Internal Revenue Code of 1986, as amended; non-qualified deferred compensation arrangements; and voluntary employees beneficiary associations ("VEBAs") established to fund certain employee welfare benefits. With certain limited exceptions (e.g., some church plans, certain foreign plans), most of the tax-qualified plans and VEBAs are subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA") or are governmental plans governed by state laws which, in many cases, contain ERISA-like rules.

As of June 30, 2004, SPTC administered over $13 billion in Plan Assets spread among an excess of 12,000 accounts (collectively, "Plan Accounts"). The majority of the assets are related to ERISA-governed defined benefit plans. Employee benefit plans rely upon SPTC as they would any bank to administer their assets in the best interests of the plan and its participants and SPTC is deemed to be a "bank" for relevant purposes under ERISA.[14] For these reasons, and because employee benefit plans comprise a significant portion of the SPTC's custody operations, SPTC requests that Rule 770's applicability be extended to savings associations.

C. Regulation S Exemption.

The SEC's proposed Rule 771 would provide banks with a conditional exemption to effect securities transactions pursuant to Regulation S with non-U.S. persons. Although Rule 771 would not apply to securities transactions with U.S. persons (except for U.S. registered broker-dealers), it would permit banks to effect transactions involving offshore, non-U.S. persons on an agency or riskless principal basis. Rule 771 further allows a bank, after the requirements of Regulation S cease to apply to an issuance, to resell the securities to another non-U.S. person or to a broker-dealer without satisfying the requirements of Regulation S. The SEC has proposed the Regulation S exemption in the belief that "non-U.S. persons will not be relying on the protections of the U.S. securities laws when purchasing Regulation S securities from U.S. banks."[15] The SEC invited comment on whether Rule 771 should be extended to savings associations and what competitive effects, if any, the exemption would have if adopted as proposed.

In addition to a sizeable U.S. presence, SPTC has significant international custody operations. Specifically, as of August 18, 2004, SPTC administered over $300 million in custody assets of non-U.S. persons comprising Institutional as well as Retail Clients. These include custody relationships with a number of European clients, either directly or indirectly through SPTC's outsourcing/custody relationship with a European affiliate. SPTC, therefore, would like to see Rule 771's applicability extended to savings associations so that SPTC's international operations may continue with minimal disruption. If Rule 771 is not extended to thrifts, then SPTC may be required to divest its custody relationships and relinquish them to a U.S. bank eligible under the exemption, thus materially and adversely impacting SPTC's overseas revenue, diminishing SPTC's opportunities for global custody business, and contributing to an anti-competitive environment by which banks, at the expense of savings associations, would continue to grow their foreign client base despite there being no public policy supporting distinct treatment of banks and savings associations.

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[13] See Letter to Jonathan G. Katz, Secretary, Securities and Exchange Commission, from Roberta J. Ufford (2004).

[14] There is no comprehensive definition of "bank" under ERISA. Certain provisions of ERISA, however, refer to a "bank or similar financial institution." See, e.g., ERISA section 408(b)(4), which broader terminology has been deemed to include other financial institutions such as credit unions.

[15] SEC Exchange Act Release No. 34-49879.

III. Amending Custody Exemption to Accept Order-Taking from Accredited Investors.

SPTC further wishes to comment on certain specific provisions of the Custody Exemption. Although SPTC favors the SEC's proposal under Rule 760 that existing custody accounts be grandfathered; i.e., allowing banks (and extended to allowing savings associations) to continue to engage in order-taking for custody accounts opened before a designated date, SPTC has the following concerns with the Custody Exemption: (i) limiting other eligible custody accounts to those established by "qualified investors"; and (ii) conditioning the exemption by requiring that a bank that accepts an order to effect securities transactions in a registered investment company for compensation does so on the same terms for any class or series of securities of such registered investment company that can reasonably be obtained by the bank for purchase or sale by the bank's customers. Each of these concerns is discussed below.

A. "Qualified Investor" Requirement.

According to Regulation B, the provisions of the Custody Exemption would be limited to grandfathered custody accounts and accounts of any "qualified investor" as that term is defined under the Exchange Act.[16] The SEC formulated this limitation based on the fact that banks provide custody services to such institutional investors as corporations, endowments, mutual funds, hedge funds, investment advisers, employee pension plans, partnerships, and limited liability companies. The SEC further noted that banks that provide custody services to individuals (such as private banking clients, trust clients, and IRA owners) do not use banks to execute securities transactions.

In contrast to Regulation B, however, SPTC believes that the SEC should not limit the Custody Exemption to "qualified investors" as defined under the Exchange Act because it unnecessarily excludes certain Institutional Clients and Retail Clients that rely upon SPTC, as custodian, to effect securities transactions on their behalf. For instance, a "qualified investor" excludes by its terms registered investment advisers who may have less than $25 million in discretionary invested assets but who by profession are sophisticated in financial matters, and therefore, do not necessarily need the level of protection of other investors under the federal securities laws. The term also excludes a number of persons (both institutional and retail) who come within the definition of an "accredited investor" under the Securities Act of 1933, as amended ("Securities Act"). As indicated under the Securities Act and implementing SEC rules, an accredited investor is able to make informed investment decisions without requiring the full panoply of investor protections afforded under the federal securities laws.[17]

Moreover, the vast majority of SPTC's accounts involve relationships with Retail Clients who are typically established through these Clients' registered investment advisers. These advisers maintain an advisory relationship with such Client throughout the Client's account relationship with SPTC. In other words, investment advisers regularly advise the Retail Clients on investments in securities and may direct securities transactions to SPTC on their behalf. SPTC further regularly accepts orders from these accounts for securities transactions who rely on SPTC, in its custodial capacity, to ensure that such orders are accepted and executed. Due to the fiduciary obligations that investment advisers owe their clients under the federal securities laws, these Retail Clients receive comprehensive investor protections while taking advantage of SPTC's services as custodian. Further, in this context, SPTC is not soliciting, initiating, or recommending the securities transaction. Rather, SPTC only is facilitating execution of a transaction initiated by a registered investment adviser on behalf of its client or pursuant to an instruction from its client.

Consequently, SPTC proposes that Rule 760 be amended to replace "qualified investor" with "any accredited investor, or any person regularly advised by a registered investment adviser or accredited investor with

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[16] See 15 U.S.C.A. § 78c(3)(a)(54).

[17] See, e.g., SEC Securities Act Release No. 33-8041 (Dec. 19, 2001) ("We are not aware of any diminution in investor protection as a result of our current definition of accredited investor.").

respect to assets held in such custody account." The term "accredited investor" can reference the definition in Section 2(a)(15) of the Securities Act and SEC rules defining the term.[18] SPTC believes that this change, based on its own custody operations, more accurately reflects traditional bank custody operations and the language and intent of GLBA's custody exception.[19]

B. Treatment of Mutual Fund Classes or Series.

Regulation B provides a number of conditions that a bank must satisfy in order to rely on the Custody Exemption. Among them is the requirement that "[i]f the bank accepts an order to effect transactions in securities of a registered investment company for compensation [in the form of 12b-1 fees or shareholder servicing fees], the bank does so on the same terms for any class or series of securities of such registered investment company that can reasonably be obtained by the bank for purchase or sale by bank customers." The SEC has stated that "[t]his condition is designed to ensure that investors have a full range of choices available when they consider whether to pay custody costs directly or to offset some of these custody costs with Rule 12b-1 fees. By making different classes of shares available, including classes that do not pay 12b-1 fees (e.g., institutional class), banks will not effectively require a customer to pay Rule 12b-1 fees to obtain execution services."[20]

SPTC believes that this condition does not accurately reflect how banks administer entry of accounts into certain classes or series of mutual funds. Different classes and series of a mutual fund typically are established for purposes unrelated to the amount of compensation that a bank may receive from the mutual fund. (The custody fees charged by SPTC, in fact, are the same and do not vary based on the class or series of the mutual fund selected.) For example, certain classes of a mutual fund may be established for institutional investors for which retail investors, due to the minimum investment parameters for such class, would not be eligible. These classes, however, are not established for the purpose of pigeonholing customer accounts into a higher fee-paying classes. Rather, these classes are designed to maximize efficiencies and/or economies of scale in administering assets invested in the mutual fund. Moreover, the Client (or its adviser), not SPTC, makes the decision as to which class of shares is selected for investment – SPTC, as custodian, simply makes the investment as instructed by the Client. On the other hand, requiring a bank under the Custody Exemption to make each and every class of a mutual fund available to its custody customers would interfere or defeat the objective of the creation of such classes in the first instance. Rather, sufficient protection already exists under Rule 760 to ensure that the customer is not charged more than a reasonable fee in connection with securities transactions. SPTC, therefore, believes that this condition is unnecessary and should be deleted from Rule 760.

IV. Deferment of Carrying Broker Rule to Separate Rulemaking Procedure.

In its commentary to Regulation B, the SEC noted that the Exchange Act generally disqualifies banks that act as "carrying brokers" from relying on the networking exception and custody exception of GLBA. Specifically, GLBA provides that a bank (1) may not rely on the networking exception if the bank carries a securities account of

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[18] See, e.g., 17 C.F.R. § 230.501(a). Although Regulation B is an Exchange Act rule and the term "accredited investor" is derived from the Securities Act rules, the SEC has previously appropriated the term "accredited investor" and applied it to Exchange Act rules where investor protections were deemed by the SEC to be unnecessary. See, e.g. 17 C.F.R. § 240.15g-1 (Exchange Act rule exempting from the penny stock disclosure requirements those transactions in which the customer is an institutional accredited investor, as defined in Rule 501 of the Securities Act).

[19] Alternatively, if the SEC ultimately decides to retain the qualified investor designation, SPTC requests that the SEC interpret the term "qualified investor" to include accounts that are advised by any federally registered investment adviser.

[20] SEC Exchange Act Release No. 34-49879.

the customer (except as provided in the trust exception and custody exception of GLBA), and (2) that a bank may not rely on the custody exception if it acts in the U.S. as a carrying broker for any broker or dealer (this prohibition excludes government securities, which may be carried under the exception). In its commentary to the 2001 interim final rules defining the terms in and specific exemptions for banks under GLBA ("Interim Rules"),[21] the SEC explained that:

"A bank acting as a carrying broker facilitates the transfer of funds and securities associated with the clearance and settlement of securities and related margin lending on behalf of a broker-dealer and executes trades for itself and its customers. A carrying broker relationship is distinguished from a custody relationship by the fact that the bank is selected and its systems are utilized primarily by the broker-dealer rather than primarily by the customer. In a situation where the broker-dealer arranges for a substantial majority of its customers to use bank custody or deposit services of a bank, a carrying broker relationship may be established particularly if the bank performs clearance and settlement functions that the broker-dealer cannot perform economically or efficiently. In contrast, a bank would not be a carrying broker when it acts as custodian for a customer of a broker-dealer and responds to customer directions to deliver securities against payment or cash against receipt of securities."[22]

The SEC has noted that only registered broker-dealers have been permitted to act as carrying or clearing brokers.[23] Because banks are permitted to act as carrying brokers only with respect to government securities, the SEC has raised the question as to what a carrying broker is and under which circumstances a bank would be deemed to be engaged in prohibited conduct as a carrying broker under GLBA and Regulation B. The SEC takes the position that "[w]hen a bank performs the back office functions of a broker-dealer, the bank is often acting as a carrying broker for the broker-dealer."[24] For example, a bank could be deemed a carrying broker by acting as a custodian, performing many back office functions for a broker-dealer, and entering into a networking arrangement on an omnibus basis with the broker-dealer.[25] In this instance, "the business of the two entities would be so inextricably intertwined, and the bank would be providing so many different functions to the broker-dealer, that the bank could be said to be "carrying" the broker-dealer's accounts."[26]

SPTC believes that its custody activities do not involve SPTC acting as a "carrying broker" as described by the SEC. Specifically, SPTC establishes custodial relationships with its Institutional or Retail Clients without the involvement or interposition of a broker-dealer. SPTC's clients may also be clients of a bank, trust company, credit union, or registered investment adviser but generally are not customers of a broker-dealer. SPTC further uses third party broker-dealers (or in the case of mutual fund transactions, NSCC/FundServ) to execute, clear, and settle trades. Any clearing-related services provided by SPTC include those that have been traditionally provided by bank custodians and that are intended to come within the provision of the custody exception of GLBA, which provides that a bank may "facilitate[s] the transfer of funds or securities, as a custodian or a clearing agency, in connection with the clearance and settlement of its customers' transactions in securities."[27] As stated by the SEC, "a bank would not be acting as a carrying broker when a customer chooses the bank to act as custodian and the bank then

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[21] SEC Exchange Act Release No. 34-44291 (May 11, 2001).

[22] See id. n. 174.

[23] Applicable statutes and rules generally use the terms "carrying broker" and "clearing broker" synonymously and interchangeably. For purposes of this discussion, the term "carrying broker" refers to both a carrying broker and a clearing broker.

[24] SEC Exchange Act Release No. 34-49879.

[25] See id.

[26] Id.

[27] 15 U.S.C.A. § 78c(3)(a)(4)(B)(viii)(I)(bb).

uses a variety of broker-dealers to execute and clear the subsequent securities transactions as permitted by the safekeeping and custody exception."[28]

Nevertheless, the SEC has solicited comment on whether the SEC should adopt a rule setting forth specific factors to clarify the distinction between a bank acting as a carrying broker and a bank acting as a custodian. Some of the factors that the SEC would consider including in a rule as indications of whether a bank is acting as a carrying broker are:

(1) A bank having, opening, approving, and monitoring control over the broker-dealer's customer accounts;

(2) A bank extending credit to the broker-dealer's customers;

(3) A bank maintaining the broker-dealer's books and records;

(4) A bank receiving and delivering a broker-dealer's funds and securities;

(5) A bank safeguarding the funds and securities of the broker-dealer's customers;

(6) A bank preparing and issuing the broker-dealer's confirmations and statements;

(7) A bank accepting the customer's orders; and

(8) A bank arranging for the execution of the customer's transactions.[29]

Although SPTC believes that its activities do not rise to the level of a carrying broker, it is possible that carrying broker rule, if broadly worded and liberally construed, might unintentionally sweep within its purview banks and thrifts that perform custody and custody-related activities within the confines of the GLBA exceptions. More importantly, SPTC believes that such rule, if adopted as part of Regulation B, would deprive affected and interested parties (including SPTC) the opportunity to comment on the rule prior to its adoption. Therefore, SPTC requests that the SEC defer any rule on carrying broker activities until the SEC first provides proposed language and further gives interested and affected parties an opportunity to comment through a separate rulemaking procedure.

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Thank you for providing SEI the opportunity to comment on Regulation B. If you have any questions or wish to discuss any of the foregoing, please contact Mark Nagle, President of SPTC, at 610-676-1493, Timothy E. Keehan, Latham & Watkins LLP, at 202-637-2291, or Lydia A. Gavalis, General Counsel, SPTC, at 610-676-1631.

Very truly yours,

/s/ Mark Nagle

Mark Nagle
President

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[28] SEC Exchange Act Release No. 34-49879.

[29] See id.