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August 31, 2004

**Via E-Mail**
Mr. Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: File Number S7-26-04.
Proposed Rule: Regulation B (Release No. 34-49879; International Series Release No. 1278)

Dear Mr. Katz:

On behalf of Nationwide Financial Services, Inc. ("Nationwide"),[1] we are grateful for the opportunity to provide comment with respect to the revised and restructured Interim Rules which the Commission is planning to promulgate in Regulation B (Exchange Act Rule 710 through Rule 781 (17 CFR 242.710 through 781). Regulation B is designed primarily to address the proposed exemptions for banks from the definition of the term "broker" under Section 3(a)(4) of the Securities Exchange Act of 1934 (the "Exchange Act"), as amended by the Gramm-Leach-Bliley Act of 1999 (the "GLBA"). Nationwide desires to limit its comments to the exemption for savings associations and savings banks (Rule 242.773[2]) and to the Commission's proposal to exclude savings associations and savings banks from the new exemption provided for in Rule 770.

Nationwide, together with various operating entities and holding companies, is registered as a unitary savings and loan holding company[3] under the Home Owners' Loan Act of 1933 (the "HOLA") and owns Nationwide Trust Company, FSB, a limited purpose federal savings bank chartered by the Office of Thrift Supervision in the U.S. Department of the Treasury and a member of the Federal Deposit Insurance Corporation.

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[1] Nationwide Financial Services, Inc. (member of the New York Stock Exchange) is the holding company for Nationwide Life Insurance Company and other companies that comprise the domestic trust, life insurance and retirement savings operations of the Nationwide group of companies, including Nationwide Trust Company, FSB, a wholly-owned subsidiary.

[2] The Commission proposes to redesignate the current exemption for savings associations and savings banks found in Exchange Act Rule 15a-9 as Exchange Act Rule 773.

[3] Nationwide Financial Services, Inc. is a majority owned subsidiary of Nationwide Corporation, which on a consolidated basis is wholly owned by Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company.



The interim Final Rules issued on May 18, 2001 in Release No. 34-44291[4] granted an exemption from the definitions of "broker" and "dealer" for savings associations and savings banks on the same terms and conditions that banks are excepted or exempted from broker dealer registration. Thus, savings associations and savings banks were exempt from the definition of "broker" so long as they had deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act, and were not operated solely for the purpose of evading the provisions of the Exchange Act.

In Release No. 34-49879, the Commission reversed its position with regard to the exemption for savings associations and savings banks. Instead, the Commission proposes to extend to savings associations and savings banks only the proposed money market exemption in Exchange Act Rule 776, the proposed exemptions in Exchange Act Rules 720-723 relating to the bank trust and fiduciary activities exception, the proposed small bank custody exemption in Exchange Act Rule 761, the proposed expanded exemption for the way in which banks effect transactions in investment company securities in Exchange Act Rule 775, and the current exemption for securities lending transactions in Exchange Act Rule 15a-11.

The Commission is no longer proposing to extend to thrifts the proposed general custody exemption in Exchange Act Rule 760, the proposed new ERISA exemption[5] in Exchange Act Rule 770, or the proposed Regulation S exemption in Exchange Act Rule 771. Consequently, federal savings associations and savings banks no longer enjoy an exemption from the definition of "broker" on the same terms and conditions that banks are excepted or exempted from broker-dealer registration.

As owner of Nationwide Trust Company, FSB, Nationwide respectfully disagrees with the Commission's actions. We believe there is no difference in the businesses of banks and federal savings banks and savings associations to justify limiting the exemptions for savings banks and savings associations. We are particularly concerned with the availability of the new ERISA exemption of Rule 770 and ensuring that a federal savings bank would be covered by such exemption.

Proposed Rule 770(a) provides as follows:

> (a) A bank is exempt from the definition of the term "broker" under section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)) to the extent that it effects transactions in securities of an open-end company in an account for a plan that is qualified under section 401(a) of the Internal Revenue

[4] Release No. 34-44291; File No. S7-12-01; Definition of Terms in and Specific Exemptions for Banks, Savings Associations and Savings Banks under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 dated May 18, 2001.

[5] The Commission refers to Rule 770 as the ERISA exemption. Technically, governmental 457 plans are not considered ERISA plans under Section4 (b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA") but nevertheless are eligible for this Rule 770 exemption.



Code of 1986 (26 U.S.C. 401(a)) or a plan described in sections 403(b) or 457 of the Internal Revenue Code of 1986 (26 U.S.C. 403(b) or 26 U.S.C. 457) for which the bank acts as a trustee or a custodian; or offers participants a participant-directed brokerage account, if:

(1) The bank offsets or credits any compensation that it receives from a fund complex related to securities in which plan assets are invested against fees and expenses that the plan owes to the bank;

(2) The bank provides a clear and conspicuous disclosure to the plan sponsor or its designated fiduciary, if any, that includes all fees and expenses assessed for services provided to the plan and all compensation received or to be received from a fund complex in a manner that permits the plan sponsor or its designated fiduciary, if any, to determine that the bank has offset or credited any compensation received from a fund complex related to securities in which plan assets are invested or to be invested against the fees and expenses that the plan owes to the bank;

(3) The bank offers the participant-directed brokerage account through a registered broker or dealer;

(4) The bank does not pay any incentive compensation to a natural person that is not qualified pursuant to the rules of a self-regulatory organization that differs based on the value of a security or the type of security purchased or sold by an account or a person who exercises control over the assets of such account; and

(5) The bank complies with section 3(a)(4)(C) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)(C)).

Under the proposed rule, if the five specified conditions are satisfied, then the bank is excluded from the definition of "broker" and accordingly is exempt from registering with the Commission with respect to effecting transactions in mutual funds in employee benefit accounts. As explained in the Release, the purpose of the new exemption is to address the inability of banks to meet the trust exemption requirement to be "chiefly compensated" through relationship fees while at the same time provide sufficient investor protection. The five conditions clearly are designed to ensure the protection of plan participants.

To the extent a federal thrift maintains employee benefit accounts in its capacity as a trustee or custodian and satisfies the same investor protection principles, it should not be deemed to be engaged in brokerage activity merely because such employee benefit plans invest in mutual funds. To do so frustrates federal policy by depriving the employee benefit market and plans of the economical trust and custodial services offered by the

federal thrift charter as a result of the additional cost and regulatory burdens associated with registration. Moreover, by excluding thrifts, the proposed rule unfairly discriminates against federal thrifts performing the same kinds of services as national or state chartered banks. Consequently, the exclusion of thrifts from the exemption puts federal thrifts on a different plane and at a competitive disadvantage to national and state chartered banks with respect to the same trust and custodial business. Like national banks, a federal thrift is subject to annual examination by an office of the Treasury Department and must maintain capital levels specified by such office as well as the Federal Deposit Insurance Corporation.

It is noteworthy that federal cases are pending in which banks or trust companies acting in a purely administrative capacity to an employee benefit plan are being deemed a fiduciary of the plan and thus subject to yet another tier of federal oversight intended to protect the consumer. Although such cases are being challenged and we do not necessarily agree with their outcome, to the extent that a federal savings bank acting in a purely administrative capacity as a directed trustee or custodian could be viewed as a fiduciary of an employee benefit plan and held to a higher standard, it should be treated the same as banks and not required to register as a broker when performing the same functions as that of a bank and subject to the same investor protection safeguards as a bank.

We urge the Commission to revert back to its original proposal and provide the same exemptive relief to federal savings associations and savings banks as banks or at a minimum extend Rule 770 to federal thrifts. If it would be helpful for Nationwide to submit further information in support of the exemptive rule for federal savings associations and federal savings banks that is coextensive with banks, we would do our best to provide it upon request. We thank you in advance for your consideration of our views on this matter.

Respectfully yours,

Nationwide Financial Services, Inc.

/s/

Mark R. Thresher
President and Chief Operating Officer