August 31, 2004

Via e-mail to: rule-comments@sec.gov.

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, D.C. 20549-0609

Re: Regulation B; File No. S7-26-04 (69 Federal Register 39682; June 30, 2004)

Dear Mr. Katz:

Fulton Financial Corporation ("FFC") and its subsidiary Fulton Financial Advisors, a nationally chartered Trust Company ("FFA"), submit this letter to provide their comments on the proposed Bank Broker-Dealer Final Rules, otherwise known as Regulation B ("Reg B"), released by the Securities and Exchange Commission ("SEC") this June. FFC has $9.2 billion in assets, while FFA has $4.6 billion in assets under management.

General Comments

FFC, through its banking subsidiaries, has a long history of offering its customers exemplary trust and fiduciary services. In May 2000, FFC centralized its trust and fiduciary services so as to offer its customers a broader array of such services more efficiently. As a result, FFA was formed, and since its inception has been dedicated to implementing a carefully developed business plan designed to enhance the trust and fiduciary products offered to customers.

The business plan of FFA was developed taking into account the provisions of the Gramm-Leach-Bliley Act ("the Act"). In establishing its operational and fee structures, FFA believed that it would be in compliance with the Act and its implementing regulations. While proposed Reg B is an improvement over the Interim Final Rules released by the SEC in 2001, FFC and FFA believe that the SEC further needs to clarify and modify certain parts of proposed Reg B before being released into final form. We have attempted to outline very specifically our questions, concerns and suggestions for change.

Third Party Brokerage Exception and the Networking Exception

The Act permits banks to enter into third party brokerage arrangements without being considered a broker that needs to be licensed by the SEC if the arrangements meet nine conditions. One of those conditions is

that "bank employees do not receive incentive compensation for any brokerage transaction unless such employees are associated persons of a broker or dealer and are qualified pursuant to the rules of a self-regulatory organization, except that the bank employees may receive compensation for the referral of any customer if the compensation is a nominal one-time cash fee of a fixed dollar amount and the payment of the fee is not contingent on whether the referral results in a transaction." 15 U.S.C.A .§ 78 c(a)(4)(B)(i)(VI).

Through Reg B, the SEC proposes to define "nominal one-time cash fee of a fixed dollar amount" to mean that a referral payment must have a value that does not exceed the greater of three alternative measures: the employee's base hourly rate of pay, a dollar amount equal to $15 in 1999, plus an adjustment for inflation, or $25. The SEC has requested comment on the proposed dollar amount and hourly compensation standards for measuring nominal value and in particular, whether the $15-inflation adjusted and $25 amounts are the most appropriate levels. In short, FFA is in favor of a definition of "nominal one-time cash fee of a fixed dollar amount" that uses a single dollar amount standard as such a standard provides the greatest ease of administration. Second, FFA believes that the dollar amounts currently proposed are capped at too low an amount to allow it to motivate bank employees to make referrals. FFA believes that "nominal one-time cash fee of a fixed dollar amount" should be defined to mean that a referral payment must have a value that does not exceed $100 adjusted annually for inflation.

As background, FFA operates on a non-platform model, which means that bank employees who receive a referral fee for directing customers to a broker offering brokerage services on or off the bank premises do not hold a broker's license. In FFA's non-platform model, the only individuals permitted to discuss brokerage services with bank customers are SEC licensed brokers. FFA has adopted the non-platform model because it believes that individuals dedicated solely to providing brokerage services will give the best securities advice to bank customers, resulting in the best transactions for bank customers and ensuring investor protection. FFA also believes that the non-platform model eliminates employee conflicts over referral fees.

Because FFA follows a non-platform model, the referral fee system substantially impacts the volume of brokerage business FFA generates. For example, annually FFA derives approximately 12,000 individual referrals from employees of FFA's affiliate banks. Those referrals amount to approximately 70 percent of FFA's brokerage business. Consequently, the SEC's regulation of this activity is critical to FFA's brokerage business. If the referral fee is capped at a fee that is not high enough to encourage referral business, like the proposed $25 referral fee, FFA's brokerage business will be negatively effected and not for any reasons that can be tied to the SEC's mission of ensuring investor protection.

In summary, the adoption of a higher fixed dollar amount for referral payments is essential for banks operating in the non-platform model such as FFA. Setting the fixed dollar amount at too low a level, as is presently proposed, may cause organizations operating in a similar model to migrate to a platform model solely for the purpose of avoiding the negative impact such a provision may have on referral volumes. Platform bankers would be licensed to allow them to share in any brokerage commissions generated from the prospect. We contend that the consequences of taking this approach may be detrimental to investors because it would place investment sales in the hands of individuals who are not exclusively focused on the business of brokerage. Furthermore, licensing several hundred-platform bankers to sell brokerage products will dramatically increase a bank's cost structure, risk profile, oversight responsibilities and regulatory burden. We believe a non-platform model places the most qualified individuals in front of

clients, and we strongly recommend that the proposed definition of "nominal one-time cash fee of a fixed dollar amount" be modified to recognize the importance of referrals to non-platform banks.

The SEC has also asked for comments on the merits of providing another alternative standard for determining whether a referral fee is nominal that would be based on the incentive a bank would pay its employees for the sale or renewal of a certificate of deposit. Though the affiliate banks of FFC do not use a point system or incentive program on the commercial side of the bank for referral of retail banking products, FFC does support providing this alternative standard for determining whether a referral fee is nominal. We believe that a points program that covers FDIC and non-FDIC insured products should be structured so that one type of product is not favored over another. We would favor a program that provides higher point value for longer-term products and deposit-oriented products over loan-oriented products. We would also favor a program that provides more points for new assets or additions to a relationship over renewals of existing products.

FFA also requests clarification of the meaning of "incentive compensation for any brokerage transaction" and in particular whether it applies to compensation arrangements that trust sales persons typically receive when directing bank customers to the brokerage side of the bank as opposed to the trust side of the bank. Under FFA's current incentive plan, trust sales people receive credit for a percentage of the commissions earned on any referrals made to brokerage. Such credit is applied against the sales person's overall new business goal. If the sales person surpasses his or her overall goal, a percentage of the fees/commissions generated on cumulative sales is paid to the sales person. Recognizing that the maximum incentive payment under this scenario for a brokerage related sale is substantially below that which a trust sales person could receive for the sale of a trust product, we believe that any argument suggesting the potential for a conflict of interest is baseless. Since a trust sales person can earn more by selling a trust product, when a trust sales person does refer a bank customer to a broker, the trust sales person is acting in the best interest of the bank customer. Consequently, we cannot understand why an incentive program such as the one followed by FFA should be disallowed under proposed Reg B, and we request SEC clarification of this issue. Furthermore, FFA maintains that if the SEC deems that the compensation arrangements that trust sales people receive for directing bank customers to SEC licensed bank brokers is activity that requires trust sales people either to hold a broker's license or receive a nominal referral fee, then trust sales people may stop directing bank customers to bank brokers, even though a bank broker may be the most appropriate individual to handle the customer's investment needs. Such a result would certainly be contrary to the SEC's goal of ensuring investor protection. Therefore, FFA requests that the SEC explain in Reg B that "incentive compensation for any brokerage transaction" does not include the compensation arrangements that trust sales people receive for directing bank customers to bank brokers.

<u>Trust and Fiduciary Activities Exception and the Definition of Chiefly Compensated</u>

The Act permits banks effecting transactions "in a trustee capacity" or "in its trust department or other department that is regularly examined by bank examiners for compliance with fiduciary principles and standards" not to register as a broker so long as the bank "is chiefly compensated" for such transactions, consistent with fiduciary principles, and does not publicly solicit brokerage business, other than by advertising that it effects transactions in securities in conjunction with advertising its other trust activities. 15 U.S.C.A. § 78 c (a)(4)(B)(ii) The bank also must be chiefly compensated for such transactions on the basis of (1) an administration or annual fee; (2) a percentage of assets under management, (3) a flat fee or

capped per order processing fee that does not exceed the cost the bank incurs in executing such securities transactions, or (4) any combination of such fees.

Through Reg B, the SEC proposes to provide guidance on when the trust and fiduciary activities exception applies. The focal point to whether a bank meets this exception relates to the definition of and the calculation of the phrase "chiefly compensated". Reg B will define "chiefly compensated" to mean that during the preceding year, the bank received more relationship compensation than sales compensation from an account. In the Interim Rules, the SEC was only going to permit a calculation of "chiefly compensated" on an account by account basis. In response to the comments to the Interim Rules, the SEC proposes in Reg B an alternative calculation for chiefly compensated based on a bank-wide approach or a line-of-business approach. Under this approach, a bank could use the alternative calculation for chiefly compensated if it could demonstrate that during the preceding year its ratio of sales compensation to relationship compensation was no more than one to nine either on a bank-wide basis or a line-of business basis ("one to nine ratio"). Reg B also proposes to exempt existing living, testamentary and charitable trust accounts from the "chiefly compensated" calculation. Finally, the SEC proposes to establish a multi-tiered "safe harbor" for banks determining compliance on an account-by-account basis that find themselves out of compliance with respect to particular accounts. Reg B proposes a series of other changes in Subpart B, all of which are intended to provide clarity to the "chiefly compensated" test. We will address those proposed changes both specifically and in general.

Line-of-Business Exemption

Generally, while we believe that the line-of-business or bank-wide approach found in proposed Rule 721 makes compliance with the "chiefly compensated" condition administratively easier, we believe the SEC too narrowly defines chiefly compensated with its proposed "one to nine ratio". The SEC has proposed this ratio because it believes that this ratio would be sufficient to accommodate most banks' business practices. While that may be true, we believe the SEC should adopt a ratio that more closely reflects when the majority of compensation is "relationship compensation." At the very least, we suggest that the ratio be modified to at least one-to-four.

Proposed Rule 721 states that a bank may use this section for all accounts for which "the bank acts in a trustee or fiduciary capacity on a bank-wide basis, or a bank may use this section for one or more individual lines of business provided that the sales compensation and relationship compensation from all accounts for which the bank acts in a trustee or fiduciary capacity, or all accounts established before a single date certain for which the bank acts in a trustee or fiduciary capacity, within a particular line of business is used to determine whether the bank meets the requirement in paragraph (a)(2) or (b)(2) of this section." We interpret this language to mean that a bank may apply this calculation of whether it is chiefly compensated on either a bank-wide basis or on a line-of-business basis. The SEC's answer to questions at a July 27, 2004 ABA-sponsored telephone conference indicate that the SEC is not clear as to whether the language in proposed Rule 721 means that the calculation can be done on a bank-wide basis. Specifically, the SEC was asked, "For accounts currently administered within the Trust Department, can the chiefly compensated calculation be performed (at the Trust Company level) without needing to exclude any account type (e.g., custody accounts)? The SEC responded as follows: "SEC staff had not really considered this option and suggested a comment be made to the effect that allowing bank trust departments to compute the chiefly compensated test in this way would ease the compliance burden. The staff did caution that even if the SEC were to permit the test to be calculated in this manner, there would

need to be some sort of assurance that custody accounts were not being treated as fiduciary accounts and thus, circumventing the ban on order taking." In light of the SEC's comments about proposed Rule 721, we seek clarification as to whether proposed Rule 721 can be applied on a bank-wide basis. We believe that proposed Rule 721 clearly permits the chiefly compensated calculation to be applied on a bank-wide basis, and furthermore, we support that approach as it would ease the compliance burden for banks.

The SEC has requested quantitative information regarding the cost savings banks could expect if they elect to follow the line-of-business exception versus the account-by-account calculation. Providing quantitative evidence of the cost savings that FFA would experience by choosing the line-of-business alternative versus the account-by-account calculation would require FFA to obtain a study from FFA's trust accounting system vendor, which would be costly and impossible to secure during this limited comment period. However, FFA would reasonably expect that the programming costs to perform an account-by-account analysis would be much larger than the costs to perform a line-of-business calculation.

Applying our understanding of the definitions of "sales compensation" and "relationship compensation", we have analyzed our compensation to determine the ratio of compensation derived from these sources. On a bank-wide basis, less than 15 percent of FFA's revenue would be "sales compensation", and therefore, FFA would qualify for the trust and fiduciary activities exception applying this approach. On a line-of - business basis, FFA would only be able to meet the proposed calculation for its Wealth Management area, which includes living, testamentary and charitable trust accounts, investment management accounts, personal custody and individual retirement accounts. FFA's Institutional line-of-business, which includes retirement services, institutional custody, institutional investment management, corporate cash management and corporate trust products, would not be able to meet the calculation and therefore would not qualify for the trust and fiduciary activities exception.

We believe the use of a ratio, as opposed to the use of a percentage, makes the comparison clear enough. We believe, however, that the SEC's desire to determine if such comparison is sufficient to accommodate banks' current business practices is shortsighted in that the ratio approach ignores banks' future need to modify their compensation arrangements, again underscoring the fact the SEC is too narrowly defining "chiefly compensated".

We believe the expanded definition of "relationship income" which would now include separately charged assets under management fees for managing other assets (such as real property, oil and gas, etc.) would be beneficial to banks in meeting the proposed line-of-business or business-entity alternative. In order to allow more banks to meet the trust and fiduciary activities exception using either the line-of-business or business entity approaches, we recommend that the definition of "relationship compensation" be further expanded to cover compensation received for administrative services, which are unrelated to effecting securities transactions, such as tax preparation, financial planning and participant record keeping charges. By including such charges in the definition of "relationship income", the SEC would be providing a more fair accommodation to the banking industry to qualify for the trust and fiduciary activities exception.

The SEC seeks comment on the procedural requirement that a bank review an account when the proportion of "sales compensation" is increased, and the impact of this condition on waiving "relationship compensation" for a particular account. FFA believes that this procedural requirement should be eliminated from the line-of-business or business entity approaches. Similarly, we believe that this procedural

requirement should be eliminated from proposed Rule 720 permitting a bank to be exempt from the "chiefly compensated" condition where it effects securities transactions for living, testamentary or charitable trust accounts opened or established before July 30, 2004 in a trustee or fiduciary capacity. Imposing an account-by-account analysis unnecessarily burdens banks when negotiating flexible compensation agreements with individual clients. Negotiation of bank compensation with individual accounts occurs for a variety of business reasons, such as recognition of the size and scope of a client's overall relationship or asset concentrations in a client's account. Because banks acting in a trust or fiduciary capacity by law owe their clients a duty of trust, loyalty and care, banks already provide full and complete disclosure to their clients of the amounts and sources of their compensation. This standard to which banks are held by law and by the regulators should satisfy the SEC's concern with whether investor interests are being properly protected when banks act in a trust or fiduciary capacity and should likewise be a reason why the SEC should remove this procedural requirement from both Rule 720 and Rule 721. In all other respects, FFA supports the exception from the chiefly compensated condition for existing personal trust accounts proposed in Rule 721.

We believe that comparing "sales compensation" to total trust compensation rather than to "relationship compensation" would provide significant cost savings to banks in complying with the "chiefly compensated" condition. We also support the elimination of any account-by-account calculation. The line-of-business or business entity level calculation is more administratively practical since banks apply standard fee schedules across an entire base of accounts. The line-of-business or business entity level calculation avoids the risk that one account can render a bank out of compliance.

We do not support the proposed one-year conditional safe harbor for a bank that exceeds the one to nine ratio. The rule would require FFA to engage its trust accounting system vendor to modify FFA's trust accounting systems in order to perform the tests, which would cause FFA to incur additional expenses. The safe harbor rule would require a bank to engage in an account-by-account analysis which approach we believe should be entirely eliminated from any aspect of the "chiefly compensated" calculation.

We support the amended definition of "flat or capped" per order processing fee to include the direct marginal cost of any resources of the bank that are used for transaction execution, comparison, or settlement for trust and fiduciary activity accounts if the bank makes a precise and verifiable allocation of these resources according to their use. We suggest that the definition be further amended to allow banks to attach a profit margin to these costs for the following reasons. First, banks are entitled to earn a satisfactory profit on services they provide. Second, absent the ability to earn a profit on specific services they provide, banks may raise other asset based fees to provide profit margins they require to satisfy the interests of their shareholders, which has the unintended consequence of driving up the costs for all clients rather than passing the cost on to those clients who use the specific services. The "flat or capped" per order processing fee is most applicable to custody account situations. We believe the intent of the rule is to restrict a bank's ability to earn a profit on securities trades in order to discourage trade solicitation. In that regard the rule is misdirected because banks do not solicit trades from custody account holders. Many self-directed clients utilize custody accounts to avoid direct contact with a broker. The bank handles trades through a broker as directed by the client. We believe that banks should be appropriately compensated for this service beyond simply recovering their costs.

The SEC has requested comment on whether the "sales compensation" definition should include additional sales related arrangements that may create conflicts of interests, such as sales or distribution- related

payments to affiliates or employees of banks. We request clarification of the types of compensation to which the SEC is referring. We also have some related concerns for which we seek SEC guidance. Many mutual fund companies provide "marketing allowances" to banks to help defray the costs incurred by banks. These allowances are not based upon any set formulas. The mutual fund companies pay the allowances out of their general operating funds, which does not impact investor returns. The receipt of these allowances by banks is disclosed to clients. We request clarification as to whether "marketing allowances" are arrangements that may create conflicts of interest. We believe they do not create a conflict of interest. For example, FFA uses a large number of mutual funds to meet the needs of its clients. The fund complex with the largest amount of FFA clients' assets under management, by a wide margin, pays no sales related compensation, such as 12b-1 fees, marketing allowances, sales loads, etc. We also seek clarification as to whether FFA's distribution-related payments to its affiliate banks create conflicts of interest. FFA distributes 95 percent of its earnings to its affiliate banks, in part, to motivate them to help grow FFA's business by referring qualified bank customers to FFA. If the SEC believes that such distributions create a conflict of interest, FFA would be substantially impacted by the amendment to the definition of "sales compensation" as its affiliate banks would dramatically curtail their referral activities for all FFA sales opportunities, not just brokerage.

FFA presently calculates 12b-1 fees based on the number of each class of an investment company's shares held in each account on the last business day of the year, multiplied by the net asset value per share on that day and by the annual rule 12b-1 fee rate applicable to that class of securities. The proposed formula would facilitate FFA's allocation of 12b-1 fees to individual accounts. We believe that there would be no need to perform such a calculation, however, if the "chiefly compensated" calculation were permitted only to be based on the line-of-business or business entity approach.

The SEC proposes to amend the definition of "sales compensation" to allow a bank to estimate the amount it receives annually that is attributable to an individual account, but that is not paid directly from the account. The only "other fees" FFA envisions would fall into this definition would be the marketing allowances discussed above. Marketing allowances are paid by the fund complex and are not directly attributable to particular funds. We maintain that the cumulative total of the marketing allowances are nominal (estimated at less than $100,000 annually), and when allocated to individual accounts become virtually inconsequential. The costs and burden associated with allocating this compensation to individual accounts would be excessive and would likely result in our discontinuing collection of marketing allowances from fund companies. Therefore, we are opposed to the amendment to the definition of sales compensation.

Other Definitions Affecting the Trust and Fiduciary Activities Exception

We have reviewed the proposed amendment to the definition of "investment adviser if the bank receives a fee for its investment advice" and the comments to the definition contained in the Interim Rules. We note the amended definition would provide that to rely on the exception a bank must have an ongoing responsibility to review, select, or recommend specific securities for its customers. We request clarification of the revised definition to determine whether the exception applies where a customer expressly authorizes the bank to act in the capacity of investment adviser exercising full discretion over investment decisions for the customer. In such instances, the Bank manages the account based upon the customer's investment objectives and risk tolerances. The Bank selects the investments to be purchased and sold in the customer's account. In these instances, the Bank does not provide specific investment

recommendations to the customer. The Bank does, however, periodically review the customer's portfolio and its performance and will discuss with the customer changes in the customer's particular circumstances, goals or objectives. We believe the amended definition should include the situation outlined above.

We believe the proposed amendment to the SEC's interpretation of "other department that is regularly examined by the bank examiners for compliance with fiduciary principles and standards" should provide banks with increased flexibility in meeting the trust and fiduciary activities exception. We believe banks should qualify for the exception as long as they are in compliance with the rules and regulations of their banking regulators.

Employee Benefit Plan Exemption

FFA's compensation arrangement in the area of Institutional Services would prevent it from meeting the requirement in proposed Reg B's trust and fiduciary activities exception to be "chiefly compensated" through relationship fees because it would not meet the one to nine ratio. Therefore, FFA must rely on proposed Rule 770 in order to be exempt from SEC regulation. Rule 770 would provide an exemption for banks effecting transactions in securities in certain employee benefit plans. Rule 770 refers to plans qualified under section 401(a) of the Internal Revenue 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) which adequately captures the types of qualified plans FFA serves.

In the text of proposed Rule 770, the SEC states that it proposes "conditionally to exempt from the definition of broker bank trustees and non-fiduciary administrators that effect transactions in securities of open-end companies for participants in employee benefit plans. A bank relying on this proposed 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." As an initial matter, we seek clarification of the use of the word "conditionally" in the SEC's exemption. Does this merely mean that the exemption applies until or unless modified by future regulations?

We also wish to comment upon the narrowness and incompleteness of the summary description of the Department of Labor ("DOL") opinion letter guidance regarding the receipt of mutual fund fees by bank trustees. DOL Advisory Opinion 97-15A is discussed in some detail, making it the apparent basis for the Rule 770 exemption in that the DOL relies on the commitment by the bank trustee to credit all 12b-1 and all sub-transfer fees it receives from the mutual funds back to the underlying plan, dollar for dollar, as the basis for concluding that no ERISA self-dealing prohibited transaction is occurring. In DOL Opinion Letter 2003-09A, the DOL has, however, also ruled that bank trustees in receipt of mutual fund fees are not engaging in ERISA self-dealing prohibited transactions if the decision to invest in the subject mutual funds is made and controlled by a fiduciary independent of the bank trustee or by the plan participant, and full and clear disclosure of the fees is disclosed to the independent fiduciary or participant. DOL Opinion Letter 97-16A is a similar ruling in the context of a directed insurance company plan fiduciary. In the proposed Rule 770 exemption, the SEC unnecessarily limits the availability of the exemption to only those situations where the bank trustee fully credits all mutual fund fees back to the plan, without giving consideration to the alternative fact pattern in which an independent fiduciary is controlling mutual fund selection and monitoring the mutual fund fee payments to the bank trustee.

The structure of the relationship between a bank trustee and the mutual fund companies it offers to its qualified plan sponsors may preclude it from directly collecting sub-transfer agent fees. A bank trustee could employ an agent to process mutual fund transactions, and the agent would be able to collect sub-transfer agent fees on the mutual funds it processes for the qualified plans of the bank trustee. The mutual fund trading agent could apply these sub-transfer agent fees against the charges it would otherwise bill to the bank trustee. The proposed rule appears to require such a bank trustee to collect sub-transfer agent fees from its mutual fund trading agent and credit them to its client's plan in its dollar-for-dollar offset practice. Consequently, we request clarification of your comment "…any compensation it received from a fund complex…"

We embrace the concept under the proposed Rule 770 exemption that would require bank trustees to "…disclose clearly and conspicuously to the plan sponsor…all fees and expenses assessed for services provided to the plan and all compensation received or to be received from a fund complex," and the need for the disclosure to be made "…in a manner that permits the plan sponsor…to determine that the bank has offset or credited any fees or expenses received from a fund complex related to the securities in which the plan assets are invested against the fees and expenses that the plan owes the bank." We question, however, the SEC's offered rationale, which is that "investors need to know about fees associated with these investments because these fees directly affect the amount of their returns." Not all compensation paid to bank trustees by mutual fund companies is, like 12b-1 compensation, a direct charge against the return of a mutual fund. Sub-transfer agent fees are an example. These are paid from the gross revenues of the fund companies and not from any particular mutual fund. As such they do not reduce the return of any particular mutual fund. We believe that compensation paid by a mutual fund complex to a bank trustee that is a direct charge against a mutual fund, like 12b-1 compensation, that directly affects the return of the mutual fund, should be described and disclosed to make this impact on return clear, separate from other fees that are not direct charges against a fund's return.

We also seek to comment upon the exemption in proposed Rule 770 that "…would require banks that offer brokerage windows to plan participants to continue to do so through a registered broker-dealer." The SEC correctly observed that some plans allow plan participants to invest through their retirement plans in securities and funds beyond those offered in the plan menu. The SEC also observed that this is often referred to as a participant-directed brokerage account or a "brokerage window." Some in the bank trustee world also call such arrangements "self directed". At FFA, instead of opening brokerage accounts, we open a segregated trust account under the plan on our trust accounting systems and require the participant to place their trades through their broker for settlement to the segregated trust account. This approach keeps the account on the trust accounting system under the watchful eye of the trustee. It allows for ease of roll-up of data on the trust accounting system for production of plan financials. Not all trust accounting systems or participant record keeping systems facilitate links to brokerage platforms. The proposed rule codifies the practice of the larger banks with the most sophisticated systems, which may not be the most prudent method for plan fiduciaries to facilitate the desire of participants to invest in assets beyond plan menus. We seek your comment on the segregated trust account alternative to the "brokerage window requirement."

Custody Activities Exemption

As background, nearly 80 percent of FFA's custody relationships are directed through a registered investment adviser. The types of securities that FFA purchases or sells for the client are primarily stocks, bonds and mutual funds. FFA has not had to limit the security selections for its clients except to the extent that they are securities, which FFA cannot handle on its accounting system. FFA has also limited custody clients to money market fund selections, which FFA supports on its trust accounting system. FFA receives compensation for custody accounts in the form of market value fees, security transaction fees, 12b-1 fees, shareholder servicing fees and marketing allowances from fund companies, if so selected by the client or the client's representative. FFA does not solicit security orders in custody account relationships, and FFA discloses all fees charged to its clients, regardless of the source of the compensation.

Accepting Customer Orders

In Proposed Rule 760, the SEC plans to amend the general custody exemption to clarify that a bank that accepts orders for securities could be compensated for effecting a securities transaction for a person with an existing custody account or for a "qualified investor" so long as the compensation that the bank receives for its custody services does not directly or indirectly vary based on whether the bank accepts an order to purchase or sell a security. We request the SEC to change its position relating to the acceptance of customer orders in a custody relationship under the general custody exemption. Taking an order to purchase or sell a security directly from a client is a customary banking activity requested by bank clients. We believe that receiving order instructions from the client for a specific security and then placing that order with the broker of record for the execution of the trade is a "related administrative service" requested by bank clients. When acting in a custodial capacity FFA offers no advice or guidance in the selection of the security, nor does FFA influence or solicit the transaction. FFA merely relays the transaction to a broker as instructed by the client. Many self-directed investors prefer not to have direct interaction with brokers and prefer to transact their business utilizing a bank custody department. We believe the SEC should not preclude an investor from conducting investment business fully utilizing the services of a Bank custodian. Therefore, we recommend that the SEC modify the proposed rules so as to exempt all custody accounts and not simply those provided for small banks and "qualified investors".

Regarding the proposal that Banks may continue to accept customer orders and be compensated for the movement of funds and securities through transaction charges and 12b-1 fees for "grandfathered" accounts and "qualified investors" only, we believe that this scenario will cause tremendous competitive pressure on banks to adjust fee schedules so that no transaction fees or 12b-1 fees will be charged. The proposed rule leaves banks with the choice of providing certain custodial services at a loss (movement of funds and securities) or retaining the transaction fee and/or 12b-1 fee structure and potentially incurring negative client reaction and client defection. Therefore, we do not believe that the effect of "grandfathering" will alleviate the described "unnecessary disruption of business" for banks. FFA's custody business will be disrupted by the proposed rule. Furthermore, FFA's overall relationship with a client could be adversely impacted causing FFA to lose other accounts with a given client and experience a loss of revenues.

Solicitation Restrictions

We request clarification of the proposed solicitation restrictions for bank custody accounts. Banks often have other investment management or trust account relationships with clients in addition to the custody relationship. If we are sending newsletters, watch lists, economic forecasts and research to these clients, will we be in violation of this proposed restriction? Additionally, is information sent to custody clients, which is intended to sell Bank investment management and trust services and not necessarily a particular security, in violation of the proposed solicitation restrictions?

Employee Activities and Compensation

We agree with the proposed elimination of the restrictions to prohibit the use of dually licensed employees to effect transactions pursuant to the general custody exemption and the requirement that a bank employee must primarily perform duties for the bank other than effecting transactions in securities. The elimination of these restrictions will enable banks to utilize skilled personnel and achieve efficiencies.

We also support the removal of the current restriction denying custody employees the receipt of incentive compensation based on the amount of securities related assets gathered or the size of the client's account. This change will enable banks to reward employees for collecting and bringing additional assets to the bank.

Custody Account Definition

The proposed custody account definition covers the basic duties agreed upon between a bank and the client. We request that this definition include "the acceptance of customer orders". Specifically, "Custodian IRA" accounts fit into this definition. Trusteed IRA accounts would be outside of this definition.

Conclusion

FFC and FFA believe that proposed Reg B is inconsistent with the Act and congressional intent. Reg B will interfere with a bank's performance of traditional trust and fiduciary activities and result in increased cost to customers and a reduction of services offered by banks. We also believe that many of the proposed rules within Reg B are overly restrictive and burdensome and do not further the SEC's mission of protecting investor interests. We ask the SEC to consider seriously the comments it receives to Reg B just as it did with the comments to the Interim Rules. The comments presented in this letter came from numerous individuals within FFA. We would welcome the opportunity to discuss any aspect of our comments with the SEC. Please direct any of your questions and concerns to Barbara Boben, Regional Compliance Officer and Associate Legal Counsel for FFC, at 717-291-2797 or bboben@fult.com. Thank you for your consideration.

Sincerely,

Fulton Financial Corporation
Rufus A. Fulton, Jr.
Chairman and Chief Executive Officer

Fulton Financial Advisors, N.A.
David W. Schoffstall
President and Chief Executive Officer