August 31, 2004

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

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

Dear Mr. Katz:

Union Bank of California, N.A. (the "Bank") is pleased to respond to the request of the Securities and Exchange Commission ("Commission") for comments on proposed Regulation B (the "Proposal") issued June 17, 2004 pursuant to Release No. 34-49879 (the "Release").[1] The Proposal interprets existing statutory exceptions and proposes new regulatory exemptions for banks engaging in specified securities activities from the definition of "broker" under Section 3(a)(4) of the Securities Exchange Act of 1934 ("Exchange Act"), as amended by the Gramm-Leach-Bliley Act of 1999 ("GLBA").[2] The Proposal also revises, restructures, and codifies certain "interim final rules" the Commission adopted in 2001 ("Interim Rules").[3]

The Bank is a national bank headquartered in San Francisco, California, with banking offices in California, Oregon, and Washington. The Bank is the fourth largest commercial bank in California and is among the 35 largest banks in the United States, with approximately $46.1 billion in assets as of June 30, 2004. The Bank provides a broad range of trust, fiduciary, and custody services for individuals and institutions through its trust and custody services divisions (referred to for convenience as the "trust division"). The trust division consists of separate business units known as Wealth Management,

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[1] 69 Fed. Reg. 39682 (June 30, 2004).

[2] Unless indicated otherwise, all section references in this letter are to the Exchange Act.

[3] Exchange Act Rel. No. 44291 (May 11, 2001).

Business Trust, Custody, and Corporate Trust. As of June 30, 2004, the trust division administered approximately 16,692 customer accounts through these business units holding aggregate assets of approximately $159 billion. The Bank's wholly owned operating subsidiaries include UBOC Investment Services, Incorporated ("UBOCIS"), a broker-dealer registered under the Exchange Act, and HighMark Capital Management, Inc. ("HCM"), an investment adviser registered under the Investment Advisers Act of 1940 ("Advisers Act"). HCM serves as investment adviser to, and the Bank acts as custodian of, the HighMark Funds, a family of mutual funds registered under the Investment Company Act of 1940 ("1940 Act").

Background Information

The following general description of the trust, fiduciary, and custody services provided through the separate business units of the Bank's trust division (Wealth Management, Business Trust, Custody, and Corporate Trust) is intended to be responsive to the Commission's request for information about how bank fiduciary and custody activities are organized and conducted.

Customers

A majority of the trust division's customers are not "qualified investors" within the meaning of Section 3(a)(54)(A).

Wealth Management provides trust, estate, investment management or advisory, and custody services primarily to: individuals; institutions (including, e.g., corporations, public and private foundations, endowments and other tax-exempt organizations, and partnerships, limited liability companies, and other business organizations); and, in a relatively small number of instances, individual retirement accounts ("IRAs") and employee benefit plans.

Business Trust provides trust, investment management or advisory, and custody services primarily to employee benefit plans, including: plans qualified for tax purposes under Section 401(a) of the Internal Revenue Code of 1986 ("Code"); plans covering employees

of state or local governmental entities (including, e.g., plans described in Code Sections 414 and 457); church plans described in Code Section 414(e); employee annuity plans qualified under Code Section 403(b); non-qualified deferred compensation plans; and IRAs. Plans qualified under Code Section 401(a) include, among others, plans meeting the requirements of Code Section 401(k) – referred to below as "401(k) plans" – and other types of tax-qualified and non-qualified "participant-directed plans" that permit individual plan participants to direct the investment of their plan accounts among various investments and investment options made available under the plans.

Custody provides custody services to: individuals that have retained registered investment advisers to direct the investment of their assets held by the Bank; institutions (including municipalities and other public entities, financial institutions, insurance companies, and registered investment companies); and, in a relatively small number of instances, IRAs and employee benefit plans, usually as part of a relationship with a registered investment adviser.

Corporate Trust provides indenture trustee and agency services primarily to state and local government entities and corporations that issue debt securities, as well as escrow agency services primarily to institutions. The trust indentures pursuant to which such securities are issued may or may not be qualified under the Trust Indenture Act of 1939.

Capacities

The Bank acts in various fiduciary and other capacities for its customers. These include acting as: trustee, personal representative, managing agent (i.e., agent with investment discretion), or agent/custodian (including escrow agent) for customers of Wealth Management; trustee, investment manager, or agent/custodian for customers of Business Trust; trustee (for IRAs) and agent/custodian for customers of Custody; and indenture

trustee and/or agent (e.g., fiscal, escrow, collateral, depository, or paying agent) for customers of Corporate Trust.[4]

Account Investments

Accounts administered by the Bank for customers described above include a wide variety of assets and investments, such as stocks, bonds, and other market-traded securities; interests in unregistered collective trust funds maintained by the Bank;[5] shares of 1940 Act-registered money market and non-money market mutual funds (including funds advised by third-party investment advisers and the HighMark Funds advised by HCM); non-marketable securities, such as interests in closely-held entities (including corporations, limited liability companies, and limited partnerships); non-securities assets (e.g., interests in real estate); and cash balances held pending investment or distribution. Investments of 401(k) and other employee benefit plans served by Business Trust also typically include stock or other securities issued by the plan sponsor. In some cases, plan participants may invest their plan accounts in stocks, bonds and other investments through "brokerage window" arrangements.

Transaction Services

As custodian of customer assets, the Bank typically processes (i.e., transfers funds and securities in connection with) securities purchase and sale transactions in one of two ways:

Ordinary Securities. The Bank transfers funds and securities in settlement of transactions involving market-traded securities that are placed directly with registered broker-dealers (including UBOCIS and third-party brokers) by the party authorized to make investment decisions for the account ("Authorized Party"). Such transfers generally are made upon the Bank's receipt of notice of placement or execution of the transactions from either the

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[4] The Bank acts as "fiscal agent" for approximately 13% of the accounts administered by Corporate Trust. As discussed further below, fiscal agent is a capacity generally recognized in the corporate trust industry that we are asking be included specifically within the scope of proposed Rule 776.

[5] Collective trust funds maintained by the Bank are excluded from status as an "investment company" under 1940 Act Section 3(c), and interests in such funds are exempt from registration under Section 3(a)(2) of the Securities Act of 1933 ("1933 Act").

Authorized Party, the broker-dealer, or a clearing agency. The Authorized Party may be the customer or a third-party investment adviser retained by the customer with respect to the account (a "Non-Managed Account"), or it may be HCM, which provides investment advisory services pursuant to a contract with the Bank with respect to those customer accounts for which the Bank has investment responsibility ("Managed Accounts"). In the case of participant-directed plans, the Bank normally receives and processes instructions from individual plan participants to purchase or sell employer stock and places orders to execute such transactions with a broker-dealer designated by the plan sponsor. In some cases, the Bank may be directed to acquire an investment in an off-market transaction (e.g., an interest in a privately offered limited partnership investment fund).

Mutual Fund Shares. The Bank typically receives orders to purchase or redeem mutual fund shares from Authorized Parties or plan participants and processes these orders through the National Securities Clearing Corporation's ("NSCC's)" Fund/SERV system or omnibus accounts maintained by the Bank with fund transfer agents. The Bank also provides "sweep" services to customer accounts pursuant to which cash balances held by the Bank pending investment or distribution are invested automatically each day in a short-term investment vehicle, such as a no-load money market mutual fund or a bank deposit account.

Compensation Arrangements

The Bank receives compensation for its services described above directly from customers or customer accounts, or indirectly from mutual funds, including the HighMark Funds or third-party funds in which customer accounts may be invested.

Fees received from customers or customer accounts typically include asset-based fees or flat dollar-amount fees for general trust, custody, or administration services and, with respect to Non-Managed Accounts only, transaction-based fees for securities transactions (purchases and sales), stated as a flat dollar amount per transaction. Customers also pay the Bank other types of fees for specific functions or activities (e.g., wire transfers, distributions) and asset types (e.g., real estate, non-marketable securities).

Fees received from mutual funds in which customer accounts have been invested include the following:

With respect to Non-Managed Accounts, the Bank receives shareholder servicing, and/or sub-accounting fees from third-party mutual funds with which the Bank has contracted to provide services with respect to shareholders who are Bank customers. The shareholder servicing fees may or may not be paid pursuant to 1940 Act Rule 12b-1 plans. The Bank also receives fees from the HighMark Funds for serving as custodian of the Funds and for providing shareholder services attributable to Non-Managed Account investments in those Funds. HCM also receives investment advisory fees from the HighMark Funds. These fees are disclosed to Non-Managed customers and, together with fees received by the Bank directly from the customer or customer account, are viewed as part of the Bank's compensation for its services with respect to the Account. The Bank does not offset or credit the fees it receives from the HighMark Funds or third-party funds against fees the Bank charges to Non-Managed Accounts or their customers.[6]

With respect to Managed Accounts, the Bank does not receive fees of any kind from third party mutual funds. In accordance with applicable state and federal fiduciary laws, including the Employee Retirement Income Security Act of 1974 ("ERISA"), the Bank does not charge fees for investment management or advisory services to a Managed Account or the customer with respect to Managed Account assets invested in the HighMark Funds. However, the Bank receives fees for custodial and shareholder services and HCM receives fees for investment advisory services from the HighMark Funds that are attributable to Managed Accounts investing in those Funds.

Trust Activities Exception[7]

Under the trust activities exception, a bank effecting securities transactions in a trustee or fiduciary capacity (as defined in Section 3(a)(4)(D)) in its trust or other department that is

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[6] As discussed below, the Bank is not required to do so under applicable state or federal laws governing the fiduciary relationships with its customers.

[7] Section 3(a)(4)(B)(ii); proposed Regulation B, Subpart B.

regularly examined for compliance with fiduciary principles will not be considered a broker if: the bank is "chiefly compensated for securities transactions," consistent with fiduciary principles and standards, on the basis of an administration or annual fee (payable on a monthly, quarterly or other basis), a percentage of assets under management, an order processing fee meeting certain requirements, or any combination of such fees; the bank does not publicly solicit brokerage business (other than by advertising that it effects transactions in conjunction with advertising of other trust activities); and the bank directs all trades of publicly traded securities in the U.S. to a registered broker-dealer (as required by Section 3(a)(4)(C)).

"Chiefly Compensated" Requirement[8]

Proposed Rule 724(a) provides that a bank will satisfy the "chiefly compensated" requirement of the trust activities exception if the bank receives more "relationship" compensation than "sales" compensation from a trust or fiduciary account during the preceding year. A bank may satisfy the chiefly compensated requirement on an account-by-account basis or, under proposed Rule 721, on a line-of-business or bank-wide basis. A bank using the line-of-business or bank-wide method may satisfy the chiefly compensated requirement by demonstrating that its ratio of aggregate sales compensation to aggregate relationship compensation for trust and fiduciary accounts in the relevant line of business or bank wide was not more than one to nine (or more than one to seven under the safe harbor of proposed Rule 721(b)).

We are continuing to compare and study the practical considerations associated with the account-by-account and line-of-business or bank-wide approaches for satisfying the chiefly compensated requirement, and have not reached final conclusions as to which approach would be most feasible for the Bank.[9] Based on our review thus far, we offer the following comments:

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[8] Section 3(a)(4)(B)(ii)(I).

[9] One of the difficulties in reaching conclusions on this issue is the inherent lack of predictability of types and sources of compensation in Non-Managed Accounts, which make up a large proportion of the

Compensation Definitions. The sales to relationship compensation comparison is not to include "unrelated" compensation. The Commission describes unrelated compensation as including "any fee the bank receives that is not related to effecting securities transactions," and "fees charged separately" for activities such as taking deposits, lending funds (including margin lending), preparing taxes, or providing other services that are not related to managing securities accounts pursuant to the trust and fiduciary activities exception."[10]

We believe there is support for the view that compensation received by a bank pursuant to other exceptions or exemptions should be treated as relationship compensation, or at least should not be treated as sales compensation. For example, a bank that effects securities transactions as trustee (or other fiduciary capacity) for an employee benefit plan pursuant to proposed Rule 770 may receive all or part of its compensation for such services in the form of asset-based service fees paid by mutual funds in which the plan may invest.[11] Such compensation is viewed widely in the industry as compensation received by the bank as trustee that is similar or equivalent to asset-based fees described in the statute. Accordingly, we request that the Commission clarify or confirm that compensation received under another exception or exemption, including proposed Rule 770 (as amended as suggested below), is to be treated as relationship compensation for purposes of the chiefly compensated requirement. If the Commission does not agree with this approach,

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trust and fiduciary accounts served by the Bank. A typical Non-Managed Account may, for example, invest in market-traded stocks and bonds, Bank-maintained collective trust funds, and mutual funds, all in relative amounts and proportions determined by the Authorized Party. The Bank's compensation (whether received from the Account or the customer or a mutual fund in which the Account may invest) in nearly all cases is computed as a percentage of assets. Depending on how the Authorized Party chooses to exercise its discretion during the year, the relative proportions of the Bank's compensation received from the account (or the customer), which generally is treated as "relationship" compensation under the Proposal, and/or mutual funds in which account invests, which generally is treated as "sales" compensation, may vary significantly. The Bank's inability to control or predict third-party investment decisions thus makes it difficult, at best, to establish procedures to control compensation types and sources to ensure compliance with the chiefly compensated requirement.

[10] 69 Fed. Reg. at 39693, n 96. The Release states that unrelated compensation also includes compensation paid to a bank or its employees pursuant to the "networking" exception under Section 3(a)(4)(B)(i). Ibid.

[11] See further discussion of this point below.

we respectfully request that it confirm at least that compensation received pursuant to other exceptions or exemptions, including, but not limited to, the networking exception, is to be treated as unrelated compensation.

Sales Compensation Ratio or Percentage. The Commission requested comments as to whether the relationship of sales compensation to relationship compensation should be expressed as a ratio or a percentage and as to whether the proposed one-to-nine ratio is sufficient to accommodate banks' current business practices or needs.

The Bank does not have a preference whether the requirement is expressed as a ratio or a percentage. However, we believe that difficulties in identifying compensation that is received for different types of services are sufficient to warrant a higher ratio or percentage of sales compensation than the Commission has proposed. An example of these difficulties is as follows.

As proposed, compensation that a bank receives from mutual funds for "sub-accounting" and similar services is to be considered unrelated compensation rather than sales compensation.[12] In practice, however, banks (including the Bank) generally agree to provide a range of shareholder, sub-accounting, and other services with respect to their customers who become mutual fund shareholders, and funds generally do not break down the amount of compensation that they pay for each of these various service(s). Funds also do not necessarily indicate whether or not the compensation is being paid pursuant to a Rule 12b-1 plan. Consequently, it could be necessary for the Bank to treat all such payments as "sales" compensation, even though it technically would not be required to do so. Naturally, this would result in a somewhat inflated computation of sales compensation. Accordingly, we urge the Commission to increase the permitted ratio or percentage to the level recommended in comments of the American Bankers Association and the ABA Securities Association ("ABA/ABASA Comment") on the Proposal.

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[12] Proposed Rule 724(e)(6)(i) – (vii).

Line of Business. While the Bank may be able to satisfy the chiefly compensated requirement on a bank-wide basis, we are concerned that there are too many ambiguities in the Proposal's definition of "line of business" for that method of calculation to be useful. Proposed Rule 724(e) generally defines line of business as an identifiable department, unit, or division organized and operated for business reasons with similar types of accounts for which the bank acts in a similar type of fiduciary capacity as listed in Section 3(a)(4)(D). The operating units under the Bank's trust division, as described above, appear to constitute "identifiable departments, units, or divisions organized and operated for business reasons." However, it is difficult to know whether those units would be considered to serve "similar types of accounts" or whether the Bank can be said to act in a "similar type of fiduciary capacity" with respect to them.

The Proposal offers no insight into what would be considered "similar." Trust and fiduciary accounts served by the Bank include, among others, trusts established for individuals, tax-exempt organizations, and corporations. Are these "similar," or must a "line of business" be a bank department, unit, or division that serves only, for example, trusts for tax-exempt organizations? Similarly, the "fiduciary capacity" in which the Bank serves its customers varies in all the ways contemplated by Section 3(a)(4)(D). Thus, the Bank serves, for example, as trustee, personal representative (e.g., executor, administrator, custodian for a minor), investment adviser for a fee, and other capacities with investment discretion. Must a "line of business" be one in which a bank acts only as, for example, trustee? or personal representative? If not, what is the measure of "similarity," other than that each capacity in which the bank serves is within the scope of Section 3(a)(4)(D)? The language of proposed Rule 724(e) suggests that a more particular "similarity" is contemplated, but it is difficult to know exactly what is required.

In the end, what is similar about and, in our view, all that should matter with respect to these accounts is that the Bank does, in fact, act in a trust or fiduciary capacity with respect to them. Accordingly, we believe that "line of business" should be defined to include any types of fiduciary accounts that are served or administered within a particular

business unit of a bank, i.e., "an identifiable department, unit, or division organized and operated for business reasons."

In this connection, we note that, even if our recommendation that the ratio or percentage used in computing compliance with the chiefly compensated requirement is accepted, the permissible ratio or percentage of sales compensation will be very much smaller than the statutorily permitted account-by-account limit of just under 50%. Accordingly, there is very little risk that any broadening of the definition of line of business would result in a bank actually receiving more sales compensation than is contemplated by the spirit of the GLBA.

Account Review Procedures. We also are troubled by the requirement that, in order to avail themselves of the line of business method of satisfying the chiefly compensated requirement, banks must establish the "account review" procedures called for in subsections (a)(3) and (4) of proposed Rule 721. The Release recognizes that commenters on Interim Rule 3a4-2(a)(2) pointed out that its procedural conditions "essentially require an account-by-account calculation, thereby defeating the purpose" of the bank-wide computation contemplated by Interim Rule 3a4-2(a)(1).[13] We believe that problem persists under proposed Rule 721.

We recognize that, as noted in the Release, the proposed Rule does not require a bank to effectively re-assess "chiefly compensated" compliance for each account every time the compensation arrangement changes in any respect.[14] Nevertheless, the procedures called for by proposed Rule 721(a)(3) and (4) would require banks to analyze the likely transactions, over time, for each new account, as well as the compensation features associated with each such transaction, to "ensure" that the bank is "likely" to receive more relationship compensation than sales compensation. The bank also would be required to

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[13] 69 Fed. Reg. at 39694.

[14] Id. at 39695.

make the same analysis whenever the bank "individually negotiates" an increase in sales compensation with the customer.

We believe that such account-by-account analyses unnecessarily undermine the efficiencies that should result from a bank-wide or line-of-business computation. For banks that use the line-of-business method, the permissible percentage of sales compensation is materially lower (roughly five times lower under the Proposal) than the bank could realize if it chose to use an account-by-account computation. Clearly, a bank cannot hope to comply with this lower, permissible percentage on a long-term basis if it does not take some steps to ensure that it is not establishing accounts that, individually, will generate more sales compensation than relationship compensation. That reality should be sufficient to obviate the imposition of a requirement that banks establish procedures for account-by-account testing. Accordingly, since the account review procedures impose a costly administrative burden without a commensurate regulatory benefit, we suggest that subsections (a)(3) and (4) of proposed Rule 721 be deleted.

"Grandfathered" Trust Accounts

Proposed Rule 720 would exempt a bank from satisfying the chiefly compensated requirement to the extent it effects securities transactions in a trustee or other fiduciary capacity for "living, testamentary, or charitable trust" accounts opened or established before July 30, 2004, provided certain conditions are met. It is unclear at this point whether this exemption ultimately will be useful to the Bank as a practical matter, given certain ambiguities in the proposed Rule as written.

Account Types. Proposed Rule 720 is unnecessarily narrow in that it extends only to some types of trust and fiduciary accounts, while excluding many others for no apparent reason. For example, a "living" trust (undefined) generally is understood to be a trust that is revocable by the trust's settlor(s) during his, her, or their lifetime(s). There appears to be no reason why the exemption should not extend also to an irrevocable trust, regardless of whether the trust is established by means of a lifetime or testamentary transfer (the latter of which is included in the scope of the proposed Rule). The same concern potentially

applies to the Rule's reference to "charitable" trusts. Although there are numerous types and variations of trusts that may be viewed as "charitable" or having charitable purposes or objectives, the Rule does not provide clear guidance as to the nature of the "charitable" characteristics a particular trust must possess in order to be included within its scope. We believe these ambiguities can be eliminated, consistent with the Commission's intention in proposing the Rule, simply by providing that the Rule applies to any account for which the bank acts in a trustee or fiduciary capacity within the meaning of Section 3(a)(4)(D).

Account Changes. It is not clear what impact a change occurring after July 30, 2004 to the form or structure of a "grandfathered" fiduciary account may have on the account's status under proposed Rule 720. For example, it is common for a living trust to provide that, upon the death of the settlor(s), the trust property will be divided into shares for the surviving children of the settlor(s), with each share allocable to a minor child continuing to be held by the trustee in a separate irrevocable trust for that child until distribution according the settlor's specifications (e.g., at the age of majority). Grandfathered living trusts and other types of fiduciary accounts also may be amended after July 30, 2004. These and other examples indicate a need to clarify the status of fiduciary accounts "opened, or established before July 30, 2004." We suggest the proposed Rule make it clear that a fiduciary account opened or established before July 30, 2004 is and will remain exempt from the chiefly compensated requirement until the account terminates according to the terms of its governing instrument, as amended.[15]

Grandfather Date. We believe that fixing July 30, 2004 as the "grandfather" date for purposes of proposed Rule 720 further complicates already complex compliance burdens unnecessarily. We suggest, therefore, that proposed Rule 720 be amended to apply to any trust or fiduciary account opened or established before the date the Commission's blanket exemption for banks from the definition of broker under the Exchange Act expires (i.e., before January 1, 2006, as currently provided in proposed Rule 781).

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[15] Thus, for example, the proposed Rule would cover a trust account until the trust and any additional trusts established pursuant to the terms of the governing instrument terminate upon final distribution of remaining assets (or court order).

Relationship to Other Exceptions and Exemptions

As illustrated by the background information above, the Bank may provide a variety of securities transaction services to a single trust or fiduciary account. For example, the Bank may (1) settle securities transactions placed by an Authorized Party directly with a broker-dealer, (2) receive (from an Authorized Party or a participant of a plan) and process (through Fund/SERV or omnibus accounts) orders to purchase or redeem mutual fund shares, and (3) "sweep" cash deposit balances of the account into money market funds. The Bank may be able to rely on the trust activities exception for all of these transactions; but even if that exception is for some reason unavailable (e.g., because the chiefly compensated requirement is not satisfied), the transactions may satisfy the conditions of other exceptions or exemptions.

We believe the Proposal should be understood to enable banks to rely on different statutory exceptions or regulatory exemptions for different services that are provided to the same account.[16] We are concerned, however, that language in the Release could be read to suggest this is not so. In the Commission's discussion of the exclusion of trust and fiduciary accounts from the scope of proposed Rule 760 (regulatory exemption for custody activities involving order taking), the Release indicates that:

> We propose to add a new provision to the general custody exemption designed to ensure that a bank would use that exemption only for those custody accounts in which it does not act in a trustee or fiduciary capacity. *Transactions for trust and fiduciary activity accounts would need to be effected in compliance with the trust and fiduciary exception in Exchange Act Section 3(a)(4)(B)(ii).* Congress enacted the conditions that apply to

[16] A bank that provides services in connection with different types of securities transactions for a single trust or fiduciary account should be able to rely on any exception or exemption (to the extent each is applicable), including, but not limited to: (1) the trust activities exception, (2) the "networking exception (Section 3(a)(4)(B)(i)), (3) the exception for "permissible securities transactions" (Section 3(a)(4)(B)(iii)), (4) the sweep exception (Section 3(a)(4)(B)(v)), (5) the custody and safekeeping exception (Section 3(a)(4)(B)(viii)), (6) proposed Rule 770 (certain employee benefit plans), and (7) proposed Rule 776 (money market fund transactions).

> that exception in recognition of certain fiduciary obligations that banks have to their trust customers.[17]

We believe that this statement was or should have been intended only to make clear that proposed Rule 760 – as opposed to other exceptions or exemptions – may not be used as a substitute or alternative to the trust activities exception for trust and fiduciary accounts. However, the statement that transactions for trust/fiduciary accounts "would need to be" effected in compliance with that exception might be read to suggest that a bank acting in a trustee or other fiduciary capacity is precluded from relying on any exception or exemption other than the trust activities exception. We believe such an interpretation would be contrary to the statute and the Commission's expressed views about the use of exceptions and exemptions generally. Thus, it would be helpful for the Commission to clarify that the above-quoted language was not intended to suggest that a bank must rely exclusively on the trust activities exception for securities transaction services provided to trust and fiduciary accounts. As discussed above, we also believe that, to the extent a bank relies on the trust activities exception, the compensation the bank receives under other exceptions or exemptions should be treated as relationship compensation, or at least should not be treated as sales compensation, for purposes of the chiefly compensated requirement.

Proposed Rule 770

The Commission appears to acknowledge the need for an exemption from broker status for banks serving employee benefit plans for two basic reasons. First, the Commission has concluded that most types of compensation received by banks from mutual funds should be treated as "sales" compensation for purposes of the trust activities exception. Since, as discussed below, banks often receive a significant portion of their compensation for providing services to plans as trustee or fiduciary in the form of fees received from mutual funds in which the plans invest, it is unlikely that such banks would be able to satisfy the "chiefly compensated" requirement. Second, the Commission asserts that a

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[17] 69 Fed. Reg. at 39711 (emphasis added).

bank is not excepted from the definition of "broker" under the statutory custody and safekeeping exception (Section 3(a)(4)(B)(viii)) if it "accepts orders" for securities transactions from plans, plan participants, or IRAs. Since accepting orders is, and traditionally has been, a function integral to custodial services customarily provided by banks to employee benefit plans and other clients (see further discussion below), and since the Commission's proposed exemption allowing banks to accept orders for custodial customers – proposed Rule 760 – would not be available to banks serving most types of employee benefit plans,[18] an exemption to permit banks to continue their traditional functions, as Congress intended in enacting the GLBA,[19] is imperative.

Proposed Rule 770 would exempt a bank from the Exchange Act definition of broker to the extent it effects transactions in securities of an open-end company (as defined) for "a plan that is qualified under [Code] section 401(a) . . . or a plan described in [Code] sections 403(b) or 457 . . . for which the bank acts as trustee or a custodian," subject to certain conditions. Although an exemption is needed for the reasons discussed above, the proposed Rule has a number of deficiencies that we believe need to be addressed by the Commission.

Plans Covered

We do not understand the Commission to have a particular reason for limiting employee benefit plans covered by the exemption only to those qualified or described under Code Sections 401(a), 403(b), or 457. Banks typically serve many other types of employee benefit plans and arrangements, including, as described above in the case of the Bank, church plans described in Code Section 414(e), other governmental plans described in Code Section 414(d), employee health and welfare plans (including "voluntary employees' beneficiary associations," sometimes referred to as "VEBAs" that qualify for tax-exempt status under Code Section 501(c)(9)), and deferred compensation plans that

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18 *See*, proposed Rule 760(a)(5).

19 *See*, H.R. Conf. Rep. No. 106-434, at 163-64 (1999) (Congress retained certain exemptions from broker status "to facilitate certain activities in which banks traditionally have engaged").

are not qualified for tax purposes under the Code. Banks provide essentially the same trustee and custodial services to these plans as to plans described in Code Sections 401(a), 403(b) and 457.

We also note that the statutory custody and safekeeping exception extends to banks providing custodial and other related administrative services to any "individual retirement account, pension, retirement, profit sharing, bonus, thrift savings, incentive, or other similar benefit plan."[20] Since, as indicated above, a purpose of proposed Rule 770 is to provide banks a means for carrying on traditional activities and services (which the Commission believes are not covered by the statutory exception), we suggest that proposed Rule 770's description of plans covered be amended to include the types of plans described in the preceding paragraph, which would reflect current business practices or, alternatively, to include plans described in the statutory custody and safekeeping exception.[21]

Fee Offset Requirement

Proposed Rule 770(a)(1) requires that "the bank offsets or credits any compensation that it receives from a fund complex related to the securities in which plan assets are invested against fees and expenses that the plan owes to the bank." The Release states that "no bank has advised the Commission staff that it does not apply mutual fund fees for the benefit of the plans."[22]

The mutual fund fee offset or credit requirement is not consistent with ERISA or industry practice, and should be eliminated. We are confident the Commission will receive numerous comments addressing this issue, so we do not attempt here to provide a complete analysis of applicable ERISA and other fiduciary requirements. It should be

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[20] Section 3(a)(4)(B)(viii)(I)(ee).

[21] Although we recognize that the Commission may not wish to extend the scope of Rule 770 to include IRAs, we think the inclusion of IRAs in the statutory exception provides a reasonable basis for doing so.

[22] 69 Fed. Reg. at 39718, n 330.

sufficient for this purpose to state that the U.S. Department of Labor ("DOL"), the agency responsible for administering and enforcing ERISA, recognizes that banks may be compensated for their services to ERISA plans directly or indirectly through fees paid by third-parties, including mutual funds. DOL guidance in this area focuses on ERISA's prohibited transaction restrictions, which prohibit, among other things, a plan fiduciary from using its authority as such (e.g., by exercising investment discretion over, or providing investment advice with respect to, plan assets) to cause the plan to pay additional fees to the fiduciary (or its affiliates). If the fiduciary uses its authority to cause the plan to invest in a fund that pays fees of any kind to the fiduciary, the fiduciary may be required to offset or credit those fees against fees or other obligations the plan is otherwise obligated to pay, either to the bank or some other service provider, or adjust its compensation arrangements in other ways. This basic principle is reflected in the DOL's "Frost" opinion cited in the Release and reflected in Rule 770(a)(1).

The Release and the proposed Rule are inconsistent, however, with further DOL guidance widely followed in the industry. First, the "Aetna" opinion cited in the Release and other more recent DOL opinions[23] state that a bank fiduciary is not required to offset or credit fees received from a fund in which the plan invests if the bank does not use its fiduciary authority to cause the plan to make the investment (i.e., if another fiduciary who is independent of the bank makes the investment decision, without investment advice from the bank). It is important to note in this context that fees paid to bank fiduciaries by mutual funds are viewed by the industry and the DOL as "indirect" compensation to the bank for its fiduciary services. Thus, requiring banks to "offset" indirect compensation from funds in which client plans have invested against "direct" compensation the plan owes the bank contradicts the agreement between the plan and the bank that the bank's compensation will consists of fees the plan (or plan sponsor) pays directly and indirectly through a fund in which the plan invests.

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[23] *See, e.g.*, DOL Advisory Opinion 2003-09A (June 25, 2003).

Second, proposed Rule 770(a)(1) requires the bank to offset "any compensation" the bank receives from a fund complex (as defined). This fails to recognize fee arrangements permitted or required under numerous prohibited transaction exemptions ("PTEs") issued by the DOL on a class or individual basis with respect to plan investments in mutual funds that are in some way affiliated with the investing fiduciary. Under PTE 77-4, for example, a bank fiduciary may invest plan assets in shares of mutual funds advised by the bank or an affiliate, if certain conditions are satisfied. One of these conditions requires an adjustment of investment advisory fees the bank may receive from the plan and the fund pursuant to either of two options: (1) the bank may offset or credit investment advisory fees it receives from the fund against investment advisory fees charged to the plan; *or* (2) the bank may not charge investment advisory fees to the plan directly, and instead retain (or permit its affiliate to retain) investment advisory fees paid from fund assets (the latter alternative generally being considered more feasible administratively). Moreover, PTE 77-4's fee adjustment requirement does not apply to compensation a fiduciary bank may receive from the fund for administrative (as opposed to investment advisory) services, such as fees for transfer agent, custodial, administrative, and accounting services.[24]

In short, whether a bank may receive compensation from a mutual fund in which the bank's plan customers may invest, and whether and to what extent the bank should be required to offset or credit that compensation against fees the plan owes the bank (or others), is and should continue to be governed by applicable law, including ERISA and other laws, such as those regulating government employee plans. Accordingly, we request that proposed Rule 770 be amended by deleting subsection (a)(1).

Fee Disclosure Requirement

Proposed Rule 770(a)(2) requires the bank to provide the plan sponsor with detailed disclosures regarding "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

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[24] *See, e.g.*, DOL Advisory Opinions 93-12A (Apr. 27, 1993) and 93-13A (Apr. 27, 1993). The bank also may satisfy the fee adjustment requirement of PTE 77-4 by not charging an investment advisory fee to the plan, while retaining the investment advisory fee paid by the fund in which the plan invests.

permits the plan to determine that the bank has offset or credited fund compensation against fees the plan owes the bank. In our view, this condition is inappropriate for two reasons. First, as discussed above, fee offsets or credits are required only in certain limited circumstances. Second, DOL guidelines already require disclosure of fees and expenses to the appropriate plan fiduciaries. Consequently, superimposing disclosure requirements in Regulation B over and above existing and future disclosure requirements under ERISA (or other applicable laws) likely will lead to contradiction, confusion, or, at best, needless duplication. Therefore, we believe that Rule 770 should be amended by deleting subsection (a)(2).

Employer Securities

As discussed above, the Bank processes transactions in securities issued by sponsors of employee benefit plans for which the Bank acts as trustee or custodian. The Bank typically receives instructions to purchase or sell such securities from the plan sponsor or participants of participant-directed 401(k) plans, and places the trades with a broker-dealer selected by the plan sponsor.

Section 3(a)(4)(B)(iv)(I) permits a bank, "as part of its transfer agency activities," to effect transactions in securities of an issuer as part of any pension, retirement, profit-sharing, bonus, thrift, savings, incentive, or other similar benefit plan for the employees of the issuer or its affiliates. However, a bank normally may not act both as trustee or custodian for a company's employee benefit plans and as the company's transfer agent. If the Bank cannot rely on this or some other exception (such as the custody and safekeeping exception under Section 3(a)(4)(B)(viii)) to process transactions in employer securities, it will be prevented from continuing to provide an important service to its employee benefit plan customers.

Accordingly, we request that the Commission amend proposed Rule 770 to extend its coverage to transactions involving securities of an issuer acquired for employee benefit plans of the same type as are described in our comment under "Plans Covered" above or at least the plan types described in Section 3(a)(4)(B)(iv)(I).

Capacities Covered

The Release indicates that proposed Rule 770 would apply to banks serving as "trustees and non-fiduciary administrators," while the proposed Rule itself refers to a bank acting as "a trustee or a custodian." These provisions are not entirely clear or consistent. For example, while banks commonly provide administrative services to plans, the term "non-fiduciary administrator" is not a term used commonly to describe a service provider's capacity. In addition, banks sometimes act in the capacity of "investment manager," rather than or in addition to serving as trustee or custodian, for employee benefit plans.[25] We therefore suggest that proposed Rule 770 be amended to indicate that it applies to a bank acting as "trustee, investment manager, custodian, or other service provider" of a plan.

Custody and Safekeeping Exception[26]

A bank is excepted from the definition of "broker" to the extent the bank, "as part of customary banking activities," provides certain safekeeping and custody services with respect to securities. Taking orders for the purchase or sale of mutual fund shares, employer securities acquired under employee benefit plans, and other types of securities has been an important part of the Bank's custody services for as long as the Bank has been in the custody business. We recognize that the Commission asserts that the statutory custody and safekeeping exception does not cover the acceptance of orders to purchase or sell securities, other than in the limited context of the activities (such as securities lending) listed in the statutory exception. Nevertheless, we respectfully but strongly continue to disagree with this interpretation.[27] While a complete analysis of "customary" bank custody activities is beyond the scope of this letter, we believe the proper interpretation of

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[25] ERISA Section 3(38) defines the term "investment manager" as a bank, insurance company, or registered investment adviser that has the power to manage, acquire, or dispose of plan assets.

[26] Section 3(a)(4)(B)(viii); proposed Regulation B, Subpart F.

[27] *See*, Comments of Union Bank of California, N.A. on S7-12-01 (Interim Rules) (July 17, 2001).

the GLBA is that Congress intended that "customary banking activities" include order-taking.[28]

Having concluded the statutory exception does not contemplate order-taking, the Commission instead has proposed Rule 760, an exemption that would permit bank custodians to "accept orders to effect transactions in securities in an account for which the bank acts as a custodian" in certain limited circumstances. One of these conditions is that a bank may accept orders only from a person with an account opened before July 30, 2004 or from a "qualified investor," as defined in Section 3(a)(54)(A). The Commission solicits comment on limiting proposed Rule 760 to "qualified investors" on a going forward basis, and asks whether there are other institutional entities that have custodial, rather than trust accounts, with banks and that have a special need for banks to take their securities orders.[29] We offer the following comments regarding proposed Rule 760:

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[28] While the term "customary" is not defined in the statute or the legislative history, its plain and widely understood meaning describes a usual or long-continued practice. (*See, e.g.*, Webster's Encyclopedic Unabridged Dictionary (2001) ("defined by long-standing practices"). Congress, the Commission, and the banking industry generally understood that order taking was an integral part of traditional bank custody activities long before the GLBA was enacted. For example, the "Initial Report on Bank Securities Activities" issued by the Commission's staff in 1977 (the "Report") presented detailed information and analysis of bank-sponsored securities services similar to services provided by broker-dealers, based on a survey of bank securities activities. One of these services – customer transaction services – is described as a service "in which a bank accepts orders from customers for the purchase or sale of a corporate stock selected by the customer and transmits those orders to a broker-dealer for execution." Report at 3, n 2. The Report indicates that:

"[h]istorically, banks have assisted their customers, both individual and institutional, in purchasing and selling securities. Banks have long played a major role in customer purchases and sales of Treasury securities, federal agency securities, tax-exempt securities and money market instruments. Depending on the security involved, banks may act either as principal or as agent. In addition, solely in an agency capacity, banks assist their customers in the purchase and sale of corporate stock."

Id. at 77. The Report further indicates that, although banks did not market the customer transaction service extensively, the survey responses showed that more banks offered the service than all the other surveyed bank services combined. Id. at 78. The Release cites a Committee Report on the House version of legislation leading to the GLBA indicating that the custody and safekeeping exception "is not intended to allow banks to engage in broader securities activities." 69 Fed. Reg. at 39708, n 252, citing H.R. Rep. No. 106-74, pt. 3, at 169 (1999). As noted in the Report and other sources, however, it is clear order taking activities were not and are not "broader" than the securities activities banks traditionally engaged in prior to the GLBA.

[29] 69 Fed. Reg. at 39709.

At the outset, we are unclear as to why, at this juncture, the Commission has found it necessary to limit the types of custody accounts for which banks may accept orders for securities transactions. No such limitation was included in the Interim Rule, and the Release indicates that the comments the Commission received focused primarily on the question of whether the bank should be able to receive compensation for taking such orders. Thus, it makes sense for proposed Rule 760 to address (as it does) the types of compensation a bank may receive for accepting orders. Imposing limits on the types of custody accounts for which such compensation may be received, however, is not responsive to the comments. It is, rather, a new approach, seemingly aimed primarily at limiting the extent to which banks may continue to perform this traditional function. As described above, a substantial portion of the Bank's customers (current and prospective) are not "qualified investors," as defined by Section 3(a)(54)(A). This aspect of the Proposal, therefore, would have direct adverse impact on Bank's existing custody business.

Moreover, a significant portion of the Bank's custody customers are institutions and individuals who, although they do not meet the financial requirements of the "qualified investor" definition, are knowledgeable, experienced, and competent to protect themselves in their contractual and other dealings with the Bank. These customers include, for example, municipal and other local government agencies or subdivisions that own and invest on a discretionary basis less than $50 million in investments. The Bank as noted above also serves as custodian for the clients of a large number of investment advisers registered under the Advisers Act or state law. These advisers, who are the parties giving transaction orders to the Bank, may or may not "own and invest on a discretionary basis" more than $25 million in investments for their clients.

These and other institutional clients may have a variety of reasons for wanting or needing to have a bank accept and process their securities orders, including the following, among others:

The customer may have a number of long-standing service relationships with the bank (including commercial lending, custody, securities lending, deposit, and investment banking services) that make it easier and more convenient to deal with a single banking institution. The customer may have developed a high degree of confidence in the financial stability and integrity of the bank, which makes it preferable from the customer's standpoint to deal with the bank rather than a broker-dealer. In many cases, the costs associated with having a bank handle or process securities transactions are likely to be lower than the costs of obtaining similar services through a broker-dealer.

Moreover, if a customer wishes to have a bank maintain custody of the customer's securities, it simply is more efficient to have the bank process the customer's purchase and sale orders, particularly with respect to mutual fund shares. As the Commission knows, banks use the NSCC's Fund/SERV system to process mutual fund trades for customers.[30] Banks also maintain and administer omnibus shareholder accounts at mutual funds that facilitate customer purchases and redemptions of shares.[31] Custody customers intend their entire investment portfolio to be included in their custody account and to be reflected in the statements the custodian bank generates. If the bank cannot accept or process purchase and redemption orders, the customer will be required to establish a separate shareholder account with the fund in the customer's name, which will not be part of the custody account maintained at the bank. Although the bank will attempt to include information about the mutual fund account in its custody statements in order to provide the customer with complete information of the customer's investment portfolio, the parallel account structure limits the bank's access to information from the fund (e.g., regarding balances, dividends, withdrawals, etc.) and requires a bank to provide what is commonly called "shadow" accounting. Shadow accounting is a manually driven process of integrating relevant information obtained from the fund into customer statements

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[30] *See*, proposed Rule 775.

[31] The bank also may be able to acquire share classes for their clients that are made available only to it as an institutional investor, which may be desirable for the bank's customers, as compared to investing directly in the funds.

produced by the bank (in written or on-line formats), usually on a time-delayed basis. This can create issues or problems, particularly when applicable law requires valuations to be provided at specific times. The overall result is a less efficient, less timely, administratively burdensome process that gives rise to reconciliation and posting issues, all at increased cost to the customer.

Finally, as described above, when a bank accepts a customer's order to buy or sell mutual fund shares or other securities, the bank processes the order through Fund/SERV or the transfer agent (in the case of mutual fund shares) or transmits the order to a broker-dealer for execution and handles the clearance and settlement of the transaction (in the case of other securities). We believe that the potential for abuse in these situations is minimal at most. As a general practice and typically by contract, bank custodians do not (and have no responsibility to) recommend investments or transactions to their customers, individual or institutional; rather, they stand ready to carry out instructions as and when given. Nor are we aware of reports of widespread abuse in connection with traditional order taking activities of bank custodians.

In sum, for the reasons discussed above, we request that the Commission delete the limitation in proposed Rule 760 that a bank may accept orders under that exemption only for "qualified investors" on a going forward basis. If the Commission decides to retain a limitation on the nature of the customers for whom a bank may accept orders, we respectfully request that the Commission consider other alternatives. One would be to amend the proposed Rule to apply to accounts for which a bank acts as custodian for "accredited investors," as defined in 1933 Act Rule 501(a), investment advisers registered under the Advisers Act, and IRAs. We believe that this or a similar modification to proposed Rule 760 would be consistent with the goal of Congress to permit banks to continue to provide "customary" custodial and safekeeping services to their customers and the Commission's goal of protecting individual investors from potential abuses in the order-taking process.

If proposed Rule 760 continues to be limited to qualified or other types of investors, the Commission should include a "reasonable belief" standard that would allow a bank to rely on a customer's representations as to its status. In this regard, we note that the Commission included a "reasonable belief" standard in Rule 15a-11, which provides an exemption from the Exchange Act definitions of broker and dealer for a bank that provides certain securities lending services to a person "the bank reasonably believes" is a qualified investor.

Solicitation Restrictions

Proposed Rule 760(a)(3) provides that a bank may respond to inquiries from custody customers that are potential purchasers of securities, provided the content of the bank's response is limited to either or both of two types of material: (1) information contained in a registration statement for the security that has been filed under the 1933 Act; and (2) certain sales literature. The sales literature that a bank may refer to for this purpose is itself limited in that it must be prepared by either: (a) a registered broker-dealer that is the principal underwriter for the security, or (b) a registered investment company that is not an affiliated person of the bank.

We have no objection to limiting the content of permissible responses to either sales literature or information contained in a registration statement, or to requiring that any sales literature be prepared by a registered broker-dealer or investment company. We believe it is anomalous, however, to prohibit a bank from using sales literature that is prepared by an investment company solely because that investment company is an affiliate of the bank. The Release offers no explanation for this prohibition.

Proposed Rule 760 does not, and should not, preclude use of sales literature that is prepared by an affiliated broker-dealer. Similarly, it does not, and should not, preclude use of sales literature relating to the shares of an affiliated investment company, or sales literature that is prepared by an unaffiliated investment company. Presumably, all of this reflects the Commission's recognition that the regulatory constraints imposed on both registered broker-dealers and registered investment companies (to say nothing of the anti-

fraud rules under the 1933 Act) are sufficient to protect investors from the possibility of improper representations being contained in the sales literature that the bank uses.

We see no basis for believing that the efficacy of those regulatory constraints (and anti-fraud rules) is compromised by an affiliation between the investment company that prepares sales literature and a bank that may use it in responding to inquiring customers. Indeed, the very materials that the bank would be prevented from using could be provided to the same customer by the fund itself or by a broker-dealer. We also see no reason to prohibit banks from being able to respond to customer inquiries with respect to their own affiliated funds than with respect to unaffiliated funds. Accordingly, we suggest that the prohibition be removed and that the words "that is not an affiliated person of the bank" be deleted from proposed Rule 760(a)(3)(B).

Definition of "Account"

Proposed Rule 762(a) seems intended to provide that an "account for which the bank acts as custodian" means an account that is either (a) an IRA for which the bank is a custodian or (b) an account for which there is a written agreement between the bank and the customer that contains the elements specified in proposed Rule 762(a)(1). As written, however, the reference to an IRA is contained in subsection (a)(2) and thus, under the grammatical structure of the provision, constitutes the subject matter of the terms of the written agreement. This appears to be a drafting error. Moreover, the proposed Rule need not and should not seek to regulate the form or content of IRA documents. For example, IRAs may be established by unilateral, rather than bilateral, instruments. The customer signs these instruments, but typically they are not signed by the custodian bank and, therefore, they cannot be said to be an "agreement between the bank and customer." In addition, in an electronic age, we see no reason to create potential confusion as to whether any custodial account, whether or not relating to an IRA, will qualify as such for purposes of Rule 762(a) if it is established pursuant to an electronic record, rather than in a paper "writing."

Accordingly, we suggest that subsection (a)(2) be deleted and that the beginning of proposed Rule 762(a) be revised to read as follows:

> (a) *Account for which the bank acts as a custodian* means an account that either is an individual retirement account for which the bank acts as a custodian or is an account established by a written agreement (which may be in the form of an electronic record) between the bank and the customer that, at a minimum, provides for the terms that will govern the fees payable, rights, and obligations of the bank regarding . . . .

<u>Grandfathered Accounts</u>

Our comments and suggestions discussed above with respect to proposed Rule 720 under the headings "Account Changes" and "Grandfather Date" apply equally to proposed Rule 760(a), which indicates in pertinent part that the exemption under proposed Rule 760 applies to accounts opened before July 30, 2004.

Proposed Rule 776

Proposed Rule 776 allows a bank to effect money market fund transactions for certain types of customers, including, among others, customers for whom the bank acts as "escrow agent, collateral agent, depository agent, or paying agent."[32] The Commission appears to have based this list of specific capacities on industry comments asking it to provide more flexibility for banks offering services to customers for whom they act "in capacities such as indenture trustee, escrow agent, or paying agent."[33] We presume the Commission believed these agency capacities were sufficiently broad to cover capacities typical in the corporate trust business, and that there was not necessarily an intention to make the list exclusive. Consequently, we believe the list should be expanded the term "fiscal agent."

A "fiscal agent" is commonly understood in the corporate trust industry to mean a bank, trust company, or other entity that has entered into an agency agreement with the issuer of

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[32] Proposed Rule 776(a)(1)(iii).

[33] 69 Fed. Reg. at 39716.

bonds or notes (usually government entities, but also corporate issuers) that provides for control and servicing of the securities being issued. These services may include, for example, disbursing dividends or interest, redeeming bonds and coupons at maturity, and handling tax matters.[34] The function of fiscal agent, while similar to the other agency functions listed in proposed Rule 776, is generally understood to be distinct from the others. Accordingly, in order to avoid uncertainty and confusion, we urge that proposed Rule 776 be amended to add the capacity of fiscal agent to the capacities listed in proposed Rule 776(a)(1)(iii).

De Minimis Exception

Section 3(a)(4)(B)(xi) permits a bank to effect 500 securities transactions per year, "other than in transactions referred to in clauses (i) through (x)" of Section 3(a)(4). We request that the Commission confirm that this exception also is exclusive of transactions effected pursuant to new exemptions created under proposed Regulation B, such as proposed Rules 760, 770, and 776.

Conclusion

Although Bank personnel and counsel have spent a substantial amount of time and effort reviewing and analyzing the Proposal, we are unable at this time, given the timing and relatively short duration of the comment period, to identify or provide comprehensive comments about all issues and concerns that may affect the Bank's fiduciary and custody business. Thus, the fact that this letter does not address a particular aspect of the Proposal should not be interpreted to mean the Bank necessarily supports it or has concluded that compliance with it is feasible. More specifically, the Bank concurs with the ABA/ABASA Comment and the comment of the Groom Law Group, chartered submitted

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[34] *See, e.g.*, R. Landau and J. Krueger, "Corporate Trust Administration and Management," at 423 (glossary) (5th ed. 1998). The term also is used in state government codes providing for public bond issuances. *See, e.g.*, Calif. Government Code Section 54552 (local agency may authorize "fiscal agent" to receive, collect, hold, or disburse revenues or any other funds available as security for payment of principal and interest on bonds).

on behalf of a group of banks, including the Bank, engaged in providing services to employee benefit plans.

We appreciate the opportunity to comment on the Proposal. We also acknowledge and appreciate the efforts of the Commission and its staff in developing the Proposal and requesting comments on a wide range of issues.

We would be pleased to respond to any questions the Commission or its staff may have with respect to these comments. Please contact William H. Wilson at (619) 230-4620 with any questions about this letter.

Very truly yours,

UNION BANK OF CALIFORNIA, N.A.

By: Richard C. Hartnack
Vice Chairman