THE FINANCIAL SERVICES ROUNDTABLE

1001 PENNSYLVANIA AVENUE, NW
SUITE 500 SOUTH
WASHINGTON, DC 20004
TEL 202-289-4322
FAX 202-289-1903

E-Mail rich@fsround.org
www.fsround.org

RICHARD M. WHITING
EXECUTIVE DIRECTOR AND
GENERAL COUNSEL

September 1, 2004

Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: Proposed Regulation B, File No. S7-26-04

Dear Mr. Katz:

The Financial Services Roundtable[1] is pleased comment on proposed Regulation B (the "Proposed Rules") offered by the Securities and Exchange Commission (the "Commission").

The Proposed Rules interpret the terms of the exceptions for banks from the definitions of "broker" in Section 3(a)(4) of the Exchange Act, as amended by the Gramm-Leach-Bliley Act ("GLB Act"). The Proposed Rules would govern the manner in which banks, savings associations, and saving banks effect securities transactions.

I. Roundtable's Comments

Roundtable member companies appreciate the substantial efforts of the Commission in preparing the Proposed Rules. In addition, we commend the Commission for conducting several meetings with industry representatives, including the Roundtable, to discuss proposed Regulation B. In addition to the following comments, the Roundtable supports the recommendations by The Clearing House Association L.L.C. ("Clearing House") and the American Bankers Association ("ABA") on the Proposed Rules.

In passing the GLB Act, Congress laid out the principle of "functional regulation". Functional regulation provides that banking activities are to be

[1] The Financial Services Roundtable unifies the leadership of large integrated financial services companies. Its membership includes nearly 100 firms from the banking, securities, investment and insurance sectors. In addition to communicating the benefits of integrated financial services to the American public, the Roundtable is a forum in which financial services industry leaders address critical public policy issues.

regulated by the appropriate banking regulators and securities activities are to be regulated by the Commission. Banks were permitted to continue their existing, limited securities activities that are part of the banking business, such as trust and fiduciary and custodial activities. Order execution of publicly traded securities was to be conducted by a registered broker-dealer.

Although we are encouraged by some of the changes the Commission has made in its position since the issuance of the interim final rules in May 2001("Interim Final Rules")[2], we believe that the Commission's Proposed Rules go beyond Congressional intent and are contrary to the concept of function regulation. We believe these Proposed Rules impose new requirements on banks which could place burdens on banks and disrupt the financial service marketplace. Our specific concerns include the following:

- Trust and Fiduciaries Exception - The Roundtable believes that the Proposed Rules that implement this trust and fiduciaries exception, specifically the Commission's definition of "chiefly compensated", is inconsistent with both the statutory language and the intent of Congress under Title II of the GLB Act.

- Networking Exception – This exception was intended to allow banks to pay bank employees "nominal" fees for referring customers in a retail networking arrangement. The Proposed Rules create a system that allows the Commission to scrutinize banks' overall compensation and bonus programs.

- Safekeeping and Custody Activities Exception - This exception was created to allow banks to continue to act as custodians. This includes taking orders for custodial accounts. The Proposed Rules inappropriately limit the custody order-taking exemption to "qualified investors" and to preexisting customers.

- Sweep Accounts Exception - We believe that the Proposed Rules would require banks to change their current practices with respect to sweep accounts. Under Proposed Rule 740(c)(1), a mutual fund would satisfy the "no-load" requirement only if its charges for sales promotion expense and personal service or the maintenance of shareholder accounts do not exceed 25 basis points of average net assets.

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

- Thrift Issues - Roundtable member companies are greatly concerned with the lack of parity for thrifts under the Proposed Rules. The Commission has changed its position and no longer provides exemptions for savings associations and savings banks on the same terms and conditions that banks are exempted from broker dealer registration.

We discuss each of these concerns in the following pages and make several specific recommendations to address them.

II. Trust and Fiduciary Activities Exception

The trust and fiduciary exception broadly authorizes a bank, without registering as a broker-dealer, to effect securities transactions in a trustee capacity, or in a fiduciary capacity in its trust department or other department that is regularly examined by bank examiners for compliance with fiduciary principles and standards. Banks may qualify for the exception if the bank: (1) is chiefly compensated for such 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, or a flat or capped per order processing fee equal to not more than the cost incurred by the bank in connection with executing securities transactions for its trust and fiduciary customers, or any combination of such fees; and (2) does not publicly solicit brokerage business (other than by advertising that it effects transactions in securities in conjunction with advertising its other trust activities).[3]

The Roundtable believes that the Proposed Rules that implement this exception, specifically the Commission's definition of "chiefly compensated", are inconsistent with both the statutory language and the intent of Congress under the GLB Act. We believe that Congress intended to protect the securities services that banks provide trust and fiduciary customers. We are concerned that the "chiefly compensated" calculation, as currently proposed would be extremely burdensome and costly to banks engaged in trust and fiduciary activities.

A. "Chiefly Compensated" Test

Current Exchange Act Rule 3b-17 defines chiefly compensated to mean that more of bank's payments for securities transactions must come from "relationship compensation" that from "sales compensation". This is to be determined by banks annually, on an account-by-account basis. "Unrelated compensation", which is any fee a bank receives that is not related to effecting securities transactions, is not included in the definition of "relationship

[3] 15 U.S.C. § 78c(a)(4)(B)(ii).

compensation." The Interim Final Rules provide two exceptions to this rule: (1) Exchange Act Rule 3a4-2 exempts banks that receive less than ten percent compensation from making calculations on an account-by-account basis, and (2) Exchange Act Rule 3a4-3 exempts banks when they act in the narrow role of indenture trustees investing in no-load money market funds.

The Roundtable appreciates some of the changes the Commission has made since issuing the Interim Final Rules, including the expansion of the definition of "relationship compensation" to include revenues received for managing non-securities assets; the new safe harbors applicable in the case of an occasional failure to meet the requirements of the "chiefly compensated" test, and the new exemption grandfathering existing living, testamentary and charitable trust accounts. However, we believe that other elements of the "chiefly compensated" test in the Proposed Rules are problematic.

In particular, Roundtable member companies are concerned with new line-of-business exemption contained in Proposed Rule 721. The Proposed Rules require a bank to measure "sales compensation" not as a percentage of all trust and fiduciary revenues but as a percentage of "relationship compensation". Under the proposal, a bank could calculate chiefly compensated by demonstrating that during the preceding year its ratio of "sales compensation" to "relationship compensation" was no more than one to nine either on a line-of-business or bank-wide basis. We believe that the one-to-nine ratio of "sales compensation" to "relationship compensation" permitted under Proposed Rule 721(a)(2) is too low. This limit may put banks at risk of violating the "chiefly compensated" test. If nothing else, it creates great uncertainty as to whether banks may contain trust and fiduciary activities without being in violation.

The Commission has asked banks to provide precise data before the Commission will consider any relief from this test. The problem is that the rules that the Commission proposed are too complicated and it is unclear how the calculations would work under the proposal. Banks have not measured relationship compensation in the past. The cost of building data collection and processing systems to measure relationship compensation in this context would be significant. Due to the ambiguous nature of the proposal, it is unclear whether banks would be able to capture the precise data the Commission is requesting under the rule. Banks would have to create new systems since they are not currently tracking a lot of this information.

Requiring banks to provide specific data on "sales" and "relationship" compensation for accounts in trust departments would be burdensome. The Roundtable believes that excluding "unrelated compensation" from the "chiefly compensated" calculation is unreasonable. We believe that "sales compensation" should be measured against all revenues received by a bank in connection with its trust and fiduciary activities. We *recommend* that banks be allowed to measure "sales compensation" against total compensation. We urge the Commission to revise the Proposed Rules to provide banks with an alternative to the account-by-account method of compliance whereby the proportion of "sales compensation" for trust and fiduciary account may not exceed a certain percentage of the total compensation from trust and fiduciary activities. This would simplify banks' task of complying with the "chiefly compensated" test.

The Roundtable is also concerned with the definition of what constitutes a line of business. Under Proposed Rule 724(e), line of business means "an identifiable department, unit, or division of a bank organized and operated on an ongoing basis for business reasons with *similar types of accounts* and *for which the bank acts in a similar type of fiduciary capacity* as listed in section 3(a)(4)(D) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(40(D)) (emphasis added)." We believe that the requirements of "similar types of accounts" and "for which the banks act in a similar type of fiduciary activity" are vague. The Proposed Rules do not provide any guidance on how banks are to assess whether accounts are of a similar type or whether a bank is acting in a similar type of fiduciary capacity. We *recommend* the provisions be removed from the definition.

B. Bank Departments That Are Regularly Examined by Bank Examiners for Compliance with Fiduciary Principles

The GLB Act requires that all securities transactions effected by a bank under the trust and fiduciary exception be effected in the bank's trust department or in another department of the bank that is regularly examined by bank examiners for compliance with fiduciary principles and standards. [4]

The Roundtable is concerned with this proposal as it relates to third parties. Banks that conduct fiduciary activities often delegate securities processing and settlement activities to a separate department or affiliate that is responsible for all of the bank's back-office securities settlement and processing tasks. Many banks, particularly small banks, outsource processing and back-office operations to third parties. While these separate bank departments, affiliates or third-party providers may be subject to examination by bank examiners, they do not themselves have fiduciary relationships with customers and may not be regularly examined for compliance with fiduciary principles and standards.

There is nothing in the GLB Act or in the legislative history that suggests that the Commission is authorized to regulate banks' reliance on third-party

[4] See 15 U.S.C. § 78c(a)(4)(B)(ii).

service providers to provide trust or fiduciary (or indeed any) products or services. We believe that regulation of banks' use of third-party service providers is the jurisdiction of the federal banking agencies, not the Commission. Therefore, we believe the Proposed Rules contradict the principle of functional regulation.

We believe that the Proposed Rules would affect business activity between banks and third parties. Banks are already examined by the appropriate agency to determine if they have processes in place to ensure that their relationship with trust and fiduciary customers adhere to fiduciary principles. We *recommend* that the Commission explicitly indicate that it does not intend to regulate outsourcing through its interpretation of the requirement that securities transactions effected in reliance on the trust and fiduciary activities exception be conducted in the bank's trust department or "other department that is regularly examined by bank examiners for compliance with trust and fiduciary principles and standards."

III. Networking Exception

A. Referral Fees

1. "Nominal One-Time Cash Fee of a Fixed Dollar Amount"

The networking exception in Exchange Act Section 3(a)(4)(B)(i) allows banks to partner with registered broker-dealers to offer securities brokerage services to bank customers. The exception allows unregistered bank employees to engage in limited securities-related activities and receive incentive compensation in the form of a "nominal one-time cash fee of a fixed dollar amount for referring the customer to the broker-dealer".

The Roundtable does not support the proposed definition of the "nominal one-time cash fee of a fixed dollar amount" that a bank may pay an unregistered bank employee for the referral of a customer to a broker-dealer under the networking exception. We believe that the three alternative measures proposed for what constitutes "nominal" under Proposed Rule 710(b) are too restrictive. Nominal one-time fees are permitted if; (1) they do not exceed the employee's base hourly rate of pay, (2) they are limited to twenty five dollars, or (3) they are limited to a dollar amount that does not exceed the whole dollar nearest to fifteen dollars in 1999 dollars, plus an adjustment for inflation rate dollars.

We believe this definition is too narrow for several reasons. The base hourly salary for employees in the banking industry has lowered or remained stagnant over the years. Even if that were not the case, merely compensating employees based on one hour of work seems extremely low even in the context of "nominal" compensation. We do not believe that basing the referral fee on hourly salary would provide an incentive for bank employees to provide referrals for services which may benefit customers. We *recommend* that the Commission reconsider this figure and create a more practical formula.[5]

Member companies of the Roundtable believe that the $25 limit in Proposed Rule 710(b)(1)(ii) is also inadequate. A flat fee does not account for the differing compensation of the employee that may be referring the customer. The $25 limit may be appropriate for tellers, however it may not be sufficient for platform personnel who receive higher compensation. We *recommend* that Proposed Rule 710(b)(1)(ii) provide for a two-tier limit. We suggest that the limit be $25 for referrals made by tellers and $50 for platform personnel.

2. Fees Paid Other than in Cash

The Roundtable is concerned with Proposed Rule 710(b)(3)(i), which deals with referral fees paid other than in cash. This rule requires that these referral fees be "paid in units of value with a readily ascertainable cash equivalent." This means that the "value or potential value [of the referral fee] must have been known by the bank and the employee at the time of the referral."[6] We believe that this requirement would be extremely difficult to calculate and would prevent banks from paying their employees referral fees with anything other than cash. We *recommend* that the Commission provide banks a clear formula for determining the cash equivalent and allow them to make this determination after the transaction has occurred.

3. Definition of "One-Time"

Section 3(a)(4)(B)(i)(VI) of the Exchange Act limits the referral fee under the networking exception to payment of a "nominal *one-time* cash fee of a fixed dollar amount" (emphasis added). The Roundtable disagrees with the Commission's interpretation of the term "one-time." Proposed Rule 710(b)(2) provides that a bank employee may receive a referral fee "no more than one time for each customer referred by that employee." The Release states that "a bank could not pay a particular employee more than one referral fee based on multiple referrals of the same customer, and an unregistered bank employee who referred a customer more than once could receive only one fee related to that customer."

We are concerned with the application of the "one-time" requirement on a per customer basis, rather than per referral basis. Banks would be forced to create

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[5] We support the proposed formula offered by Clearing House which states that an unregistered employee would be eligible to receive referral fees not greater than 1/1000th of the total compensation received by that employee for either the current year or for the prior year.

[6] 69 Fed. Reg. 39,688 (2004).

systems and maintain records that track the identity of customers referred. In addition, the Proposed Rules provide no guidance as to the length of time that the prohibition on payment of a referral fee to an employee for referral of the same customer would last.

4. "Contingent on Whether the Referral Results in a Transaction"

The Roundtable *supports* the Commission's new definition of "contingent on whether the referral results in a transaction." Proposed Rule 710(a) provides that referral fees are contingent on two factors: (1) whether a customer contacts or keeps an appointment with a broker-dealer as a result of the referral, and (2) whether the referred customer meets certain generally established requirements regarding assets, income or net worth that the bank or broker-dealer may have established for payment of referral fees.

The Proposed Rules request comment on whether "banks should be able to condition the payment of referral fees on other criteria relating to other aspects of a customer's financial profile, such as tax bracket."[7] The Roundtable believes that conditioning payment of referral fees on criteria, such as a customer's tax bracket, would be consistent with Proposed Rule 710(a)(2) which allows a referral fee to be contingent on whether the customer's assets, net worth, or income meets certain minimum requirements that the banks and broker-dealers have established for referrals .

5. Bonus Plans

The Commission has made one change from the Interim Final Rules allowing bonuses that are part of the overall profitability of the bank holding company. We believe the Commission is overreaching its authority in this regard by overseeing the bonus and other compensation plans of bank holding companies.

The Roundtable *recommends* that the Commission limit its authority over bonus plans. We believe that the Commission should state that bank bonus programs are outside of its jurisdiction, except when used as an indirect conduit for the payment to bank employees of specific transaction-related referral fees not covered by the networking exception. We believe this would allow the Commission to limit "incentive compensation" without interfering with bank operations. Without taking this step, the Commission's rule may having a chilling effect on bank bonus programs which are often used to gauge how well banks are meeting the needs of their customers.

[7] 69 Fed. Reg. 39,692 (2004).

IV. Safekeeping and Custody Exception

Exchange Act Section 3(a)(4)(B)(viii) provides an exception from broker-dealer registration for certain securities-related safekeeping and custody services that banks perform for their customers. The exception allows banks to serve as custodians to IRAs, pension, retirement, profit sharing, bonus, thrift, savings incentive, or other similar benefit plans without being considered a broker. The exception does not apply to banks that act as a carrying broker or clearing broker in connection with securities transactions.

The Commission has determined that this statutory language does not permit a bank to accept orders for the purchase or sale of securities in circumstances "not specifically provided for" in the GLB Act, and that the authorization to perform "administrative services" with respect to IRAs and retirement plans does not include the authority to accept orders.

The Roundtable appreciates the changes made by the Commission since the release of the Interim Final Rules. These changes include removing certain restrictions from the order-taking exemption, including: (1) the prohibition on use of dually licensed employees to effect transactions pursuant to the exemption, (2) the requirement that a bank employee effecting transactions in reliance on the exemption primarily perform duties for the bank other than effecting transactions in securities, (3) the prohibition on custody employees from receiving compensation for the amount of securities-related assets gathered, and (4) the prohibition on bank employees from receiving payment of referral fees pursuant to the networking exception if they engage in order taking on behalf on custody customers.

The Roundtable is still concerned however that the Proposed Rules restrict banks' ability to rely on the safekeeping and custody exception. In particular, we are concerned that the Proposed Rules limit the scope of the order-taking exemption contained in Proposed Rule 760 to qualified investors and preexisting customers, place restrictions on the receipt by banks of Rule 12b-1 fees in connection with order taking, tighten the solicitation of securities transactions relating to the general bank custody order-taking exemption, and create an unworkable definition of custody account.

A. Scope of the Order-Taking Exemption

The Roundtable believes that the GLB Act permits custodial order taking. Order taking is a customary activity that banks perform for their custodial accounts. We do not believe that the Proposed Rules should limit the availability of the custody order-taking exemption to "qualified investors" and to preexisting customers. Limiting the ability of bank custody departments to place securities orders for custody customers is contrary to the language and intent of the GLB Act. The Commission has not provided any justification as to why this function should be limited to "qualified investors" or preexisting customers. The Commission has not produced any evidence that there is a public interest in preventing custody accounts from taking orders or that current custody customers are being harmed by this practice. No commissions are paid for trades in these accounts. In some cases, servicing fees based on the total assets in custody or small securities movement transaction fees are charged.

Custodial accounts serve important functions for customers who may wish to have their assets in one central location. By limiting the scope of the order-taking exemption, the Proposed Rules may disrupt the marketplace. Customers (especially those who are not "qualified investors") may be forced to remove assets from custody accounts and open a duplicate brokerage account. We *strongly recommend* that Proposed Rule 760(a) be amended to extend the scope of the order-taking exemption to all custody customers.

B. Bank Compensation

The Roundtable appreciates the Commission's willingness to modify the general bank custody exemption. In particular, we are encouraged by the Commission amending the general custody exemption to permit banks to be compensated for accepting orders to purchase and sell securities through payment of Rule 12b-1 fees and shareholder servicing fees for accounts that were opened before the date of the Release for "qualified investors". As the Commission suggests, this is necessary to avoid a disruption of bank custody activities.

C. Solicitation of Securities Transactions

The Commission is proposing to "tighten" the solicitation conditions relating to the general bank custody order-taking exemption. For example, the Proposed Rules would remove from the current custody exemption a provision that permits banks to solicit investors through investment company advertising and other sales material. Also, banks would not be permitted "to solicit through another bank department securities activities in its custody department."

We believe that some of these adjustments are too strict. Although we agree that a bank custody department's ability to solicit order taking should be restricted, these restrictions should not be extended to other departments of the banks. For example, bank trust departments should be allowed to continue their normal marketing of their fiduciary services, including to custody customers.

D. Custody Account Definition

The Proposed Rules define a custody account as one "established by written agreement between the bank and the customer, which at a minimum provides for the terms that will govern the fees payable, rights, and obligations of the bank regarding the safekeeping of securities, settling of trades, investing of balances" and various services provided by the bank as custodian.

The Roundtable believes that this definition would be burdensome for banks as they would be required to make revisions to how they document their custodial relationships with customers (new and existing). We do not believe there is any benefit to the customer in providing this information. In addition, this appears to be another instance where the Commission is acting contrary to the concept of function regulation by reviewing custody activities of banks. Therefore, we *recommend* that the Commission eliminate this provision from the Proposed Rules.

V. Sweep Accounts

Section 3(a)(4)(B)(v) of the Exchange Act permits banks to sweep deposit funds into no-load money market mutual funds. A mutual fund satisfies the sweep exception if: (1) it does not have a sales load or a deferred sales load; and (2) its total charges against net assets to provide for sales-related expenses and service fees (including 12b-1 fees) do not exceed .25 of one percent of average net assets annually and are disclosed in the mutual fund's prospectus. The rule is consistent with the NASD's definition of "no-load".

The Roundtable *does not support* this provision. We believe that the .25 percent standard is not consistent with the GLB Act or its legislative history. Congress intended to permit banks to continue to offer sweep accounts as they were offered before the enactment of the GLB Act, which did not include the NASD definition of "no load."

The .25 percent standard would force banks to accept sweep relationships materially less advantageous than their pre-GLB Act arrangements, reconfigure their relationships with money market funds within the Commission's narrow exceptions to the .25 percent standard, or create complex and costly multi-party relationships among bank customers, the bank, and a broker-dealer for daily sweep services. All of these alternatives place the bank at a competitive disadvantage to broker-dealers, which can offer sweep facilities without these constraints.

We *recommend* that the Commission modify the "no-load" definition accordingly so that banks will be exempt from the definition of “broker” to the extent that they sweep funds into money market mutual funds.

VI. Thrift Issues

Roundtable member companies are concerned with the lack of parity for thrifts under the Proposed Rules. When the Commission released the Interim Final Rules in 2001, it granted an exemption from the definitions of “broker” and “dealer” for savings associations and savings banks on the same terms and conditions that banks are exempted from broker dealer registration.

In the Proposed Rules, the Commission has inexplicably changed its position with regard to the exemption for savings associations and savings banks. The Commission proposes to extend to savings associations and savings banks only the proposed money market exemption in Exchange Act Rule 776, the proposed exemptions in Exchange Act Rules 720-723 relating to the bank trust and fiduciary activities exception, the proposed small bank custody exemption in Exchange Act Rule 761, the proposed expanded exemption for the way in which banks effect transactions in investment company securities in Exchange Act Rule 775, and the current exemption for securities lending transactions in Exchange Act Rule 15a-11. The Commission is no longer proposing to extend to thrifts the proposed general custody exemption in Exchange Act Rule 760, the proposed new ERISA exemption in Exchange Act Rule 770, or the proposed Regulation S exemption in Exchange Act Rule 771. Consequently, federal savings associations and savings banks are not exempt from the definition of “broker” on the same terms and conditions that banks are exempted from broker dealer registration.

The Roundtable disagrees with the Commission’s position. We believe there is no difference in the businesses of banks and thrifts. We are particularly concerned with the lack of parity under Exchange Act Rule 770. Exchange Act Rule 770 exempts from the definition of “broker” for banks effecting transactions in securities in certain employee benefit plans. The conditions for meeting this exemption in the rule are designed to ensure the protection of plan participants. By excluding thrifts, the proposed rule unfairly discriminates against federal thrifts performing the same kinds of services as national or state chartered banks. The exclusion of thrifts from the exemption places federal thrifts at a competitive disadvantage to national and state chartered banks with respect to trust and custodial business.

The Roundtable *recommends* that the Commission amend the Proposed Rules to conform to their original proposal in the Interim Final Rules, which provided the same exemptive relief to thrifts. At a minimum, we would urge the Commission to extend Rule 770 to federal thrifts.

VII. Dual Employees

The Roundtable is concerned with the application of NASD Rule 3040 to dual employees (those bank employees also registered as broker-dealers). The Proposed Rules suggest that the Commission or the NASD would oversee bank activities of registered broker-dealers. The Roundtable *recommends* that the Commission clarify that NASD Rule 3040 does not allow the Commission or NASD to examine activities of dual employees acting in their capacities as bank employees, including effecting securities transaction in compliance with an exception of the GLB Act. This is necessary to preserve the concept of functional regulation and maintain the authority given to the banking agencies to scrutinize these activities.

VIII. Conclusion

The Roundtable appreciates the Commission's efforts to create regulations that would determine which securities activities are permitted by banks and bank employees. However, we believe that the Proposed Rules misinterpret the GLB Act and certain provisions place undue restrictions and conditions on traditional banking activities. We believe that the Proposed Rules give the Commission jurisdiction over matters that are the purview of other agencies and is contrary to the concept of functional regulation mandated by Congress in the GLB Act. We urge the Commission to delay implementing the final rules until these issues are resolved. We also request that the Commission consider republishing the Proposed Rules for further comment.

We look forward to discussing our comments further with the Commissioners and staff. If you have any further questions or comments, please do not hesitate to contact me or John Beccia at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel