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May 9, 2008

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Proposed Amendment of Regulation S-P

Dear Ms. Morris:

We are writing to offer our comments on the proposed rule that would set forth more specific requirements for safeguarding information and responding to information security breaches, as well as permitting transfer of information to nonaffiliated third parties when personnel move from one broker-dealer to another. Our comments are on behalf of Comerica Securities, Inc., Detroit, Michigan, a registered broker-dealer and investment adviser wholly-owned by Comerica Bank, and on behalf of Comerica Bank. Comerica Bank is a full service state member bank, based in Dallas, Texas, that operates more than 400 offices in the states of Michigan, California, Texas, Florida, and Arizona and holds more than $62.5 billion in assets. Comerica Bank, consistent with Federal Reserve Regulation P and the Gramm-Leach-Bliley Act, from time to time, refers customers to Comerica Securities, Inc. and shares information with Comerica Securities, Inc. Accordingly, both Comerica Securities, Inc. and Comerica Bank are directly affected by the proposed rule.

Generally, we support the proposed amendments to the extent that they harmonize Regulation S-P with Federal Reserve Regulation P. However, a part of the proposal goes far beyond Federal Reserve Regulation P. The proposal would add a new exception from the notice and opt-out requirements to permit disclosure of investor information when a registered representative moves from one brokerage firm to another so that the new firm could contact clients and offer them a choice to move to the new firm.

Nancy M. Morris, Secretary

The premise of this aspect of the proposal seems to be that the moving registered representative has some property or other right to the investor information. That is a false premise. There have been many cases of departing registered representatives taking such investor information with them and being (along with their new employers), in many cases successfully, sued by their former employers for conversion, theft of trade secrets, breach of fiduciary duty of loyalty1, tortious interference with contract2, and even privacy violations. In such cases, judgment is usually accompanied by an injunction against the departing registered representative and his or her new employer against use of the stolen information. It is surprising that the Commission would propose to regulate in this highly sensitive and controversial area, particularly in the context of regulating privacy, and then, instead of proposing a measure to protect the confidentiality of customer information and the property interests of brokers by preventing the transfer of customer information, propose the opposite. It is unclear why the Commission would not instead provide that no customer information may be taken by a departing registered representative without the consent of the investor, and thereby protect customer privacy (and thereby also protect the proprietary interest of the former employer in such information).

The Commission, in its notice, suggests that departing brokers are likely to remember basic contact information or have recorded it in their own personal records. However, whether a trade secret is "embodied in written lists or committed to memory is … of no significance; in either case the data are entitled to protection" under trade secret law.3

In some cases in which the broker that formerly employed the departing registered representative sues for the wrongful taking of customer information, one of the causes of actions it may plead is violation of customer privacy. Adoption of the proposal would eliminate that basis for protecting customer and broker information. Worse, adoption of this aspect of the current proposal may well be construed by courts as a Commission determination that it is appropriate for a departing registered representative to take investor information when he or she leaves, essentially undermining the case law in this area and shifting the right to the information in these cases to the defendant registered representative and new employer. That would cause such a significant reversal of law in this area that it should be considered by the Commission, if at all, as a well-publicized stand-alone proposal, not as a small part of a largely technical amendment to Regulation S-P.

Nancy M. Morris, Secretary

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1 See Reading Radio Inc. v. Fink, 2003 PA Super 353, 933 A. 2d 199, 211 (Pa. Super. 2003). Creating, while in a company's employ, a target book of business that would be moved to another firm constitutes a breach of fiduciary duty of loyalty. Latuszewski v. VALIC Financial Advisors, Inc., 2007 U. S. Dist LEXIS 93329 (W. D. Pa. 2007).

2 The former employer has an existing contract with each customer whose information would be moved to the new employer, and the departing registered representative and his or her new employer would have a specific intent to harm that relationship by causing the customer to end its relationship with the former employer. Taking the customer's information is presently wrongful (theft of trade secrets and breach of fiduciary duty of loyalty) and thus not a defense, but the Commission's proposal would change that. See Latuszewski, ibid.

3 Morgan's Home Equip. Corp v. Martucci, 290 Pa. 618, 136 A. 2d 838, 843 (Pa. 1957).

In support of this aspect of the proposal, the Commission cites a 2004 protocol to similar effect signed by three large broker-dealers and subsequently signed by at least three others. Obviously there are many brokers that did not sign that protocol and that would not sign it, if offered the opportunity to do so. However, by adoption of the proposed rule, the Commission would, in effect, impose that protocol on all non-signatory broker-dealers.

The Commission's notice of proposed rulemaking expressly acknowledges that currently "some representatives may have to take information with them secretly when they leave". There is no reason that such representatives do this "secretly", other than that they believe such taking is wrong and perhaps illegal. Adoption of this proposal would make lawful what today is wrong and in most cases illegal4.

The Commission also suggests that adoption of this aspect of the proposal would clarify that a firm may not require or expect a registered representative from another firm to bring more information than necessary to solicit clients. Today it is unlawful for the departing registered representative to bring the information (name, general description of the account and products held, and contact information) the Commission would permit to be brought to a new broker. Such information clearly constitutes trade secrets.5 The Commission is correct that some recruiting firms require or expect a recruited registered representative to bring such information. Indeed, very large signing bonuses are paid by some recruiting brokers; such could be construed as the price the recruiting broker is paying the registered representative for the trade secrets in the form of confidential customer information that the registered representative has stolen from his or her former employer. The Commission should not condone these practices by adopting this aspect of the proposal as these practices defy the fundamental premise of Regulation S-P, the protection of a customer's information.

Many customers care about the sanctity of their information and, in some cases, if not many or most, had the opportunity to choose either the registered representative's former firm or new firm and chose the former. The Commission now proposes that, without the customer's consent and quite possibly against the customer's will, the customer's confidential information be shared without any opportunity to object or opt out. That seems to frustrate the fundamental purpose of Title V of the Gramm-Leach-Bliley Act, which states "[i]t is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers'

Nancy M. Morris, Secretary

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4 Latuszewski v. VALIC Financial Advisors, Inc., 2007 U. S. Dist. LEXIS 93329 (W.D. Pa 2007).
5 Latuszewski, ibid. Even if a registered representative helped develop the customer list, if the information was developed while in the former broker's employ, the customer list information is owned by the former employer. Morgan's Home Equip., 136 A. 2d at 842. See also Certified Laboratories of Texas, Inc. v. Rubinson, 303 F. Supp. 1014, 1024-25 (E.D. Pa. 1969). The value in the former employer's customer information is in the compilation, categorization, and organization of information. This is what a competitor does not have and cannot easily recreate. Latuszewski, ibid..

nonpublic information." It does not respect the privacy of customer information or protect its confidentiality to treat such information as if it is the alienable property of a registered representative and to enable registered representatives to transfer such information to a new broker without any notice to the customer or right to object.

If the purpose of this aspect of the proposal is to promote competition in recruiting registered representatives, as implied by one of the questions set forth in the notice of proposed rulemaking, we would respectfully submit that lessening privacy protections is not the proper mechanism by which to promote such competition and that the Commission should consider other measures more directly to promote such competition.

For the foregoing reasons, we urge the Commission not to adopt that aspect of the proposal that would create an exception for sharing information when a registered representative changes employers.

Thank you for this opportunity to express our views.

Best wishes,

s/ Julius L. Loeser

Julius L. Loeser