National City

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March 23, 2007

Jennifer J. Johnson, Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue N.W.
Washington, DC 20551
Docket No. R-1274

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549-1090
File No. 57-22-06

Re: Comments to Proposed Regulation R of the Securities Exchange Act of 1934 ("Exchange Act") and Release No. 34-54946, 71 Fed. Reg. 77522 ("Proposed Regulation R")

Dear Ms. Johnson and Ms. Morris:

National City Corporation, a one hundred forty billion dollar financial holding company headquartered in Cleveland, Ohio, with subsidiary banking institutions and a full service broker-dealer serving primarily the eight (8) state area of Ohio, Pennsylvania, Indiana, Kentucky, Michigan, Illinois, Missouri and Florida ("National City"), wishes to submit its comments to Proposed Regulation R. National City's lead bank was founded in 1845 and has a long history of successfully providing a full array of trust, fiduciary, custodial, safekeeping, and similar services, subject to the supervision and regulation of the Office of the Comptroller of the Currency. As a result of the Gramm-Leach-Bliley Act ("GLB"), the law has changed, but it was not intended to fundamentally alter the way banks conduct their traditional activities.

We applaud the diligent efforts of the federal banking agencies in working with the Securities and Exchange Commission ("SEC") to fulfill the requirements of Title II of GLB. Proposed Regulation R is more consistent with GLB and its provisions are much more workable than previous proposals by the SEC to implement the exceptions to the definition of "broker" under Section 3(a)(4) of the Exchange Act which are intended to allow banks to continue to perform activities in which they have traditionally engaged. However, there are still several aspects of Proposed Regulation R that we believe need to be addressed in order to properly comply with Congress' intent set forth in GLB that bank activities be conducted without unnecessary burdens.

Networking Exception

1. In proposed rule .700(a), there is a definition of "contingent on whether the referral results in a transaction" which includes the phrase "whether an account is opened with a broker or dealer." We believe that this phrase is more limiting than necessary and indirectly conflicts with .700(a)(2) which allows the use of objective, base-line qualification criteria. Whether or not an account is opened is not the relevant focus and unnecessarily prevents

programs based on account openings, particularly for money market sweep accounts, financial planning services, investment advisory wrap products offered by a broker-dealer that is also registered as an advisor, and other non-brokerage, non-transactional activity in which a broker-dealer may engage. Deleting this phrase would not be contrary to the intent of prohibiting payment of referral fees based on a securities transaction. For example, many customers open asset management accounts which combine a bank account and a brokerage account. Often, the brokerage account is opened, but not funded or is invested only in a money market mutual fund which banks will be allowed to offer under Proposed Regulation R. Permitting a referral fee to be paid based on an account opening can reduce operational burdens for banks by providing an efficient mechanism to track a referral's eligibility.

2. In proposed rule .700(c), there is a definition of "nominal one-time cash fee of a fixed dollar amount." We believe that this definition should be modified to allow a bank to award points that equate to a payment of a nominal fee of a fixed dollar amount in order to provide added flexibility in the administration of a referral program. We believe that this can be done without violating the intent of the regulation. A properly weighted point system can allow a bank to incent the referral of non-securities products by requiring non-securities targets to be met before the referral fee for securities products is considered earned and payable. At a minimum, it should be made clearer in this section as to whether the securities referral fee can be withheld based on the failure to meet non-securities factors.

In addition, we have a concern with the definition of "nominal one-time cash fee" which references an employee's base hourly or annual wage or salary. We believe that this definition materially disadvantages those employees who receive the bulk of their compensation in the form of non-securities product commissions, such as mortgage brokers, private bankers, and trust salespersons. Under the proposed rule, these employees would receive a smaller fee for referring relatively more sophisticated customers than, for example, branch employees who typically refer retail customers.

3. Proposed rule .701(a)(1)(i)(A) defines "bank employee" by requiring that the employee not be qualified or otherwise required to be qualified pursuant to the rules of a self-regulatory organization. This requirement appears to be punitive to those banks and employees who have taken steps to increase their knowledge and training by getting registered in order to offer additional products, such as variable insurance products and mutual funds. This requirement should either be removed or at least clarified that a bank employee who is registered with a broker-dealer is allowed to participate in the bank's referral program. It is neither appropriate nor within Congressional intent to exclude registered bank employees from participating in a bank referral program just because they are registered. As written, the proposed rule is not supported by GLB and creates an artificial and unjustified disincentive for securities registration. Further, the current requirement would appear to require both the bank and the broker-dealer to administer separate referral programs for the same type of referral. For example, a bank employee registered with a broker-dealer who primarily sells mutual funds to retail customers would not be permitted to receive a payment under the bank's plan for referring an institutional or high net worth customer. Instead, the broker-dealer would have to administer a similar, but separate, referral program.

4. Proposed rule .701(a)(1)(ii) requires that the "bank employee" encounter a high net worth customer or institutional customer in the ordinary course of the employee's assigned duties for the bank. Read literally, this would mean that a bank teller who meets a customer at the teller window would be eligible to receive enhanced referral fees, but a vault teller who does not encounter customers would not be eligible. Further, for example, an executive vice president

of a bank who manages systems operations and does not normally have customer contact could not take advantage of this exception. We do not believe that the proposed rule was intended to have such a narrow application. Bank employees often encounter current or prospective customers in a variety of settings outside the office, such as sporting events, social events, school functions, social and civic organization activities, fundraisers, etc. Our interpretation of the rule is that such encounters which lead to a referral will not disqualify a bank employee from receiving the enhanced referral fee, even if that employee does not normally interact with current or prospective customers during the course of the business day, as long as the encounter was not primarily intended to result in a referral to a broker-dealer.

5. Proposed rule .701(a)(2)(i) requires that the bank provide certain disclosures to a customer "prior to or at the time of the referral." This requirement is very impractical. For example, a bank employee may make a referral to a broker-dealer based on his/her knowledge of the customer's interest or qualifications without even having contact with the customer. Further, if there is contact with the customer, it may be in an informal, off-premises setting or by telephone. It cannot reasonably be expected that bank employees will carry around disclosure forms everywhere they go. In addition, no account opening or security transaction may result from the referral, so why should the customer be notified of the bank's incentive program when the customer may not even open an account with, or do any business with, the broker-dealer? We believe that the customer should be provided with disclosure information prior to, or at the time, the first transaction is completed. This change would better mirror the solicitor disclosure requirements under the Investment Advisors Act as well as the remuneration requirements associated with the SEC's Rule 10b-10 confirmation requirements. The disclosure can be better and more fully made at the time the customer meets with a broker-dealer representative. Further, since the disclosure is being made to institutional and high net worth investors who must pass suitability/sophistication tests prior to completion of the transaction, these tests will support the customer's capacity to evaluate and decide whether or not to complete a transaction with a broker-dealer and thereby reduce the need to rely upon a disclosure statement.

6. Proposed rule .701(a)(2)(ii)(A) and (B) are written in such a way that the bank is responsible for determining whether a customer meets the definition of institutional customer or high net worth customer. This requirement is contrary to our understanding of a previous SEC ruling that discouraged non-registered bank employees from profiling the suitability of a customer. While we believe that it is a valid requirement for a determination to be made as to whether a customer meets the definition of institutional or high net worth customer, we believe it would be better served as a broker-dealer responsibility pursuant to proposed rule .701(a)(3) since the broker-dealer is required to profile the customer for suitability purposes as well as to comply with proposed rule .701(a)(3)(i)(B). Making this change would provide a logical and practical basis for ensuring that the customer meets the qualification requirements of the rule and receives the disclosure required by proposed rule .701(a)(2)(i). The broker-dealer would then be in a position to confirm to the bank that a referral to a valid institutional or high net worth customer occurred and that the proper disclosures were made. This scenario would also present a good opportunity for the broker-dealer to provide the bank with the results of its background check and verify whether or not the referring employee is statutorily disqualified.

Further, the proposed rule imposes two different timing requirements for determining whether a customer qualifies as an institutional or high net worth customer. Proposed rule .701(a)(2)(ii)(A) states that for an institutional customer, the determination must be made before the referral fee is paid. Proposed rule .701(a)(2)(ii)(B) states that for a high net worth customer, the determination must be made prior to or at the time of the referral. We see no reason for the distinction. All customers should be qualified before the referral fee is paid, not prior to or at the time of the referral. In the course of performing their suitability analysis, broker-dealers will be able to determine if an individual is a high net worth customer at the time they effect the securities transaction but before any referral fee is paid to the bank employee.

7. Proposed rule .701(a)(3)(i)(A) states that the bank AND the broker-dealer must determine that the bank employee is not subject to certain "statutory disqualifications." We do not believe that it is necessary for both entities to incur the time and expense of making this determination. We recommend that the proposed rule be reworded to make this determination the responsibility of either the bank or the broker-dealer as negotiated by them in their written agreement according to which entity they decide is best suited to perform this analysis.

8. Proposed rule .701(a)(3)(iii) requires that the broker-dealer promptly inform the bank if the broker-dealer determines that the customer is not a high net worth or institutional customer. In order to provide more flexibility to allow efficient compliance with this section of the proposed rules, we recommend requiring that the broker-dealer notify the bank if a customer does meet the definition of high net worth or institutional customer. This change would transfer the responsibility for determining customer qualifications to the broker-dealer, consistent with our previous comment regarding proposed rule .701(a)(2)(ii)(A) and(B). Whether the proposed rule is changed or not as we have recommended in this paragraph, we believe that it is important for it to be made clear in the proposed rule that any communication made by the broker to the bank in accordance with the rule that the customer is or is not a high net worth or institutional customer would not be a violation of federal or state privacy laws.

9. Proposed rule .701(d)(1) defines "high net worth customer." We believe that this definition should be replaced with the SEC's current definition of an "accredited investor" in Regulation D which is a natural person who has individual net worth, or joint net worth with the person's spouse, that exceeds $1 million at the time of the purchase; or, a natural person with income exceeding $200,000 in each of the two most recent years or joint income with a spouse exceeding $300,000 for those years and a reasonable expectation of the same income level in the current year. The SEC uses its definition of "accredited investor" to determine whether to allow investors to purchase private placements and penny stocks. A mere referral to a regulated broker-dealer selling registered securities would not appear to carry with it risks in excess of those associated with unregistered securities and, therefore, should not be predicated on the net worth and income levels currently contained in this section of the proposed rules.

10. Proposed rule .701(d)(2) defines "institutional customer." We believe that this definition should be replaced with a definition similar to that of the SEC's current definition of an "accredited investor" in Regulation D so that "institutional customer" would be defined to mean any corporation, partnership, limited liability company, trust, or other non-natural person with assets exceeding $5 million. This change, in combination with incorporating the accredited investor criteria into proposed rule .701(d)(1), should simplify the requirements of the proposed rules while not significantly reducing their protections.

Trust and Fiduciary Activities Exception

1. Proposed rule .721(a)(4) defines "relationship compensation." The proposed rule provides some examples of bank services, the fee for which will be considered "relationship compensation." The proposed rule indicates that these examples are not exclusive, using the language "including without limitation" in several places. It is our understanding of the proposed rule that to qualify as "relationship compensation," it is not necessary for the service to have a specific trust or fiduciary "account" associated with the service. For example, the trust/fiduciary

area of a bank may provide advice on specialized strategies (for example, prepaid variable forward contracts and structured notes), asset allocation models, research, financial planning, etc. These services may be provided to an existing custody account customer, a brokerage customer of an affiliated broker-dealer, a customer of an affiliated or non-affiliated registered investment advisor or broker, the registered investment advisor or broker itself, or others that may not have actual trust/fiduciary "accounts" with the bank (although the services may be provided pursuant to a written agreement). It is our understanding that the fees for such services provided by the trust/fiduciary area of the bank will be considered "relationship compensation." The trust/fiduciary area of a bank that has expertise in such matters and sells it services should not be penalized by having to count this compensation as non-relationship compensation simply because there is no trust/fiduciary "account" on its books.

2. Proposed rule .722 permits trust and fiduciary compensation to be calculated on a bank-wide basis as an alternative to the account-by-account basis set forth in proposed rule .721. While we are certainly supportive of the bank-wide alternative calculation, we think it would be appropriate for this alternative to be expanded to allow banking organizations the flexibility to make the requisite calculation on a bank holding company basis as well. A strict reading of the proposed rule indicates that the calculation may only be done on a bank entity basis, but it may be more practical for a number of banking organizations to perform the analysis on an enterprise-wide basis.

3. Proposed rule .760(b)(6) contains the exemption for accommodation trades for custodial accounts and requires that the bank not provide investment advice or research to the account concerning securities or make recommendations to the account concerning securities. This requirement seems to preclude the Trust Department of a bank from providing any stock research, investment advice or recommendations to a custody account owner. If the Trust Department does not charge a fee for any securities transactions in the account, this requirement seems to be unnecessarily restrictive and hamper efforts to try to "convert" the custody account to an investment management account. In addition, due to other banking relationships with the customer, the Trust Department may choose to share its advice or its research on certain stocks with the customer for either goodwill purposes or in an effort to obtain additional referrals from the customer. Consistent with proposed rule .721, if no fee is charged in connection with a securities transaction, we do not believe it is necessary to have this restriction.

Conclusion

National City believes that Proposed Regulation R represents a significant improvement over previously proposed Regulation B. National City, in general, supports Proposed Regulation R. We believe that our comments do not substantively change the intent of Proposed Regulation R but rather should be viewed as enhancements and clarifications to make it easier to comply with, and ultimately achieve, Congressional intent. We appreciate the efforts taken by the federal banking agencies and the SEC to formulate a more practical approach to this issue, and we appreciate your consideration of these comments.

Sincerely,

Timothy J. Lathe
Executive Vice President

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