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March 23, 2007

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Re: Comments on the Proposed Rules Relating to the Definitions of Terms and Exemptions Relating to the "Broker" Exceptions for Banks under the Securities Exchange Act of 1934
Docket No. R-1274; File Number S7-22-06

Comments on the Proposed Exemptions for Banks Under Section 3(a)(5) of the Securities Exchange Act of 1934 and the Related Rules
File Number S7-23-06

Ladies and Gentlemen:

The Institute of International Bankers (the "Institute") appreciates this opportunity to comment on the proposed rules implementing certain of the exceptions for banks from the definition of the terms "broker" and "dealer" under Section 3(a)(4) and Section 3(a)(5), respectively, of the Securities Exchange Act of 1934 (the "Exchange Act"), as amended by the Gramm-Leach-Bliley Act (the "Proposed Rules").[1] The Institute's

[1] The Proposed Rules consist of the notice of proposed rulemaking jointly issued by the Board of Governors of the Federal Reserve System (the "Board") and the Securities and Exchange Commission (the "SEC") pursuant to Section 101 of the Financial Services Regulatory Relief Act of 2006 relating to the definition of the term "broker" under Section 3(a)(4) of the Exchange Act (the "Joint Proposal") (71 Fed. Reg. 77522 (Dec. 26, 2006)); and the complementary proposal by the SEC relating to the definition of the term "dealer" under Section 3(a)(5) of the Exchange Act (the "Proposed Dealer Rules") (71 Fed. Reg. 77550 (Dec. 26, 2006)). Because the Institute's comments on the Proposed Rules concentrate on the so-called "Regulation S Exemption", the provisions of which are set forth in both the Joint Proposal (Rule 771) and the Proposed Dealer Rules (Rule 3a5-2), we are submitting our comments in a single letter for the sake of administrative convenience.

members are internationally headquartered banking/financial institutions that conduct banking operations in the United States through U.S. bank subsidiaries and branches and agencies and therefore are directly affected by the Proposed Rules.

We appreciate the efforts by the Board and the SEC and their respective staffs to address in a comprehensive manner through the Proposed Rules the concerns and issues previously raised with respect to implementation of the broker "push out" provisions of the Gramm-Leach-Bliley Act. In general, we share in the observations and support the recommendations regarding the Proposed Rules articulated in the comment letter by the American Bankers Association and the ABA Securities Association with respect to the networking exception, the trust and fiduciary activities exception, the safekeeping and custody exception, the securities lending exemption, broker-dealer execution and the money market mutual fund exemption. Our comments in this letter, however, will focus on the provisions of the Regulation S Exemption, which would permit U.S. banks and the U.S. branches and agencies of internationally headquartered banks (collectively, "Banks") to conduct certain securities transactions with and on behalf of non-U.S. persons.

EXECUTIVE SUMMARY

The Institute strongly supports adoption of the proposed Regulation S Exemption, subject to the comments and requested clarifications discussed below.

The "Reasonable Belief" Standard. The addition of a "reasonable belief" standard with respect to transactions in "eligible securities" (as defined in the Proposed Rules) occurring after their initial issuance provides a practical means, and one that we believe is in accordance with industry practice, to address the concerns raised with respect to "tracking" whether an eligible security was initially issued in compliance with Regulation S. The Proposed Rules require Banks to make this determination for all such transactions regardless of the person to whom an eligible security is sold, but, as drafted, the reasonable belief standard applies only to a subset of these transactions. Because the burden of making the determination is the same for all transactions, the reasonable belief standard should be equally applicable. We respectfully request that in connection with finalizing the Proposed Rules the reasonable belief standard be incorporated into each of the provisions relating to resale transactions.

"Fiduciary" Regulation S Exempt Transactions. There are two key points that we think should be confirmed in connection with finalizing the Proposed Rules in order to clarify the scope and operation of the Regulation S Exemption. First, we respectfully request confirmation that compensation attributable to transactions effected in reliance on the Regulation S Exemption ("Regulation S Exempt Transactions") by a Bank acting in a fiduciary capacity is excluded from the determination of the Bank's compliance with the "chiefly compensated" requirement under the trust and fiduciary activity exception and the "bankwide" exemption under proposed Rule 722 (hereinafter collectively referred to as the "trust and fiduciary provisions"). It is generally understood that, as is generally the case under the "push out" provisions, the Regulation S Exemption and the trust and fiduciary provisions do not otherwise affect each other. Attributing compensation from a Regulation S Exempt Transaction for purposes of applying the trust and fiduciary provisions could have the unintended result of precluding reliance on the trust and fiduciary exception with respect to transactions that otherwise would be within its ambit.

"Seasoned" Transactions. Second, we respectfully request confirmation the Regulation S Exemption continues to be available following expiration of the applicable "seasoning" period under Regulation S. Cutting off the Regulation S Exemption at the time that Regulation S ceases to apply to a transaction would be contrary to the underlying policy of the Regulation S Exemption inasmuch as a non-U.S. person would in any event be able to acquire the same security from a bank outside the United States. Moreover, the SEC's commentary in the Federal Register on this point could be read as indicating that this conclusion applies only to riskless principal transactions and not to brokerage transactions, which would be an anomalous result.

Non-U.S. Purchasers Outside the United States. As a corollary to this second point, we respectfully submit that the language in the Proposed Rules stating that permissible purchasers in resale transactions effected under the Regulation S Exemption must be "outside the United States within the meaning of [Rule 903 of Regulation S]" is unnecessary and unduly restrictive. It is unnecessary because it in effect reads into the Regulation S Exemption provisions of Regulation S that are otherwise applicable – it is in general understood that nothing in the Regulation S Exemption affects the necessity to comply with applicable requirements of Regulation S. The language is unduly restrictive in that it appears to apply the "offshore transaction" requirements of Regulation S in circumstances where Regulation S otherwise would not be applicable. We therefore respectfully request that this language be deleted in the final rules, with the result that, as originally was the case under the 2004 "Regulation B" proposal, reseals would be permitted simply to "purchasers" (defined in the Proposed Rules to be persons who are "non-U.S." persons under Regulation S).

Relationships Between Rule 771 and Rule 3a5-2. Clarification of the following matters also would be helpful. We understand that the provisions of Rule 771 and Rule 3a5-2 are intended to be parallel to each other, but there are certain "gaps" between the two that should be reconciled in connection with finalizing the Proposed Rules. For example, under Rule 771 a Bank may, as agent, effect a transaction by or on behalf of a non-U.S. person to another non-U.S. person or to a registered broker-dealer. The parallel provision in Rule 3a5-2 refers only to purchases of eligible securities by Banks as riskless principal from non-U.S. persons and does not state to whom such securities may be sold. Presumably, it is intended that sales may be made to other non-U.S. persons or to registered broker-dealers, but this point should be clarified. Also, whereas Rule 771 includes provisions that we understand apply specifically to the initial issuance of an eligible security under Regulation S, the parallel provisions of Rule 3a5-2 appear to be broader in scope. The two provisions should be made consistent.

Applicability of the "Distribution Compliance Period". We question the need to include in the Regulation S Exemption language relating to the applicability of the "distribution compliance period" under Regulation S to a Regulation S Exempt Transaction. Such language is unnecessary (because these Regulation S requirements apply independently of the Regulation S Exemption) and potentially confusing (because including the language may imply that it is intended to condition the exemption on compliance with requirements beyond what Regulation S would otherwise require).

Definition of "Eligible Security". We also seek clarification that the definition of the term "eligible security", which excludes from the Regulation S Exemption securities sold from the inventory of an affiliate or that are underwritten by an affiliate on firm-commitment basis, does not prohibit a Bank from effecting Regulation S Exempt Transactions in securities that have been issued by an affiliate.

Treatment of Repurchase Transactions. Finally, consideration should be given by the Board and the SEC to the treatment under the "push out" provisions of the Gramm-Leach-Bliley Act of repurchase transactions by Banks in which the underlying asset is a non-exempt security, including equity securities, and the circumstances in which it would be appropriate to exempt such transactions from any applicable "push out" requirement.

DISCUSSION

The "Reasonable Belief" Standard

As explained in the Proposing Release for the Proposed Dealer Rules, the terms and conditions of the Regulation S Exemption are intended to be substantially the same as those of Rule 771 as proposed by the SEC in 2004, except that the actions a Bank must take to determine whether an eligible security was initially issued in compliance with Regulation S are now qualified by a "reasonable belief" standard. This change has been made to address concerns that the original proposal imposed unduly burdensome requirements on Banks with respect to the degree of diligence required to determine the manner in which an eligible security had been initially offered.[2]

We believe the proposed "reasonable belief" standard is consistent with industry practice, which we understand includes reliance on information about an eligible security that is maintained by the security's transfer agent as well on information that is

[2] See Release No. 34-54947, 71 Fed. Reg. at 77552.

obtainable through other third-party sources, and as such provides a practical means to address the "tracking" issues we raised with respect to the original proposal.[3] Like the original proposal, the re-proposed Regulation S Exemption will provide important but focused relief preserving the ability of Banks to provide traditional "private banking" services to non-U.S. persons. We appreciate the attention devoted in particular by the SEC and its staff over the years to developing exemptive relief that is responsive to the concerns of our member institutions in this area.

We note that the reasonable belief standard has not been incorporated into all of the provisions of the Regulation S Exemption relating to transactions in an eligible security occurring subsequent to its initial issuance; it applies only to Regulation S Exempt Transactions covered by Rule 771(a)(2) or Rule 3a5-2(a)(2) and does not apply to transactions covered by Rule 771(a)(3) or Rule 3a5-2(a)(3). In both cases, however, a Bank is required to make a determination regarding the manner in which the eligible security that is the subject of the transaction was initially issued.[4] As such, we believe the reasonable belief standard should be equally applicable, and we respectfully request that the Regulation S Exemption be revised accordingly.

Treatment of Compensation for Regulation S Exempt Transactions Effected By a Bank Acting in a Fiduciary Capacity

Under the Proposed Rules, a Bank may effect a Regulation S Exempt Transaction acting either as agent or as riskless principal. In either case, depending on the nature of the relationship between the Bank and its customer, the Bank also may be acting in a "fiduciary capacity" within the meaning of Section 3(a)(4)(D) of the Exchange Act. For example, the Bank may exercise investment discretion over a customer's account and,

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[3] See pages 2-3 of the Institute's September 1, 2004 comment letter on the Regulation B proposal. We note that our 2004 comment letter suggested that a means to address the "tracking" issues would be to permit a Bank to effect resales of a security if the Bank reasonably believes that any securities in the same class (as opposed to the particular security) were initially sold in reliance on Regulation S. See id. at page 6. We continue to believe that such an approach would further reduce Banks' compliance burden and is consistent with the purposes of the Regulation S Exemption.

[4] As proposed, Rule 771(a)(2) applies to the situation in which a Bank, as agent, effects a resale of an eligible security by or on behalf of a person who is not a U.S. person under Rule 902(k) of Regulation S (a "Non-U.S. Person") to a purchaser who is a Non-U.S. Person and who is outside the United States within the meaning of Rule 903 of Regulation S (a "Non-U.S. Purchaser Outside the United States") or to a registered broker-dealer, whereas Rule 771(a)(3) applies to the situation in which a Bank, as agent, effects a resale of an eligible security by or on behalf of a registered broker-dealer to a Non-U.S. Purchaser Outside the United States. In both cases, the Bank is required to determine whether the eligible security was initially sold outside the United States in compliance with Regulation S. As discussed above, the reasonable belief standard is intended to reduce the burdens resulting from this inquiry, which are equally great regardless of on whose behalf the Bank might be acting in connection with the transaction. The same considerations apply under Rule 3a5-2 with respect to a Bank acting as riskless principal.

acting pursuant thereto, may decide to effect a Regulation S Exempt Transaction with or on behalf of the customer.[5] Where such a transaction meets the terms and conditions of the Regulation S Exemption, it is clear under the Proposed Rules that the transaction qualifies as a Regulation S Exempt Transaction – the Regulation S Exemption is not affected in any manner by whether or not a Bank might also be acting in a fiduciary capacity.[6]

We read the Proposed Rules as intending that the trust and fiduciary provisions likewise are not affected in any manner by the Regulation S Exemption. In this regard, we respectfully request confirmation in connection with finalizing the Proposed Rules that compensation attributable to Regulation S Exempt Transactions effected by a Bank acting in a fiduciary capacity is not included as compensation for purposes of applying the "chiefly compensated" requirements of the trust and fiduciary provisions.

This request arises from our concerns regarding the language of the trust and fiduciary provisions. For example, the proposed "account-by-account" test for determining compliance with the chiefly compensated requirement measures the "relationship compensation attributable to the trust or fiduciary account" as a percentage of the "total compensation" attributable to the account.[7] For these purposes the term "trust or fiduciary account" is defined in proposed Rule 721(a)(5) to mean "an account for which the bank acts in a trust or fiduciary capacity as defined in section 3(a)(4)(D) of the [Exchange] Act." Literally read, these provisions of the Proposed Rules raise the question whether compensation for Regulation S Exempt Transactions effected by a Bank for an account "for which the Bank acts in a trust or fiduciary capacity" should be included in the determination of the chiefly compensated requirement even though, as discussed above, the trust and fiduciary provisions would not be applicable to the transaction from which the compensation derives. For the reasons discussed below, we believe that such a literal reading is contrary to the intended purposes of the "push out" provisions.

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5 Section 3(a)(4)(D)(ii) of the Exchange Act defines the term "fiduciary capacity", as applied for purposes of the trust and fiduciary provisions, to include, among other things, acting "in any capacity in which the bank possesses investment discretion on behalf of another." Our reference to transactions involving the exercise of investment discretion is for illustrative purposes only and is not intended to suggest that the requested clarification would be limited to such circumstances.

6 This is not to say that a Bank would be prohibited from conducting such a transaction in reliance on the trust and fiduciary provisions if it chose do so (in which case, of course, the Bank would have to comply with the applicable requirements). Indeed, we understand that in general the various "push out" provisions are not mutually exclusive and that a transaction may qualify under more than one exception or exemption. In this regard, we think it would be helpful to confirm in connection with finalizing the Proposed Rules that in such circumstances Banks, absent an express provision to the contrary (for example, proposed Rule 760(d)(1)), can elect on which of the applicable provisions they wish to rely.

7 See proposed Rule 721(a)(3) (definition of the term "yearly compensation percentage").

Just as nothing in the Proposed Rules suggests that reliance on the Regulation S Exemption is intended to be affected by the trust and fiduciary provisions, nothing suggests that reliance on the trust and fiduciary provisions is intended to be affected by the Regulation S Exemption. Construing the Proposed Rules to require inclusion of compensation attributable to Regulation S Exempt Transactions effected by a Bank acting in a fiduciary capacity for purposes of applying the "chiefly compensated" requirement under the trust and fiduciary provisions could preclude reliance on the trust and fiduciary provisions with respect to transactions that plainly fall within their ambit.

This result could occur, for example, where (i) a Bank, acting in a fiduciary capacity, effects on behalf of its customers both Regulation S Exempt Transactions and transactions that are not Regulation S Exempt Transactions and (ii) compensation attributable to the Regulation S Exempt Transactions exceeds the compensation attributable to non-Regulation S Exempt Transactions. In this case, assuming the non-Regulation S Exempt Transactions otherwise meet the requirements of the trust and fiduciary provisions, the applicability of the trust and fiduciary provisions to the non-Regulation S Exempt Transactions would depend on the extent to which compensation attributable to Regulation S Exempt Transactions would qualify as "relationship compensation" (as defined in proposed Rule 721(a)(4)). Assuming further, for the sake of argument, that *none* of the compensation from the Regulation S Exempt Transactions qualifies as relationship compensation but *all* of the compensation from the non-Regulation S Exempt Transactions qualifies, then the non-Regulation S Exempt Transactions would be prohibited under the trust and fiduciary provisions since in this case neither the "account-by-account" nor the "bank-wide" test for satisfying the "chiefly compensated" standard prescribed under the Proposed Rules would be satisfied.

We believe that the better reading of the Proposed Rules, and the one that would most effectively avoid the unintended consequences described above, is to exclude from the determination of compliance with the requirements of the chiefly compensated requirement under the trust and fiduciary provisions compensation from Regulation S Exempt Transactions effected by a Bank acting in a fiduciary capacity, and we respectfully request that the Board and SEC confirm this result in connection with finalizing the Proposed Rules.

Application of the Regulation S Exemption Following Expiration of the Applicable "Seasoning" Period under Regulation S

As discussed above, the Regulation S Exemption is intended to be substantially the same as the provisions of Rule 771 as originally proposed by the SEC as part of its "Regulation B" proposal in 2004. Indeed, the Regulation S Exemption has been re-proposed for the same reasons it was originally proposed.[8] As articulated in the Proposing Release, these reasons include the following:[9]

- The belief that non-U.S. persons generally will not be relying on the protections of the U.S. securities laws when purchasing Regulation S securities from Banks.

- The general principle that U.S. broker-dealers should be subject to the same standards of conduct when dealing with non-U.S. persons is "less compelling" when a non-U.S. person has chosen to deal with a Bank with respect to Regulation S securities that are designed to be sold to non-U.S. persons offshore.[10]

- In the absence of the Regulation S Exemption, non-U.S. persons could purchase the same securities from banks located outside the United States.

The Regulation S Exemption as originally proposed in 2004 was intended to cover (i) transactions involving the initial issuance of securities under Regulation S, (ii) the resale of such securities in compliance with the requirements of Rule 904 under Regulation S (which, among other things, requires that resales effected under Regulation S by any person other than the issuer or a distributor of a Regulation S security are made in "offshore transactions"), and (iii) the purchase or sale of "seasoned" securities originally issued under Regulation S. As explained in the Proposing Release for Regulation B:

> [The Regulation S Exemption] would permit banks to effect transactions involving offshore, non-U.S. persons on an agency or riskless principal basis. . . . A bank could also resell any eligible Regulation S securities after their initial issuance by or on behalf of a non-U.S. person or to a non-U.S. person as long as the bank continues to comply with the requirements of Regulation S [including Rule 904]. *After the requirements of Regulation S cease to apply to an issuance, then the bank could resell the securities to another non-U.S. person or a broker-dealer without meeting the terms of Regulation S [including Rule 904].*[11]

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[8] See 71 Fed. Reg. at 77552. The re-proposal also includes some clarifying changes to the text of the rule as proposed in 2004. These changes are described in footnote 24 of the Proposing Release as "non-substantive."

[9] See 71 Fed. Reg. at 77552.

[10] See id., note 16.

[11] Release No. 34-49879, 69 Fed. Reg. 39682, 39719-20 (June 30, 2004) (emphasis added; footnote omitted). It is generally understood that nothing in the Regulation S Exemption would affect the necessity of complying with the requirements of Regulation S. See 71 Fed. Reg. at 77551 note 12; 69 Fed. Reg. at 39719 note 340 (proposed Regulation B). As discussed above, the requirement to conduct a Regulation S

Essentially the same explanation of the Regulation S Exemption is provided in the Proposing Release for the Proposed Dealer Rules, with the notable exception that the description of the rules applicable to resale of an eligible security "after the requirements of Regulation S cease to apply to an issuance" – i.e., once an eligible security has been "seasoned" – has been modified to state that in this situation resale to another non-U.S. person or a broker-dealer would be permissible *"so long as the transaction complies with another bank broker or dealer exception or exemption."*[12]

We note that this characterization of the Regulation S Exemption appears only in the Proposing Release for the Proposed Dealer Rules and is not included in the commentary on the Joint Proposal. Whether or not this omission is intended to indicate that a limitation on transactions in "seasoned" Regulation S securities applies only with respect to riskless principal transactions and does not apply to transactions effected as an agent, we believe that any exclusion of "seasoned" transactions from the scope of the Regulation S Exemption is contrary to the policies underlying the exemption, none of which have changed since 2004. No purpose under the Exchange Act would be served by excluding such transactions from the Regulation S Exemption inasmuch as a non-U.S. person in any event would be able to purchase the same securities from banks outside the United States.

Accordingly, we respectfully request that the Board and the SEC in connection with finalizing the Proposed Rules confirm that the Regulation S Exemption continues to be available following expiration of the applicable seasoning period under Regulation S.

Resales To Non-U.S. Purchasers Outside the United States

Related to our concerns regarding the availability of the Regulation S Exemption following expiration of the applicable seasoning period under Regulation S, we note that the description of who qualifies as a permissible "purchaser" under the Regulation S Exemption in connection with transactions effected subsequent to the initial issuance of an eligible security under Regulation S has been modified from what was proposed in 2004. The original provision referred only to a "purchaser", defined to mean "a person who purchases an eligible security and who is not a U.S. person under [Rule 902(k) of Regulation S]." Exactly the same definition of "purchaser" applies under the proposed Regulation S Exemption,[13] but the description of to whom an eligible security may be

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Exempt Transaction in accordance with the applicable requirements of Regulation S in effect incorporates the "offshore transaction" requirement prescribed under Rule 904. However, this requirement is no longer applicable "after the requirements of Regulation S cease to apply to an issuance."

12 71 Fed. Reg. at 77551 (emphasis added).

13 See Rule 771(b)(3) and Rule 3a5-2(b)(3).

resold has been changed from simply a "purchaser" to "a purchaser who is outside the United States within the meaning of [Rule 903 of Regulation S]" (i.e., a "Non-U.S. Purchaser Outside the United States" as defined above in footnote 4).[14]

Our concern with this modification is two-fold. First, it is unnecessary inasmuch as Rule 904 otherwise imposes an "offshore transaction" requirement on resales effected prior to expiration of the applicable seasoning period under Regulation S. Second, the language is unduly restrictive in that it appears to apply the "offshore transaction" requirements of Regulation S in circumstances where Regulation S otherwise would not be applicable. In this regard, the language appears to require that all Regulation S Exempt Transactions be effected in "offshore transactions" and thus could be read as supporting the erroneous view that the Regulation S Exemption expires once an eligible security has been seasoned. As discussed above, we believe this view is contrary to the policies underlying the Regulation S Exemption.

We therefore respectfully request that this language be deleted from the final rules and that resales accordingly be permitted simply to "purchasers" (as defined in the Proposed Rules), subject to compliance with any applicable requirement of Regulation S – i.e., the same as originally was the case under the 2004 "Regulation B" proposal.

Relationship Between the Provisions of Rule 771 and Rule 3a5-2

We recognize that in connection with issuing the Joint Proposal it was necessary to divide the Regulation S Exemption into complementary "broker" and "dealer" provisions. As discussed above, we understand that in doing so the intention is to retain the Regulation S Exemption substantially as originally proposed in 2004, save for the addition of the "reasonable belief" standard. That is to say, the provisions of Rule 771(a) and Rule 3a5-2(a) are intended to parallel each other.

That being so, there appears to be a discrepancy between Rule 771(a)(2) and Rule 3a5-2(a)(2) in that the former specifies the types of persons to whom an eligible security may be resold – a Non-U.S. Purchaser Outside the United States or a registered broker-dealer – but the latter does not. To maintain consistency between Rule 771 and Rule 3a5-2, it presumably is intended that Rule 3a5-2(a)(2) applies to resales to the same types of persons covered by Rule 771(a)(2), but this should be clarified in connection with finalizing the Proposed Rules. We note by comparison the consistency between Rule

[14] In the 2004 proposal, sale to a Non-U.S. Purchaser Outside the United States was required only with respect to the initial issuance of an eligible security. See 69 Fed. Reg. at 39738 (Rule 771(a)(1) as originally proposed).

771(a)(3) and Rule 3a5-2(a)(3) on this point – each applies to resales to Non-U.S. Purchasers Outside the United States.[15]

We understand that Rule 771(a)(1) is intended to apply only to the initial sale of an eligible security under Regulation S, but the provisions of Rule 3a5-2(a)(1) suggest that it is intended to apply as well to sales occurring subsequent to the initial issuance but prior to expiration of the distribution compliance period. We respectfully request clarification of this point in connection with finalizing the Proposed Rules.

Applicability of the "Distribution Compliance Period" Under Regulation S

As proposed, Rule 771(a)(2) and (a)(3) and Rule 3a5-2(a)(1) would impose the following condition on a Bank's ability to effect a secondary market trade: "if the sale is made prior to the expiration of the distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the sale is made in compliance with the requirements of 17 CFR 230.904." We assume that this condition merely requires a Bank, in connection with any resale transactions, to comply with Regulation S to the extent applicable. If our understanding is correct, we respectfully request confirmation of this point in connection with finalizing the Proposed Rules. Alternatively, we believe it would be appropriate to delete the language quoted above on the grounds that it is unnecessary (because the Regulation S requirements apply independently of the Regulation S Exemption – see footnote 11 above) and potentially confusing (because including this language may imply that it is intended to condition the exemption on compliance with requirements beyond what Regulation S would otherwise require).[16]

Definition of "Eligible Security"

As proposed, the definition of "eligible security" in Rule 771 and Rule 3a5-2 would exclude any security that (i) is being sold from the inventory of a Bank or its affiliate, or (ii) is underwritten by a Bank or its affiliate on a firm-commitment basis. We understand these restrictions are included to limit potential conflicts of interest that might create special incentives for a Bank to sell particular securities. We believe it would be useful, however, to clarify in connection with finalizing the Proposed Rules that the restriction on sales from inventory would *not* prohibit a Bank from selling securities that are being or have been *issued by* an affiliate. Thus, for example, a Bank could sell a structured note or other investment product (whether or not customized for the particular

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[15] Our concerns and recommendations with respect to limiting all resales to Non-U.S. Purchasers Outside the United States are discussed above at pages 9-10.

[16] For example, no distribution compliance period applies to "Category 1" offerings, but the proposed text could be read to suggest that such a period must be applied to all secondary market trades effected pursuant to the exemption.

customer) that is issued by the Bank or an affiliate of the Bank, or shares in an offshore mutual fund controlled by the Bank or an affiliate of the Bank.

Treatment of Repurchase Transactions Involving Non-Exempt Securities

Finally, we wish to raise another matter for preliminary consideration by the Board and the SEC. This matter concerns the treatment under the "push out" provisions of the Gramm-Leach-Bliley Act of repurchase transactions by Banks in which the underlying asset is a non-exempt security, including equity securities. In substance, such transactions constitute a form of secured lending. If viewed as constituting a securities transaction for "push out" purposes, a question that we believe requires further analysis and discussion,[17] such repurchase transactions can appropriately be seen as functionally equivalent to securities lending and treated accordingly. This subject is of common interest to U.S. domestic banks and the U.S. banking operations of internationally headquartered financial institutions, and we believe it merits further study by both the Board and the SEC, and, if need be, the adoption of an appropriate exemption to enable Banks to conduct such business.

Please contact the Institute if we can provide additional information or assistance.

Very truly yours,

Lawrence R. Uhlick

Lawrence R. Uhlick
Chief Executive Officer

[17] We note that these types of questions do not arise with respect to repurchase transactions involving exempt securities in view of the exceptions provided under the Gramm-Leach-Bliley Act for such securities.