Ohio Bankers League

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

Re: Regulation B, Release No. 34-49879, File No. S7-26-04, 69 Federal Register39682 (June 30, 2004)

Dear Mr. Katz:

The Ohio Bankers League (The "OBL") is a non-profit trade association representing nearly 300 banks and savings banks and savings associations doing business in the state of Ohio. Our membership spans the entire range of depository institutions from small mutual thrifts that are managed from a single office to holding companies that literally do business from coast to coast and around the world. More importantly for purposes of this comment however are the 41 members that have the authority to act in a fiduciary capacity that will be directly impacted by your proposed rule. These members are the core of the OBL Trust & Investment Services Division, which guided the preparation of this comment.

The OBL appreciates the substantial efforts of the Commission in the preparation of the Proposed Rules. In particular, the recognition that the final effective date will need to allow sufficient time for banks to obtain the systems and adopt the policies necessary to comply with the Rule is very helpful.

The Ohio Bankers League respects your role protecting the investing public and commends the Commission for conducting several meetings with industry representatives to discuss proposed Regulation B. Although we are encouraged by some of the improvements the Commission has made since the issuance of the interim final rules in May 2001, we still believe that the Commission's Proposed Rules go beyond Congressional intent and remain contrary to the concept of functional regulation.

These Proposed Rules are still unworkable, overly complex and will be extraordinarily expensive to implement. As a result, this rule will be a substantial impediment to banks providing traditional fiduciary services the public has come to expect from bank trust departments. The impact will be most acutely felt by community banks that are often the only professional fiduciary in the markets they serve because they have fewer resources to allocate to new compliance burdens.

Congress clearly did not intend that result. Congress unambiguously stated that the exceptions for bank activities in Section 3(a)(4) should be interpreted to allow banks to continue to perform, without SEC oversight, all of the traditional banking functions performed prior to passage of the Gramm-Leach-Bliley Act ("GLBA"). The legislative history as expressed in the conference report clearly shows that the Section 3(a)(4) exceptions were intended to preserve bank powers to engage in securities related activities. Despite this Congressional mandate, the Rule forces banks to drastically alter traditional trust and fiduciary business practices and may eliminate banks as providers of some traditional bank and fiduciary services.

In writing this comment we surveyed our membership on the impact of the Proposed Rule. We are providing the Commission the Ohio industry views on the following;

- The chiefly compensated component of the Trust and Fiduciary Exemption;
- The exceedingly narrow application of the Custody and Safekeeping Exemption;
- The competitive disadvantage caused by the proposed exemption on Sweep Programs;
- The problems caused by extending SEC Jurisdiction over bank compensation programs; and
- The unfair distinction between the exemptions as they apply to banks and thrifts.

In drafting this comment, as the Commission requested, we attempted to provide precise data. The problem is that the rules that you have proposed are too complicated and it is unclear how the calculations would work under the proposal. In addition, banks have not made the required measurements in the past. The cost of building data collection and processing systems to measure relationship compensation in this context would be significant. Given the nature of the rule, it was very difficult for banks to capture the precise data the Commission is requesting. Banks would have to create new systems since they are not currently tracking this information. As a result, we were not able to develop industry-wide numbers.

Traditional Trust and Fiduciary Activities

Under Title II of Gramm-Leach Bliley (GLBA), a bank that conducts securities transactions in connection with providing trust or fiduciary services is exempt from having to push these activities out of the bank and into a registered broker-dealer if three basic conditions are satisfied. (1) A bank cannot publicly solicit brokerage businesses other than a general advertising that it offers trust services; (2) The compensation for conducting transactions must consist chiefly of an administrative or annual fee, a percentage of assets under management or a cap on fees that reflects the cost of conducting the transaction; and (3) The bank must direct all trades of a publicly traded securities to a registered broker dealer. While the OBL appreciates the improvements incorporated since the Interim Final Rules, several problems remain, primarily with the complex requirements to qualify for the "chiefly compensated" test. Candidly, it is difficult for us to draw the connection between the simple, straightforward statutory language and the requirements of the Proposed Rule.

The OBL recommends that simplicity in of itself should be an objective of the final rule. The good news is that simplifying the ratio to get within the test and the calculation should not detract from the objectives of the Commission. One easy step the Commission could take would be to permit comparing "sales compensation" to total revenues received by banks in connection with fiduciary activities, rather than comparing sales compensation to relationship compensation.

Second, The Ohio Bankers League believes that the 1 to 9 ratio the Commission suggests remains too low. The statute only requires that the bank be "chiefly compensated" via a combination of the permissible, non-sales related fees. While "chiefly" is not a defined term, and it is not in Webster's Dictionary, within the context of GLBA, "chiefly" could easily be interpreted to be any ratio of sales compensation to relationship compensation up to 1 to 1. Thus, the Commission could increase the ratio proposed, without violating the intent of GLBA. The OBL recommends that as long as the sales compensation remains less than total compensation or at least less than relationship compensation as defined in the current proposal, it should be acceptable to the Commission.

Custody and Safekeeping
The second major concern in the proposed rule is the very narrow interpretation of the custody and safekeeping exemption contained in 3(a)(4). Banks have traditionally offered custodial accounts for customers that want the convenience of maintaining all of their securities in a single location. The fundamental purpose of any custodial relationship is of course the ability to take orders, buy and sell securities and clear and settle securities trades on behalf of customers. Order taking is a core function of this traditional banking activity.

The OBL appreciates the improvements the Commission has made to the Interim Final Rules, particularly related to the broader small bank custody exception and the use of dual employees. We find no authority however in the underlying statute to restrict this traditional activity to either pre-existing accounts or to qualified investors. We can see no evidence that current customers are being harmed by the current practice nor can we see any policy interest in preventing this traditional activity from continuing. Our biggest concern is that in its current form, the practical result of the rule is that many of our members will be forced to get out of this important line of business, causing banks to lose valuable customers and revenue and lessening competition in the marketplace.

Sweep Accounts
Section 3(a)(4) permits banks to sweep deposit funds into no-load money market mutual funds. A mutual fund will satisfy this exception if it does not have a sales load or a deferred sales load and its total charges against net assets to provide for sales-related expenses and service fees do not exceed 25 basis points, and are disclosed via prospectus. While this is consistent with NASD definition of no-load, we object to this provision because it puts banks at a competitive disadvantage when compared to brokers that are offering the same service. There is no evidence that Congress intended to put banks at a competitive disadvantage in GLBA, so we therefore urge you to withdraw any restrictions that are inconsistent with permissible sweep programs offered through brokers.

Networking
The networking exception in Section 3(a)(4) allows banks to partner with registered broker-dealers to offer securities brokerage services to bank customers. The exception allows unregistered bank employees to make referrals to licensed employees 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.

First, the SEC's definition of "nominal" is unnecessary. Banks have been limited to paying "nominal" referral fees since 1994 when the Interagency Statement on Retail Sales of Nondeposit Investment Products was adopted by the federal banking agencies. None of the banking agencies believed that a definition of "nominal" was necessary nor, to our knowledge, have any state or federal regulatory agencies or self-regulatory organizations such as the NASD expressed concern during the last decade about the size of referral fees being paid. In the absence of a problem, we see no need for an SEC rule.

Second, the OBL is concerned that the SEC, perhaps unintentionally, is asserting jurisdiction over all bank compensation plans. We believe that the Commission should clarify that bank and bank holding company 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 traditional bank compensation programs, or improperly concerning itself with issues under the discretion of the bank regulators.

Thrift Issues
The Ohio Bankers League objects to 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 current version of the rules however the Commission has taken a rare step backwards by changing its position with regard to the exemption for savings associations and savings banks. The Commission proposes to extend to savings associations and savings banks the proposed money market exemption, the proposed exemptions relating to the trust and fiduciary activities exception, the proposed small bank custody exemption, the proposed expanded exemption for the way in which banks effect transactions in investment company securities and the current exemption for securities lending transactions. The Commission is no longer proposing to extend to thrifts the proposed ERISA exemption or the proposed custody exemption. 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.

We believe there is no difference in the businesses of banks and thrifts and 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 Ohio

Bankers League recommends that the Commission amend the Proposed Rules to conform to their original proposal in the Interim Final Rules which provided the same exemptions to thrifts as to banks.

Conclusion

The Ohio Bankers League appreciates both the time you have taken to solicit input from the banking industry and the substantial improvements incorporated in the Rules since they were first released in 2001. Nevertheless, we believe that the rules are overly complex and will be extremely expensive to comply with, and will casue some corporate fiduciaries to exit traditional businesses. We believe this is contrary to the intent of Congress. For this reason we encourage the Commission to withdraw the Proposed Rules and continue the productive dialog with the industry.

Respectfully Submitted;

Jeffrey D. Quayle
Senior Vice President & General Counsel