Key Bank, N.A.
127 Public Square
Cleveland, OH 44114-1306

(216) 689-5429 (Direct Dial)
(216) 689-9950 (Facsimile)

August 31, 2004

40

Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549-0609

RECEIVED
SEP 01 2004
OFFICE OF THE SECRETARY

Attention: Jonathan G. Katz

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

Dear Mr. Katz:

I am submitting this letter on behalf of KeyCorp, one of the nation's largest bank-based financial service companies, with assets of approximately $86 billion. Its principal banking subsidiary, KeyBank National Association, provides a wide range of trust, fiduciary and custody services. Key companies provide investment management, retail and commercial banking, retirement, consumer finance, and investment banking products and services to individuals and companies throughout the United States and, for certain businesses, internationally.

We appreciate the opportunity to comment on the Securities and Exchange Commission's ("SEC") Release No. 34-49879 (the "Release") proposing for adoption Regulation B (the 'Rule') regarding Section 3(a)(4) of the Securities Exchange Act of 1934 ("Exchange Act"). The Rule represents an improvement in many ways over the interim final Rule published in 2001. However, we continue to believe the Rule has fundamental problems that need to be addressed and corrected prior to its adoption.

The Rule is still unworkable, overly complex, highly disruptive and anti-competitive. Many of the Rule's provisions, such as the new account review for fiduciary accounts, simply will not work in practice. Changes to the 'chiefly compensated' provisions of the new Rule made it even more complex than the original proposal. The Rule will require banks to restructure account fees, employee compensation plans, sales practices and customer service arrangements. It will potentially eliminate banks as competitors of brokers in the custody and cash sweep businesses.

Congress, the SEC and the banking agencies all recognize that Section 3(a)(4) is intended to further the concept of functional regulation. However, the Rule does not do so. It engrafts so many technical requirements on the bank exemptions that it instead injects the SEC into a wide assortment of bank-customer relationships, into bank compensation plans for employees and into the day-to-day conduct of the banking business. Under the guise of defining the bank exemptions, the Rule instead engages in substantive regulation of the banking business.

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[1], all of the traditional banking functions performed prior to passage of the Gramm-Leach-Bliley Act ("GLBA"). The legislative history clearly shows that the Section 3(a)(4) exceptions were intended to *preserve* bank powers to engage in securities related activities. Indeed, in the Conference Committee Report, Congress specifically stated:

> The Conferees provided that banks that effect transactions in a trustee or fiduciary capacity under certain conditions will be exempt from registration under the Federal securities laws if the bank: (1) is chiefly compensated by means of administration and certain other fees, including a combination of such fees, and (2) does not publicly solicit brokerage business. **The Conferees expect that the SEC will not disturb traditional bank trust activities under this provision.**

[1] In several places the Rule expresses the SEC's concern that bank customers be afforded the same protections as would be available under federal securities laws. Congress clearly did not share these concerns. Activities covered by the bank exemptions are not subject to the SEC's oversight. Congress clearly believes the banking agencies have sufficient expertise and statutory powers to oversee the exempt activities.

Congressional Record - House 11255 at 11297 (Nov. 2, 1999) (emphasis added). 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.

We firmly believe that one of the Rule's core problems is the failure to rely on established banking law principles to define bank activities and concepts. It seems self-evident to us that statutory exemptions intended by Congress to preserve traditional banking activities should be defined in the context of existing bank regulation. Instead of relying on concepts and definitions honed to precision over the years by expert federal banking agencies, the Rule time and again attempts to define, and in many cases re-define, concepts that are familiar to bankers. Instead of providing helpful guidance, the Rule creates a minefield for banks by making exemptions contingent on highly technical distinctions that are in many cases contrary to current banking practices. There is no need for the Rule's regulatory gloss because the statutory provisions are unambiguous when viewed from the bank regulatory perspective.

We are particularly concerned about the cost of compliance and, for smaller banks, the ability to comply at all with the Rule's complex and confusing provisions. Larger institutions will need to add significant resources to compliance and legal staffs. Smaller institutions, however, may not have that option. Smaller banks are already struggling to deal with the ever-expanding regulatory mandates for compliance with anti-money laundering, privacy, anti-terrorism, and other recently enacted or expanded statutes.

We believe SEC needs to rethink its approach to most of the exemptions covered by the Rule. We appreciate the SEC's efforts, since the initial Rule was published, to meet with banks and bank trade groups to address our concerns, but more work is clearly required. The best evidence of that conclusion is the fact that the Rule requests comment on well over 100 specific items, including requests for detailed analysis and information. The rulemaking process is not well suited in these circumstances for the type of analysis and discussion needed to craft a workable exemption model that is consistent with its legislative purpose.

We find it impossible to comment on all of the items on which the Release requested comment or to address all of the deficiencies we see in the

Rule. Accordingly, we have confined our comments to the items that we view as most problematic.

A. Custody Exemption.

One of the Rule's most serious deficiencies is the failure to permit order taking for custodial accounts. The Rule would allow order taking in grandfathered accounts and accounts of accredited investors, but we believe order taking should be permitted for all custody accounts.

Banks have long provided order taking, clearing and settlement services for their trust, fiduciary and custody clients. As custodians, banks customarily maintain possession and control of client assets and necessarily must process orders to buy or sell securities and clear and settle securities trades on behalf of such accounts. Order taking is one of the core functions that banks perform as a trustee, fiduciary or custodian.

We find no support in GLBA or its legislative history for the SEC's position that order taking is impermissible. In fact, Section 3(a)(4) clearly indicates that Congress intended the custody exception to *preserve* a custodian's ability to take orders. The safekeeping and custody provision is one of three provisions referenced in Section 3(a)(4)(C), which requires banks to direct trades to a registered broker or dealer for execution.[2] If Congress did not intend for custodians to take orders, there would be no need to mandate that orders in custody accounts be executed through registered brokers. Congress intended only to assure that orders are executed by registered brokers or dealers. Congress did not intend to disturb traditional custody activities.

We also strongly oppose the inclusion of a definition of "account for which the bank acts as a custodian" in Section 242.762(a) of the Rule. The definition purports to list rights or duties that "at a minimum" must be in a written agreement between the custodian bank and its customer in order to qualify as an "account for which the bank acts as a custodian." Decades of banking practice and banking law have well settled the essential elements of custodial relationships. The definition is simply not needed. It unnecessarily injects the SEC into bank customer relationships by mandating the essential

---

[2] Orders taken in connection with trust and fiduciary activities and stock purchase plans also must be executed through registered brokers or dealers. See Exchange Act, Section 3(a)(4)(C).

elements of a custody contract. In addition, it creates a trap for banks, putting them at risk of failing to qualify for the bank exemption from registration if the bank's contracts don't meet the Rule's hypertechnical definition. The definition should be deleted from the Rule.

We support the change made in the Rule to allow dual employees of custodians to take orders for the purchase or sale of securities. We presume the change would allow a dual employee who is registered with a broker or dealer to take orders even if the final Rule retains the prohibition on order-taking by bank employees with respect to accounts that are not grandfathered or owned by accredited investors. We also support the change made in the Rule to permit employees to receive incentive compensation based on the size or value of assets gathered.

We appreciate the SEC's efforts to allow order taking with respect to grandfathered accounts and we support that accommodation to the banking industry. However, restricting order taking in the future to accounts of accredited investors would create significant problems. Custodians typically do not collect information geared toward identifying whether a particular customer is an accredited investor. Likewise, customers seeking a custody account do not expect to complete investor questionnaires or disclose and document their income, assets and other financial data that are relevant to determining whether the customer is accredited. The Rule leads to innumerable additional questions.[3] Would a custodian be prohibited from taking orders if the customer ceased being accredited? Is the custodian required to update a customer's responses to the 'accredited investor' questionnaire and, if so, how often? Is the custodian's employee required to determine that the customer is an accredited investor each time the custodian takes an order? The Rule's approach is unworkable and complicated, creating significantly more operational issues and questions than it answers. Custodians will incur significant costs in order to keep track of accredited investors and potentially to

[3] We note that the accredited investor concept is most frequently used in connection with determining whether a non-registered offering can be sold to a particular investor and typically involves an analysis conducted at the specific point in time when an offering occurs. Here, the Rule attempts to use the same concept in connection with a recurring activity, which theoretically would require a determination of the customer's 'accredited' status each time an order is placed.

update financial information on a regular basis. The better solution, consistent with Congressional intent, is to allow order taking on all custody accounts.[4]

We also support the change in the Rule to allow compensation for securities movement and settlement services if the compensation does not vary based on whether the custodian also acted as an order-taker. The change allows banks to impose a fee uniformly for such services without violating the Rule. We note, however, that (i) GLBA does not prohibit banks from imposing an order-taking fee in connection with custody accounts and (ii) unlike the fiduciary provisions of the Rule in which banks may impose a flat or capped per order fee, fees charged for securities movement and settlement in custody accounts are not limited under the Exchange Act to an amount reflecting the cost to provide such services. We continue to believe there is no statutory basis for placing any limits on order-taking fees, securities movement and settlement fees or other transaction fees in custody accounts and banks ought to be able to charge such fees without restriction.

B. <u>Chiefly Compensated – Treatment of Servicing Fees</u>.

The treatment of servicing fees under the Rule is confusing and appears to be inconsistent with mutual fund industry practices. The proposal issued in 2001 contained language in footnote 146 ("Footnote 146") [5] indicating that fees relating to certain services would be considered 'unrelated' compensation. In contrast, fees related to other services, as well as fees paid under any 12b-1 plan, would be considered 'sales' compensation for purposes of the 'chiefly' compensated test. The Rule made no changes to these provisions, apparently relying on the theory that investment companies could restructure their service arrangements to help banks avoid having fees be classified as 'sales' compensation under the Rule.

---

[4] Preserving a bank's ability to take orders on custody accounts will not materially effect the protections afforded by the securities laws. Orders must be routed through registered brokers or dealers for execution. In addition, custody customers are clearly free to use a specific broker and arrange settlement through the custodian if a customer desires to place orders directly with a broker.

[5] See Exchange Act Release No. 34-44291, 66 Fed. Reg. 27760, at 27775, footnote 146 (May, 18, 2001).

The release seems to imply that, to the extent the Rule's new provisions create uncertainty or problems for banks, the solution would be for mutual funds to restructure their compensation plans. Obviously banks cannot mandate that mutual fund companies conform their compensation plans (which may require approval of the fund's shareholders) to the Rule's categories. Instead, the Rule should be drafted to take into account the current business practices of funds and not presume that the mutual fund industry will change its business practices to suit the SEC's model for bank regulation.

More importantly, the distinction the Rule attempts to make among 12b-1 fees, service fees (both of which are considered 'sales' compensation) and other service type fees listed in Footnote 146 (which are considered 'unrelated' compensation) makes no practical sense. There appears to be no logical distinction between the types of services the Rule considers to be 'sales' compensation, and the types of services described in Footnote 146 as 'unrelated' compensation. Mutual funds make no such distinction. Mutual fund servicing plans typically pay financial intermediaries for the services described in Footnote 146 as well as many other services that are not related to sales activities. All of such activities relate to services performed for the client or on behalf of the mutual fund, not sales activities, and should be considered 'unrelated' compensation or 'relationship' compensation.

The Rule also classifies servicing fees as either 'sales' or 'unrelated' based on the meaningless distinction of how the mutual fund or its related parties choose to pay such fees. Mutual funds pay servicing fees in four different ways: (i) from fund assets generally as subtransfer agent fees, (ii) from fund assets under a 12b-1 plan[6], (iii) from fund assets under a shareholder servicing plan and (iv) from the distributor's or adviser's assets as 'revenue sharing.' Under the proposed Rule, fees for services would be treated as 'unrelated' if paid under a shareholder servicing plan or as subtransfer agent fees. However, fees for identical services would be treated as 'sales' compensation if the mutual fund chose to pay them under a 12b-1 plan or the adviser chose to pay them from its own assets. Banks cannot dictate to registered investment

[6] Funds that have adopted 12b-1 plans typically do not have shareholder servicing plans. Consequently, 12b-1 plans usually allow compensation to be paid for a variety of activities, including activities relating to sales, activities the Rule considers to be 'servicing,' and activities listed in Footnote 146 that would not be considered 'servicing.'

companies and their advisers how to structure compensation plans. A bank's ability to perform the chiefly compensated calculation, and to qualify for the exemption from registration as a broker, should not be dependent on how a mutual fund chooses to pay servicing fees. Banks should be permitted to treat all servicing fees as 'unrelated' or 'relationship' compensation for purposes of the chiefly compensated test.

C. Chiefly Compensated – New Account Review.

Section 242.721(a)(2) requires banks that use the line of business test to maintain procedures reasonably designed to assure that, before opening a new trust or fiduciary account, the bank review the account to determine that the bank is likely to receive more relationship compensation than sales compensation in connection with the account. We believe the Rule's approach is impractical and its requirements are not possible to meet.

Unless a bank charges only asset based fees that clearly are 'relationship' compensation, the bank will know whether the relative amount of relationship compensation will exceed sales compensation only if the bank can accurately predict the activity that might take place in an account. If a bank charges a settlement fee for securities movement, for example, such fee could be 'sales' compensation but the bank cannot determine the level of sales compensation unless it can predict the nature, number and frequency of securities that move into and out of the account.

The problem is most easily seen with new accounts in which the customer deposits only cash. In order to perform the analysis required by Section 242.721(a)(3), the bank would need to predict whether the assets would be invested in whole or in part in securities, the turnover in securities positions that likely will occur and the nature and type of revenue the bank might receive under all of these scenarios. Moreover, if the bank does not have investment discretion, or shares investment discretion with others, the bank would have little control over what investments the investment adviser on that account may select or how often the adviser will conduct transactions.

The requirement to review each account at opening should be deleted from the Rule. It imposes unnecessary additional costs on the bank, is impossible to perform with any degree of accuracy and does not in any material way help to assure compliance with the chiefly compensated test.[7]

D. Chiefly Compensated – Flat or Capped Order Fees.

GLBA allows banks to count as 'relationship' compensation any flat or capped per order fee that is equal to not more than the cost incurred by the bank in connection with the execution of securities transactions for trust and fiduciary accounts. As we read it, the Rule does not prohibit a bank from charging order fees that exceed its cost. Fees above cost, however, would be considered 'sales' compensation under the chiefly compensated test.

In attempting to be clear and precise, the Rule creates a massive trap for banks that attempt to cost justify the amount of a transaction fee. The Rule allows a bank to add to the amount charged by a broker to execute a trade, the "the direct marginal cost" of resources used by the bank to execute, compare and settle the trade, as long as the bank makes a "precise and verifiable allocation" of these resources. The degree of certainty apparently required by the Rule will almost guarantee that no bank will rely on the statutory language to count transaction fees as 'relationship' compensation and risk failing to qualify for the exemption from registration.

That result is clearly not what Congress intended. We believe the flat or capped per 'order' fee is intended to apply only to *order* processing fees and should be construed to apply only to fees that a bank may charge for accepting orders or routing orders on trust and fiduciary accounts to a registered broker-dealer. The reference in the Exchange Act to an 'order' processing fee should not be construed to apply to clearing and settlement services, which are distinct activities that banks have long performed for all trust, fiduciary and custody clients.[8]

---

7 Although our discussion in this section focused on the new account review, we believe the requirement in Section 242.721(a)(4) to review existing accounts when the compensation structure is changed likewise suffers from the same deficiencies because it is also a forward-looking test requiring a prediction of future account activity.

8 We are aware that the SEC has traditionally viewed clearing and settlement as part of "effecting transactions" in securities and an indicia of the broker-dealer business. However, we believe it is not appropriate to apply this broad interpretation in the context of traditional bank activities where banks customarily clear and settle transactions as part of the core functions and duties of a trustee, fiduciary or custodian.

We believe the Rule should allow banks to charge and receive a clearing and settlement fee on trust and fiduciary accounts, like the fees that can be received on custody accounts. To the extent the bank charges a higher fee or an additional fee for order taking, only the difference or additional fee should be considered 'sales' compensation. Fees charged for securities clearing and settlement should be considered 'unrelated' or 'relationship' compensation.

The Rule's provisions on flat or capped per order fees essentially mandate a fee structure that is clearly at odds with a bank's legitimate goal of fair and equitable treatment of customers. Bank customers that demand a higher level of service pay a higher fee. The Rule's approach would likely cause banks to raise all base trustee fees to cover the costs of providing clearing and settlement services to those accounts in which securities transactions occur. We believe the better and more equitable approach is to charge for individual services, assuring that accounts requiring a low level of service pay low fees and that the costs associated with higher levels of service are borne only by accounts that make use of such services.

E. Chiefly Compensated – Revenue to be Included.

The Rule added a new provision to the general custody exemption to clarify that it cannot be used as the basis for activities that would be governed by the exemption for trust and fiduciary activities. The change appears to clarify the SEC's position that when engaging in an activity for a trust or fiduciary account, for example, the bank must rely only on the trust and fiduciary exemption. Although it is not clear from the Rule, we presume that the converse is true – that when engaging in activities under the trust and fiduciary exemption, a bank need not consider the requirements of other exemptions.

For example, the chiefly compensated test applies only to compensation derived from trust and fiduciary accounts. Revenue derived from activities permitted under other exemptions would not be relevant and, consequently, would need to be excluded from the chiefly compensated calculation, even if the calculation is done on a 'line of business' basis. Banks that engage in custody activities would not include in their chiefly compensated calculation any custody revenues, including any securities settlement or securities movement fees that would be permissible under the final Rule, regardless of whether the custody revenues would be viewed as 'sales,' 'unrelated' or 'relationship' compensation. Likewise, any revenue that a bank derived from its securities lending activities or when serving as trustee or custodian of an employee benefit plan, both of which are also governed by the general custody exemption, would be excluded from the chiefly compensated calculation.

Although we believe our analysis of these provisions is correct, we expect that other banks, particularly smaller institutions, may not be fully cognizant of the need to exclude custody or other revenues. We suggest the Rule be revised to clarify that revenue derived from activities governed by other exemptions should be excluded when a bank performs its chiefly compensated test.

F. Chiefly Compensated – 1 to 9 Ratio.

Although GLBA requires banks, when acting as trustee or fiduciary, to be 'chiefly compensated' on the basis of certain specified fees, GLBA does not mandate any specific approach to assure compliance. In the Rule, the SEC mandates an extremely burdensome, extremely complex and absolutely impractical approach requiring an account-by-account review that is clearly not required by GLBA.

While we appreciate the SEC's effort to simplify compliance by allowing an alternative line-of-business test, we believe that any relief provided by the alternative test is illusory. Even if the safe harbor is satisfied, banks must still be ready to perform an account-by-account calculation in the event the bank does not qualify for an exemption using the line-of-business test. Banks must still incur the substantial initial and on-going administrative burden and expense necessary in order to be able to test on an account-by-account basis for those years in which 'sales' compensation exceeds the 1 to 9 ratio. Moreover, to assure that at year-end we meet the test, we will likely need to perform a year-to-date calculation on a more frequent basis. We will need to implement new administrative and recordkeeping procedures and incur well over a million dollars in expenses to create and implement the computer programming and training needed merely to compile the information necessary to perform the calculation. In addition to these substantial initial outlays, banks will incur substantial costs on an annual basis to conduct on-going testing and training to assure that data is being collected correctly and to perform the annual account-by-account calculation.

Tracking and categorizing each fee will be a difficult and complex task. Banks perform a variety of services for trust and fiduciary customers and many banks charge a separate fee for each service. For example, some banks impose a termination fee when the bank is removed or replaced by a new trustee. The fee is intended to compensate the bank for the administrative service and expense incurred in transferring assets held in trust to the new trustee. If those assets include securities, should the termination fee be considered 'sales' compensation because the services performed include, in part, transferring and reregistering securities? Should the fee be categorized as 'relationship' compensation because it is paid by the trust whether or not securities transfers are involved? Should the fee instead be 'unrelated' compensation, but perhaps only when no securities are transferred? The only certain outcome of the Rule's scheme for categorizing fees is a dramatic increase in compliance costs to banks and a skyrocketing number of requests for formal and informal guidance on these issues from the staff of the SEC.

The Rule's choice of a 1 to 9 'sales' safe harbor for the line of business test seems arbitrary. GLBA clearly indicates the exemption is available as long as a bank is 'chiefly' compensated by certain types of fees. We believe 'chiefly' means 50% or more and the choice of an 11% threshold has no statutory basis. The correct approach would be to use 50% as the threshold for compliance.

The Rule should be changed to eliminate any need for an account-by-account review and focus on whether more than half of the bank's revenue is from 'sales' activities. A general analysis of revenue should be sufficient to assure that a bank meets the GLBA standard. In lieu of such a simple calculation, the SEC has chosen a complicated line of business analysis that ignores the express statutory permission for banks to receive up to 49% of revenue as 'sales' compensation and still qualify for the exemption from registration as a broker.

G. Section 242.770 – Employee Benefit Plans.

Section 242.770 exempts a bank from registration to the extent that it effects transactions in open-end mutual funds under employee benefit plans. It is unclear whether this section is intended to only apply to defined contribution plans because the provisions in such section seem to relate to participant directed accounts. We presume the exemption provided by Section 242.700 would apply to defined benefit plans as well, some of which invest in mutual funds, and we would appreciate the inclusion of language in the final Rule or its accompanying release to clarify the scope of the exemption.

H. Section 242.776 – Mutual Fund Transactions.

GLBA and the Rule require banks to execute orders through registered brokers. We appreciate the SEC's decision to allow banks to continue to use NSCC's Mutual Fund Services as a vehicle for completing mutual fund transactions on behalf of clients without using a registered broker-dealer. We also appreciate the change made to allow direct purchase from a transfer agent or the distributor of a fund. However, we see no reason to burden that relief with additional conditions relating to the compensation that the transfer agent may receive and the amount of sales charges that could be paid. Section 242.776 is another clear example of the Rule's tendency to choose a complex solution to a relatively simple problem. A bank cannot dictate the transfer agent's compensation or the sales charge that a fund may impose, and we see no rational reason why those conditions should be a part of the Rule.

There are other instances in which securities are generally sold directly by the issuer. For example, most privately placed investment funds, such as venture capital partnerships, typically place the securities with investors themselves rather than use broker-dealers.[9] A bank that used a broker-dealer in such instances would likely be considered to have breached its fiduciary duty by causing the trust or fiduciary account to incur a commission or placement fee when other purchasers of such securities purchase commission-free. The Rule should be amended to reflect a bank's ability to purchase securities in private placements and other situations where the security may be available from the issuer or other non-broker source.

I. Networking Exemption.

The networking exception in GLBA contains a narrowly crafted provision prohibiting bank employees from receiving incentive compensation for any

[9] We note that Exchange Act Rule 3(a)(4)-1 reflects the SEC's position that issuers and related parties that privately place securities in accordance with that Rule are not considered broker-dealers.

'brokerage transaction' but allows the payment of 'nominal' referral fees. Congress did not otherwise restrict the design of bank employee incentive compensation programs or place any limit on the compensation that banks pay to their employees.

The Rule, in contrast, goes far beyond the requirements of GLBA and injects the SEC into the design of employee compensation plans. As long as a plan does not pay incentive compensation based on any 'brokerage transaction,' the plan should be permissible. We believe it is important to note that Congress used the narrower phrase 'brokerage transaction,' rather than 'effecting transactions in securities,' when limiting incentive compensation. Under this language, plans that are based, for example, on the amount of assets gathered, or non-brokerage revenue generated,[10] or other measure not based on brokerage transactions should be permitted under GLBA.

The SEC's definition of 'nominal' is completely arbitrary and unnecessary. Banks have been limited to paying 'nominal' referral fees since February 15, 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.

J. Fiduciary Exemption – Department Regularly Examined.

The trust and fiduciary exception requires banks to effect securities transactions in the trust department or "other department that is regularly examined by bank examiners for compliance with fiduciary principles and standards." The Release attempted to clarify certain aspects of the Rule, but many questions still remain unanswered. For example, the text accompanying footnote 201 indicates that bank affiliates must register as a broker if they participate in a securities transaction, but the footnote indicates that certain

[10] Although brokers are generally not permitted to pay any portion of their commissions to non-licensed persons, we note that the SEC, NASD and NYSE have all approved the payment of finders fees in corporate finance transactions and solicitation fees pursuant to Rule 206(4)-3 of the Investment Advisers Act. We believe Congress did not intend that such payments to banks or their employees be restricted by GLBA.

activities may occur in a registered investment adviser. Unfortunately, the footnote does not indicate what activities are permitted.

Some banks with registered investment adviser affiliates have consolidated, to the extent legally permissible, some of the functions related to one or more aspects of a securities transaction. For example, some banks use the trading desk of their registered investment adviser to process trades on fiduciary accounts.[11] Likewise, some banks may have 'outsourced' securities clearing and settlement services to their registered broker-dealer affiliates. In such instances, the trading desk function or clearing and settlement functions may not be subject to OCC or FRB examination because the adviser and broker are functionally regulated by the SEC. The result then, is that while such activities have been 'pushed out' (presumably consistent with the SEC's position), the bank can no longer rely on the trust and fiduciary exemption to engage in <u>any</u> securities related activities because the departments that conduct certain 'aspects' of securities transactions are not regularly examined by 'bank examiners' for compliance with fiduciary law.

K. <u>No-Load Fund Definition</u>.

There is no basis in the legislative history of GLBA to engraft the NASD's definition of 'no-load' onto the bank exception for sweep transactions. The purpose for the NASD's rule is to regulate use of the term 'no-load' in advertising in order to assure that the investing public is not deceived when selecting from among the thousands of mutual funds offered.

Banks customarily offer sweep products as an adjunct to traditional bank products, such as a checking account or corporate cash management service. In such instances, customers are primarily shopping for appropriate banking services and, while a sweep option makes the bank product more attractive, the specific fund into which cash is swept is rarely a significant consideration. Banks typically offer a very limited range of sweep options, primarily due to the expense of arranging for daily sweeps. The primary factor in a customer's decision on which sweep fund to use is the investment

---

[11] Consolidation obviously leads to greater efficiencies and economics of scale, but it also can yield very practical compliance benefits. A centralized trading function, for example, helps to assure best execution of client trades at the lowest possible commission. It also avoids the potential compliance risks associated with having individual trust account managers place trades directly with independent broker-dealers.

objective of the fund (e.g. a tax-free fund, government obligations fund, or a taxable corporate obligations fund), not the fees associated with each fund.

We see no purpose in the SEC's decision to adopt the NASD's definition of no-load. The Rule will not serve the purpose of protecting the investing public from deceptive advertising because banks select the funds to be offered as sweep options. The Rule serves no apparent purpose other than to limit the compensation that banks may receive. As such it gives a competitive advantage to brokers, who are not bound to offer only funds that meet the technical definition of 'no-load.'

L. Grandfather Dates.

We appreciate the SEC's willingness to grandfather certain account structures, compensation arrangements and activities on existing accounts. From a practical standpoint, however, a grandfather date tied to the end of a calendar year, with sufficient notice well in advance, would be more appropriate than a July 31 date. Banks will need advance notice to change new account policies and procedures when the final Rule is adopted. Likewise, banks will need sufficient notice to capture account data prior to the grandfather date. If the Rule is not finalized before November 2004, December 2005 should be the grandfather date.

M. Effective Date.

We appreciate the SEC's decision to allow a long delay between the adoption and effective date for compliance with the Rule. Even if modified as the banking industry suggests, the Rule will require massive changes in the way banks charge their customers for trust, fiduciary and custody services. It will take a significant amount of time to review account fee and compensation arrangements and implement new fee schedules based upon the Rule, review employee compensation structures and make any necessary modifications, implement computer programming changes and provide customers with sufficient advance notice of any changes.

Please feel free to contact the undersigned at (216) 689-5429 or William J. Blake, Deputy General Counsel, at (216) 689-4129 if you have any questions or would like to discuss our comments further.

Sincerely,

Carol L. Klimas
Executive Vice President
and Chief Fiduciary Officer
KeyBank National Association