SEC Regulation B Will Adversely Impact Health Savings Accounts

In creating Health Savings Accounts (HSAs), Congress and the Administration expressly intended for banks to offer these accounts to their customers. However, the SEC's proposed Regulation B (to implement the bank exceptions from the definition of "broker" under Title II of the Gramm-Leach-Bliley Act) creates significant and, in some cases, insurmountable, barriers to banks' ability to offer HSAs.

Banks accepting HSA accounts generally have three options for investing HSA account assets once the assets reach an appropriate investment level:

- A deposit account from which assets are swept into a securities product, such as a mutual fund;
- A custody account where the customer directs the bank on the investment of HSA account assets, and
- A trust account where either the customer or the bank exercises investment discretion over HSA account assets.

Regulation B interferes with a bank's ability to offer HSA customers these products:

- Regulation B prohibits banks from sweeping deposit assets into equity or fixed-income mutual funds. Sweeping only into no-load money market mutual funds is permissible under the SEC's proposal.
    - Money market mutual fund yields are significantly lower than those offered by equity and fixed-income mutual funds. Thus, by limiting HSA customers' ability to invest in assets that generate larger yields, Regulation B impedes their ability to save money in order to pay future health costs.
- Regulation B prohibits banks from taking investment orders from custodial account customers unless those customers have an investment portfolio of at least $25 million. Allowing banks to offer HSA custodial accounts to only the highest net worth customers is, we would submit, not a result intended by either the Congress or the Administration.
    - Regulation B requires banks to build costly compliance systems to measure compensation received from trust and fiduciary accounts. Costly compliance systems will discourage banks from offering trust and fiduciary accounts to prospective HSA customers, as those accounts, at least at the beginning, will hold more modest amounts of investable cash.

Title II of the Gramm-Leach-Bliley Act was intended to allow banks to continue to engage in traditional banking activities. As many members of the House and the Senate, as well Federal Reserve Board Chairman Greenspan, then-Comptroller of the Currency Hawke, and Federal Deposit Insurance Corporation Chairman Powell, have all asserted, the activities discussed above are traditional banking activities that should be allowed to be conducted in the bank unimpeded by SEC regulation.