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June 2, 2009

Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th and Constitution Streets, NW
Washington, DC 20551

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Ability to Rely Upon Other GLBA Exceptions and Regulation R Exemptions
When Engaged in “Order Taking “ for Custody Accounts Pursuant to Rule
760 of Regulation R, SEC Release No. 34-56501; S7-22-06; Regulation R;
Docket No. R-1274.

Dear Ms. Johnson and Ms. Murphy:

The American Bankers Association¹(ABA) and the ABA Securities Association²
(ABASA) understand that the staff of the Board of Governors of the Federal
Reserve System and the Securities and Exchange Commission (hereinafter referred
to as “Agencies”) may be considering adopting an interpretation of Rule 760 which
would eliminate a bank’s ability to rely simultaneously on other statutory exceptions
and regulatory exemptions contained in the Gramm-Leach-Bliley Act (“GLBA”) and
Regulation R with respect custody accounts if the bank engages in “order taking”
services as authorized under Rule 760. For the reasons discussed below, ABA and
ABASA respectfully submit that such an interpretation is wholly inconsistent with
the fundamental intent of GLBA and Regulation R to accommodate long-standing
business practices of banks and should not be adopted.

The final rules were adopted after long and careful consideration by the Agencies
based on significant input from the banking industry with respect to custody
accounts. Protections were imbedded in Rule 760 to avoid the possibility that “order

¹ The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$13.5 trillion in assets and employ over 2 million men and women.

² ABASA is a separately chartered affiliate of the American Bankers Association (“ABA”) representing those holding company members of the ABA actively engaged in capital markets, investment banking, and broker-dealer activities.

taking” would convert the custody account into a brokerage account requiring registration. The activities covered by the various statutory exceptions and regulatory exemptions, by their very inclusion, were obviously deemed by the Congress and the Agencies to be activities that were acceptable for banks to engage in without registration as a broker.

Care should be taken not to undo the carefully crafted statutory exceptions and regulatory exemptions which were designed to achieve the fundamental intent of GLBA to allow banks to engage in long-standing and acceptable activities with respect to exempt securities and other permitted securities transactions.

Discussion

Banks offer custody accounts to their customers without restricting the types of securities and other assets that may be placed in these accounts. As a result, custody accounts may contain all types of securities, including securities that are exempt under various provisions of GLBA, as well as Regulation R.

The Agencies have made clear that “[t]he final rules are designed to accommodate the business practices of banks and protect investors. If more than one broker exception or exemption is available to a bank under the statute or rules for a securities transaction, the bank may choose the exception or exemption on which it relies to effect the transaction without registering as a broker-dealer.³

Thus, if a custody account holds only money market mutual funds and/or exempt securities, a bank, without the need to rely on Rule 760, is able:

- To take an order to purchase no-load and load money market mutual funds held in a custody account, relying on either or both the statutory exception for no-load money market mutual funds and the exemption contained in Rule 741 for load money market mutual funds.
- To take an order to purchase exempt securities (such as commercial paper and municipal securities) held in a custody account under the statutory exception for exempt securities.
- To take orders to purchase both exempt securities and load and no-load money market mutual funds held in a custody account under either or both the statutory exceptions for exempt securities and no-load money market mutual funds and the exemption for load money market mutual funds contained in Rule 741.

Further, a bank would be free to provide investment advice to their customers and to compensate bank employees for assisting customers in placing their orders under

³ *Definitions of Terms and Exemptions Relating to the “Broker” Exceptions for Banks*, 72 Fed. Reg. 56514, 56516 (October 3, 2007).

any of the fact patterns outlined above as neither the statutory exceptions nor Rule 741 are conditioned on any such restrictions.

It follows logically from the above that a bank should also be able to rely on these same exceptions with respect to a single custody account that contains—in addition to exempt securities and money market mutual funds—securities for which orders may *not* be taken, except under authority of Rule 760, *i.e.*, orders for non-exempt securities. Thus, for example, for a single custody account, a bank should be able to take orders for exempt securities and load and no-load money market mutual funds in reliance upon either the statutory exceptions and/or Rule 741 and take orders for non-exempt securities such as debt and equity securities in reliance upon Rule 760.⁴

The Agencies have articulated only one single exception to the use of multiple statutory exceptions or regulatory exemptions. Specifically, banks cannot, as a general matter, use the Rule 760 “order taking” exemption to avoid satisfying the trust and fiduciary exception’s conditions, most notably its compensation and advertising limitations.⁵ Thus, while the Agencies expressly limited the “order taking” exemption to prevent its use to evade the restrictions of the trust and fiduciary exception, they did not include in Rule 760 any other limitations or restrictions on the ability of banks to rely upon multiple statutory exceptions or regulatory exemptions. Nor did they do so with respect to any other statutory exceptions or regulatory exemptions. Indeed, the Agencies illustrated how multiple exceptions and exemptions could be used in tandem when they stated that it might be appropriate to allocate securities transactions entered into on behalf of trust and fiduciary accounts among the several exceptions or exemptions just so long as revenues earned on transactions conducted in accordance with another exception or exemption were not included within the trust and fiduciary exceptions “chiefly compensated” test.⁶

This same “allocation” principle should also allow a custodial bank to conduct its order taking activities in reliance upon Rule 760 and any other applicable exception or exemption. Thus, for example, a bank should be able:

- To take an order to purchase exempt securities held in a custody account under the statutory exceptions for no-load money market mutual funds or exempt securities and to purchase non-exempt securities held in that same account under Rule 760;
- To take an order to purchase load money market mutual funds under Rule 741 and non-exempt securities held in that same account under Rule 760.

⁴ While ABA has consistently taken the position that order taking is not precluded under the safekeeping and custody exception, the Agencies, by adopting Rule 760, appear to have taken a contrary position.

⁵ Directed trust accounts are, however, permitted to be treated under either the statutory trust and fiduciary exception or Rule 760.

⁶ See 72 Fed. Reg. at 56532.

Of course, any order taking activity with respect to non-exempt securities conducted in reliance upon Rule 760 would be subject to the restrictions imposed by Rule 760. Thus, in our examples above, a bank employee would not be able to receive compensation based on the securities transaction executed as a result of the custodial customer's instructions to purchase non-exempt securities. Nor would the bank be able to provide the customer with investment advice or research concerning these non-exempt securities.⁷ Conversely, order taking with respect to securities that banks are permitted to purchase in reliance on other exceptions and exemptions should enjoy the full scope activity permitted by those exceptions and exemptions without being restricted by the limitations contained in Rule 760.

Our strong interest in being allowed to allocate transactions among the statutory exceptions and regulatory exemptions is based on the fact that the restrictions imposed under Rule 760 would place significant limitations on our members' ability to offer investment advice to many of their custodial customers. It is not uncommon for these customers to request advice on particular money market mutual fund sweep vehicles made available to them. Nor is it uncommon for banks to recognize an employee's contribution in assisting customers in selecting a money market investment.

Moreover, we note that nothing in the statutory exceptions would preclude banks from offering such advice. If the Agencies were to take the position that the order taking limitations of Rule 760 apply to all securities held in a custody account, they would then be adding a condition to the statutory exceptions that Congress did not deem to be warranted. The end result of adopting such an interpretation would be to substantially undermine the statutory exceptions provided in GLBA.

The ability to sweep excess cash into load and no-load money market mutual funds on an "as directed" basis is also an important product offering bank customers have long demanded to ensure that they gain the maximum return possible on their assets. Indeed, the Agencies themselves recognized the importance of sweep services when, in Rule 741, it provided banks with the ability to continue to offer customers the ability to sweep into load money market mutual funds, so long as the client purchased from the bank another product or service, including custodial services. Precluding the ability of banks to provide customers with investment advice regarding load money market mutual funds and rewarding employees for assisting customers when those customers have custodial accounts significantly diminishes the usefulness of Rule 741.

Requiring two custodial accounts for the same client—one for exempt securities and one for non-exempt securities—as some have suggested is not a solution. Rather, it would pose insurmountable operational problems. Moving cash at the end of the day from one custody account to another and then to a money market mutual fund, all before the mutual fund's end of day cut-off time for investment invites not only operational difficulties but also the potential for liability to the client for failing to invest, as directed, before the mutual fund's deadline. Moreover, such a "solution"

⁷ We recognize that this limitation only applies to order taking for "accommodation" trades.

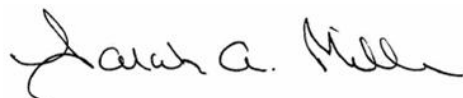
elevates form over substance and cannot have a rational basis. It is not logical to forbid a bank to do in one account what it can do in two accounts.

Another example of the mischief that the Agencies' proposed interpretation would wreak on the carefully constructed regulatory exemptions involves Rule 775. That Rule is intended, among other things, to permit banks to execute mutual fund transactions directly with a mutual fund transfer agent or through the National Securities Clearing Corporation rather than through a broker as required by Section 3a(4)(C) of the statute. Clearly, if a custody account holds only money market mutual funds and exempt securities, it would be able to rely on the exemption provided by Rule 775. Banks should also be able to rely upon Rule 775 in the execution of money market and other non-exempt mutual funds held in a single custody account.

By its terms, Rule 760, however, permits a bank to engage in order taking "only if the bank" complies with the execution requirements of Section 3(a)(4)(C). Based upon the Agencies' proposed interpretation of Rule 760 whereby reliance upon other exceptions or exemptions would be prohibited, it would appear that banks, relying on Rule 760, could not also rely upon the exemption contained in Rule 775 in connection with the execution of mutual fund transactions. Such a result would severely disrupt the operation of custody accounts by imposing substantially different execution requirements on custody accounts that hold only money market mutual funds and exempt securities and those that hold non-money market, non-exempt mutual funds. This certainly cannot be the result the Agencies intended and it is not the result the banking industry expected.

In conclusion, we believe that there is no valid investor protection or regulatory justification for restricting a bank's ability to allocate transactions among various statutory exceptions and regulatory exemptions. We urge the Agencies not to adopt such an interpretation but rather to affirm promptly that Rule 760 does not interfere with a bank's ability to allocate transactions among all available statutory exceptions and regulatory exemptions.

Sincerely,

A handwritten signature in cursive script that reads "Sarah A. Miller".

Sarah A. Miller

cc: Kieran Fallon, Assistant General Counsel, Board of Governors of the Federal Reserve System
Andrea Tokheim, Counsel, Board of Governors of the Federal Reserve System
Linda Stamp Sundberg, Senior Special Counsel, Securities Exchange Commission