WISCONSIN BANKERS ASSOCIATION

March 26, 2007

VIA EMAIL
Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave. N.W.
Washington, DC 20051
regs.comments@federalreserve.gov
Docket No. R-1274

VIA EMAIL
Ms. Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549-1090
rule-comments@sec.gov
File No. S7-22-06

Re: Definitions of Terms and Exemptions Relating to the "Broker" Exceptions for Banks.

Dear Ms. Johnson and Ms. Morris:

The Wisconsin Bankers Association (WBA) is the largest financial institution trade association in Wisconsin, representing approximately 300 state and nationally chartered banks, savings and loan associations, and savings banks located in communities throughout the state. WBA appreciates the opportunity to comment on the proposed rule regarding the definitions of terms and exemptions relating to the "Broker" exceptions for banks.

The Board of Governors of the Federal Reserve System (FRB) and the Securities and Exchange Commission (SEC) (collectively, the Agencies) request comment on proposed rules that would implement certain exceptions for banks under Section 3(a)(4) of the Securities Exchange Act (Exchange Act) as amended by the Gramm-Leach-Bliley Act (GLBA). The proposed rules would define terms used in the statutory exceptions and would include certain related exemptions.

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History

The GLBA amended several federal statutes governing activities and supervision of banks, bank holding companies, and their affiliates. The GLBA repealed most of the separation between investment and commercial banking imposed by the Glass-Steagall Act, and revised the provisions of the Exchange Act, which had completely excluded banks from broker-dealer registration requirements.

Regarding the definition of "broker," the Exchange Act as amended by GLBA, provided eleven specific exemptions for banks. Each of those exemptions permits a bank to act as an agent with respect to specific securities products or in transactions that meet specific statutory conditions. In particular, section (3)(a)(4)(B) of the Exchange Act provides conditional exceptions from the definition of "broker" for banks that engage in certain securities activities in connection with: (1) third-party brokerage agreements; (2) trust and fiduciary activities; (3) permissible securities transactions; (4) certain stock purchase plans; (5) sweep accounts; (6) affiliate transactions; (7) private securities offerings; (8) safekeeping and custody activities; (9) identified banking products; (10) municipal securities; and (10) a *de minimis* number of other securities transaction.

In 2006, the Financial Services Regulatory Relief Act (Relief Act) was enacted. It required the Agencies to jointly adopt a single set of rules to implement the bank "broker" exceptions in Section 3(a)(4) of the Exchange Act. The Relief Act also amended the definition of "bank" in Section 3(a)(6) of the Exchange Act to include any federal savings association or other savings association the deposits of which are insured by Federal Deposit Insurance Corporation (FDIC).

The Agencies seek comment on the proposed rule to implement the "broker" exceptions for banks relating to: third-party networking arrangements; trust and fiduciary activities; sweep activities; and safekeeping and custody activities. The proposed rules include certain exemptions related to these activities and are designed to accommodate the business practices of banks and protect investors. To assist the Agencies in promulgating this rule, WBA offers the following comments.

Networking Arrangements: Proposed Definitions Related to the Payment of Referral Fees.

Proposed Definition of "Nominal One-Time Cash Fee of a Fixed Dollar Amount."

The third-party brokerage exception under the Exchange Act permits a bank to avoid being considered a "broker" if, under certain conditions, it enters into a contractual or other written arrangement with a registered broker-dealer in which the broker-dealer offers brokerage services to a bank customer (Networking Arrangement). While the Networking Arrangement generally provides that a bank may not pay unregistered employees "incentive compensation" for referring a customer to a broker-dealer, the statutory exemption *does* permit a bank employee to receive a "nominal one-time cash fee of a fixed dollar amount" for referring bank customers to the broker-dealer if payment for the referral is not contingent on whether the referral results in a transaction. The proposed rule contains three alternatives to determine whether such referral fee is nominal.

Under the first alternative, a referral fee would be considered nominal if it did not exceed either twice the average of the minimum and maximum hourly wage established by the bank for the current or prior year for the "job family" that included the relevant employee, *or* 1/1000th of the average of the minimum and maximum annual base salary established by the bank for the current and prior year for the "job family" that includes the relevant employee. The proposed rule defines "job family" as a group of jobs or positions involving similar responsibilities, or requiring similar skills, education or training, that a bank or separate unit branch or department of a

bank has established and uses in the ordinary care of its business to distinguish among its employee for purposes of hiring, promotion and compensation.

Under the second alternative, a referral fee would be considered nominal if it did not exceed twice the employee's actual base hourly wage. And, under the third alternative, a referral fee would be considered nominal if the payment did not exceed $25. This dollar amount would be adjusted for inflation beginning April 2012, and every 5 years thereafter.

WBA struggles to understand the need for defining the term "nominal" as a set dollar amount or equation. Banks are required under existing banking regulations and securities guidance to ensure that retail referral fees paid to non-registered bank employees be nominal in amount. Nominal, by definition means small or trifling, which by itself is explanatory. Banks are currently meeting this requirement and WBA does not believe the term needs to be specifically defined by an identified dollar amount or equation.

WBA believes the determination of a referral fee needs to be as flexible as possible to allow banks the opportunity to structure a referral program or incentive program that remains competitive to its market place and rewarding to its participating employees. WBA is concerned that a prescribed fee equation based upon a job family's base hourly or yearly wages will result in disparaging treatment for those employees whose yearly wages are heavily based upon sales of products and services of non-investment products, as opposed to other branch employees. Bank employees such as personal bankers, private bankers, and mortgage bankers have a wage structure where the majority of that job family's income will be derived from the production of new products and services used and retained by new or existing bank customers. These employees generally have stronger relationship ties with their customers and many times refer more experienced or sophisticated customers than other retail customer service employees, yet the proposed referral fee equation would result in paying such employees a lower referral fee.

In addition, WBA suggests banks be allowed to pay referral fees in other non-cash forms. This flexibility would allow banks the opportunity to structure their incentive program to meet the statutory requirements of the GLBA conditions while not requiring a cash payout to the referring non-registered bank employee after every referral transaction. For instance, points may be accumulated over a month or quarter to be paid as cash to the non-registered bank employee at a later incentive program payout period. WBA also believes that such referral fee be allowed to be given on referrals of both bank customers as well as potential customers of the bank seeking financial products and services.

Proposed Definition of "Contingent on Whether the Referral Results in a Transaction."

Under the statutory Networking Arrangement exception, a "nominal" fee paid to an unregistered bank employee for referring a customer to a broker-dealer may not be contingent on whether the referral results in a transaction. Under the proposed rule, a fee would be considered "contingent whether the referral results in a transaction" if payment of the fee is dependent on: whether the referral results in a purchase or sale of a security; whether an account is opened with a broker-dealer; whether the

referral results in a transaction involving a particular type of security; or whether the referral results in multiple securities transactions.

The proposed rule, however, also recognizes that a referral fee may be contingent on whether a customer (1) contacts or keeps the appointment with the broker-dealer; or (2) meets any objective base-line qualification criteria established by the bank or broker-dealer or other requirements imposed by state or federal government.

WBA generally agrees with the proposed circumstances of when a nominal referral fee may be paid to an unregistered bank employee, including the provisions that a referral fee may be contingent upon the customer keeping his or her appointment with the broker-dealer or the customer meeting any objective base-line qualification.

Proposed Definition of "Incentive Compensation."

As outlined within the proposed rule, the Networking Arrangement exception prohibits unregistered employees of the bank that refer customers to a broker-dealer under the exception from receiving "incentive compensation" for the referral or any securities transactions conducted by the customer with the broker-dealer. However, "incentive compensation" would not include a nominal, non-contingent fee.

The proposed rule further defines "incentive compensation" as compensation that is intended to encourage a bank employee to refer potential customers to a broker-dealer or to give a bank employee an interest in the success of a securities transaction at the broker-dealer. The proposed rule excludes from this definition certain types of bonus compensation. It also excludes compensation paid by a bank under a bonus plan that is paid on a discretionary basis and based on multiple factors or variables.

WBA believes that the Networking Arrangement exception under GLBA was not intended to prohibit the payment of bonuses to employees as measurements of the financial performance of the branch, divisions or department units, or those based upon the general profitability of the bank and its affiliates. Instead, WBA believes this exception was generally intended to prohibit only the payment of traditional broker-dealer commissions to non-registered bank employees. WBA agrees with the Agencies that the definition of "incentive compensation" should not include traditional bonus plans of a bank.

Proposed Exemption for Payment of More Than a Nominal Fee for Referring Institutional Customers and High Net Worth Customers.

Definitions of "Institutional Customers" and "High Net Worth Customers."

The proposed rule outlines that a conditional exemption would permit a bank to pay an employee a contingent referral fee of more than a nominal amount for referring an "institutional customer" or "high net worth customer" to a broker-dealer when the bank has a contractual or other written Networking Arrangement. However, to take advantage of this conditional exemption, the bank must comply with the conditions in the statutory Networking Arrangement exception.

An "institutional customer" is defined to mean any corporation, partnership, limited liability company, trust, or other non-natural person that has at least $10 million in investments or $40 million in assets. A lower threshold of $25 million in assets has also been proposed for non-natural persons to permit banks to facilitate access to capital markets by referring smaller businesses to broker-dealers.

A "high net worth customer" is defined in the proposed rule to mean any natural person, who, either individually or jointly with his or her spouse, has at least $5 million in net worth excluding the primary residence and associated liabilities of the person. Both of these dollar amount thresholds would be adjusted for inflation beginning April 2012, and every 5 years thereafter. While WBA does not find the proposed definitions of an institutional or high net worth customer necessary, at the very minimum, WBA believes that such threshold should be consistent with existing regulations. The proposed thresholds appear to be substantially higher than current requirements and WBA suggests that the Agencies lower the proposed thresholds to existing net worth calculations.

Under the proposed rule, a bank is required to determine that a non-natural person customer qualifies as an "institutional customer" prior to any referral fee being paid. For a natural person customer, the bank is required to determine that the customer qualifies as a "high net worth customer," or must obtain a signed acknowledgment from the customer stating that the customer meets that standard. As proposed, the "high net worth customer" qualification must occur prior to or at the time the referral is made. WBA recommends that the proposed rule be modified so that high net worth customers must be "qualified" at or around the time the referral fee is paid to the non-registered bank employee and not prior to or at the time of the referral is made.

In addition, the proposed rule requires the bank to provide the "high net worth customer" or "institutional customer" written disclosures about the bank employee's interest in the referral prior to or at the time of the referral. The new disclosures must: be clear and conspicuous; disclose the name or the broker-dealer; disclose that the bank employee participates in an incentive compensation program under which the unregistered bank employee may receive a fee of more that a nominal amount for referring the customer to the broker-dealer; and state that the payment of such fee may be contingent on whether the transaction with the broker-dealer results in the purchase of a security.

WBA finds the new disclosure requirements burdensome. WBA agrees with the Agencies that such customers are more sophisticated than a bank's general retail customer and that these customers generally better understand the relationship between the bank and its broker-dealer partner and any possible referral programs between the two. As such, WBA finds unnecessary a requirement that a savvy customer – a threshold based solely on mere the customer's investment or asset size – be informed at the time of the referral that the referring non-registered bank employee may receive a referral fee of an amount greater than a nominal fee.

It should also be noted that under existing securities rules, the broker-dealer is required to complete a risk assessment analysis of the customer and thoroughly disclose to all his or her investment customers all of the features related to the securities product. Such disclosures require a discussion of any fees and charges,

account accessibility, transferability and any risk factors of the account. The customer's decision to purchase a particular securities account will be based upon these factors, features, risks, and overall investment plan of the customer. The knowledge that a non-registered bank employee may receive a particular referral fee should not have an effect upon the customer's decision and should not be a required new disclosure. Referrals by non-registered bank employees to broker-dealers is not a new procedure. Bank customers, sophisticated or otherwise, are already aware that bank employees are trained to help identity for the customer the possibility that other financial products may be available for them to further the customer's savings and investment plans. To create a new disclosure stating that which customers already know is needless.

Trust and Fiduciary Exception

Under section 3(a)(4)(B)(ii) of the Exchange Act, banks are permitted, under certain circumstances, to effect securities transactions in a trustee or fiduciary capacity without being registered as a broker. The bank must effect such transactions in its trust department, or other department that is regularly examined by bank examiners for compliance with fiduciary principals and standards. Banks are also required to be "chiefly compensated" for such transactions upon several basis.

WBA commends the Agencies actions to reduce burdens and expenses associated with the "chiefly compensated" requirement within the trust and fiduciary exception. The proposed rule offers new "chiefly compensated" conditions to be determined based upon the "relationship-total compensation percentage" or "aggregate relationship-total compensation percentage." Under these new calculations, banks would not be required to complete an account-by-account review of its compensation, and instead would be permitted to work within a reasonable bank-wide exemption. In addition, WBA is pleased that the proposed rule would include fees otherwise permitted under Rule 12b-1 of the Investment Company Act and other similar fees.

WBA would like the stress the importance that banks would not be required to comply with the trust and fiduciary exception when it serves as trustee for individual retirement accounts (IRA) which may include securities accounts held by a clearing broker. Banks are permitted under Internal Revenue Service (IRS) rules to act as trustees for IRAs. Some banks performing this function may, however, not have trust powers. As such, those banks would not meet the compliance requirements of the trust and fiduciary exception because they would not have a trust department regularly examined by bank examiners for compliance with fiduciary principals and standards. Those banks serving as trustees of IRAs containing securities sold through the bank's broker-dealer partner, held by a clearing broker, should not be determined to have conducted securities transactions. WBA supports the proposed provision, which excludes these IRAs.

Safekeeping and Custody Exception

Section 3(a)(4)(B)(viii) of the Exchange Act permits a bank to be exempt from the definition of broker if it has: performed as part of its customary banking activities the function of safekeeping or custody services with respect to securities; facilitated the transfer of funds or securities as a custodian or clearing agency; effected securities

lending or borrowing transactions with or on behalf of customers; held securities pledged by a customer to another person or securities subject to purchase or resale agreements; or has served as custodian or provider to any IRA, pension, retirement, profit sharing, or other retirement account.

WBA commends the Agencies efforts to include in the definition of "employee benefit account" and "IRA or similar account" the full product line of employee benefit plans that a bank's custodian department may normally manage. In addition, WBA agrees with the Agencies that accounts such as both traditional and ROTH IRAs, health savings accounts, medical savings accounts and education savings accounts should be included within this exemption.

Conclusion

WBA recognizes the efforts and steps taken by the Agencies to issue its joint rules. While WBA generally agrees with the proposed rule requirements, we strongly encourage the Agencies to: remove the need to define the term nominal; remove the requirement of a new referral fee disclosure; and remove or at a minimum reduce the asset or investment dollar amount thresholds for institutional and high net worth customers.

Once again, WBA appreciates the opportunity to submit comments on the proposed rule.

Sincerely,

Kurt R. Bauer
President/CEO