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Re: Docket No. R-1274

Jennifer J. Johnson, Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Dear Mesdames:

We are writing to offer our comments on the proposed rule that would provide definitions of terms and exemptions relating to the "broker" exception for banks. Comerica Bank is a full service state member bank, based in Detroit, Michigan, that operates more than 400 branches in the states of Michigan, California, Texas, Florida, and Arizona and holds more than $58.5 billion in assets. It engages in a full range of fiduciary activities, provides sweep accounts, and is parent of a registered broker-dealer, Comerica Securities, Inc. with which it may engage in networking arrangements. Accordingly, Comerica Bank is directly affected by the proposed rule.

At the outset, we would like to congratulate the Board, the Commission, and their staff on a proposal we believe far more closely approximates Congressional intent behind Title II of the Gramm-Leach Bliley Act than did previous proposals. As you know, the legislative history of Title II is that traditional banking activities be left undisturbed. The instant proposal appears to accomplish that goal.

The most notable concerns that we have with the proposal relate to the so-called "networking exception" and "fiduciary exception".

"NETWORKING EXCEPTION"

The first concern we have with the "networking exception" is with what some have called "junk referrals". Because the statute only permits the payment of nominal referral fees and then only on a non-contingent basis, an incentive is created for bank employees to make referrals in large volumes (because the referral fee for each referral is so small) and to do so without any expectation that any one referral is likely to result in the opening of an account. This sort of “shotgun” approach to referrals not only results in the payment of undeserved referral fees, but also causes the securities firm receiving the referrals to waste resources following up on referrals that are not likely to be productive, thereby impairing the productivity of the securities firm. This problem may be a necessary consequence of the statutory requirement that referral fees be nominal and the statutory prohibition that the payment of the fee cannot be contingent on the success of the referral. However, we are afraid that the proposal contributes to the problem by defining the phrase “contingent on whether the referral results in a transaction” more broadly than the phrase’s normal meaning to include “whether an account is opened with a broker or dealer” in proposed Section 218.700(a). Normally, under the securities laws, a transaction is the purchase or sale of securities, not the mere opening of an account. The very term “broker” means one who effects transactions in securities. If a firm never effected a purchase or sale of securities, it would not be a broker even if it opened up an unlimited number of accounts. That is because it would not have a salesman’s interest in transactions in securities. This may seem just to be a theoretical argument, but it has an enormous practical consequence. If a bank could pay a referral fee for the opening of an account, irrespective of whether a purchase or sale ever takes place, it would enable the bank to eliminate the inefficiency and waste caused by “junk referrals”. We urge that the Board eliminate the phrase “whether an account is opened with a broker or dealer” from the definition of “contingent on whether the referral results in a transaction” in Section 218.700(a).

The other major concern we have with the “networking exception” has to do with what some are calling the “institutional exemption” permitting larger and non-contingent referral fees for large sophisticated customers. We strongly applaud the proposal of the exemption. However, the definition of the term “high net worth customer” triggering the exemption in the case of referrals of natural persons requires a net worth of $5 million excluding primary residence and associated liabilities. We believe that is unnecessarily high and discriminates against banks like ours that compete in smaller less affluent markets. While large New York City banks may serve enormous numbers of individuals with a net worth of $5 million or more, a bank in Detroit or in small rural communities is not likely to be able to do so. The geographical disparity in the application of this definition has a particular irony when one considers that the test is supposed to be a measure of a customer’s financial sophistication and ability to resist the salesman’s interest that a referring bank employee might theoretically have as a consequence of a referral fee. (Never mind that, before any transaction would be effected, there would always be the necessary intervention of a registered representative of a regulated broker-dealer.) The irony is that the Securities and Exchange Commission applies many other versions of net worth or total assets measurements as proxies for whether an accredited investor or otherwise sophisticated investor needs the protections of traditional securities laws and none of those measurements is as high as $5 million in net worth or even close. Indeed, such measurements go as low as $1.5 million (an investment advisor may engage, and realize capital gains, in transactions, with its own client if the client has a net worth of $1.5 million (17 CFR 275.205-3(d)(1)).

A more reasonable standard here would be a net worth of $500,000, in light of the fact that an investment advisor is permitted to self-deal with clients worth $1.5 million while here we are merely talking about paying referral fees in a transaction in which the customer would always be protected by definition by a regulated licensed supervised registered rep subject to SEC sanctions for any wrongdoing. That is a number that reflects reality outside of New York where self-made entrepreneurs in that range of net worth constitute major bank customers who have a high enough level of financial sophistication to be presumed to be able to protect themselves.

Finally, with regard to the institutional exemption, we note that proposed Section 701 requires that the referring employee encounter the high net worth or institutional customer in the ordinary course of the employee's assigned duties for the bank. At our bank, and we believe at most banks, all employees are expected to be ambassadors of the bank and to develop relationships within the communities served by their banks. Therefore, it is common for bank employees to encounter current and prospective customers at charitable, civic, and social functions, and we presume that those encounters would be deemed in the ordinary course of the assigned duties of each employee.

"FIDUCIARY EXCEPTION"

Proposed section ______.722(a)(2) exempts a bank from the "chiefly compensated" condition in the statute if it meets other conditions and the aggregate relationship-total compensation percentage for the bank's trust and fiduciary business is at least 70 percent. As we have considered this, we have noted the absence of definitions of the terms "total compensation [attributable to the bank's trust and fiduciary business as a whole]" as used in proposed section _____.722(c) and "bank's trust and fiduciary business". Thus, confusion has arisen as to what actual numbers go into the denominator of the equation with the possibility that income associated with accounts ineligible for the trust and fiduciary exemption might be required to be included in the denominator. We have heard it suggested that revenue associated with accounts maintained within the trust and fiduciary business unit but that are not trust or fiduciary accounts, such as custody or sweep accounts, might be required to be included in the denominator in calculating the bank's yearly bank-wide compensation. We have also heard it suggested that revenue associated with accounts for which a choice of exemptions might be available, but for which the bank has chosen not to rely on the trust and fiduciary exemption, might nonetheless be required to be included in the denominator. Finally, we have heard it suggested that non-account-related revenue to a trust department, such as income from sale of financial models, might be encompassed in total compensation attributable to a bank's trust and fiduciary business. In none of these three types of instances is the trust and fiduciary exemption being relied upon, and, therefore, such revenue should not be included in either the numerator or denominator in calculating trust and fiduciary compensation on a bank-wide basis under section 722.

On reflection, we believe that what is intended is a comparison of the aggregate relationship compensation to the bank from trust and fiduciary accounts for which the bank is relying on the trust and fiduciary exemption and maintained as part of the bank's trust and fiduciary business to the aggregate total compensation from the same universe of accounts. If our understanding is correct, it would be helpful for the Board to clarify the language in ___.722(c) to reflect that. As revised the language would read:

> (c) Yearly bank-wide compensation percentage. For purposes of this section, a bank's yearly bank-wide compensation percentage for a year shall equal the relationship compensation attributable to trust and fiduciary accounts for which the bank is relying on the trust and fiduciary exemption and maintained as part of the bank's trust and fiduciary business as a whole during the year divided by the total compensation attributable to trust and fiduciary accounts for which the bank is relying on the trust and fiduciary exemption and maintained as part of the bank's trust and fiduciary business as a whole during that year, with the quotient expressed as a percentage.

In closing, we would again like to thank the Board and the Commission for dramatically "advancing the ball" in this effort while all the time remaining mindful of Congressional intent.

Best wishes,

Julius L. Loeser