

Board of Governors of the Federal Reserve System

Regulation R

Exceptions for Banks from the Definition of Broker in the Securities Exchange Act of 1934

12 CFR 218, effective April 17, 2008



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218.760 Exemption from definition of <i>broker</i> for banks accepting orders to effect transactions in securities from or on behalf of custody accounts	(a) <i>Contingent on whether the referral results in a transaction</i> means dependent on whether the referral results in a purchase or sale of a security; whether an account is opened with a broker or dealer; whether the referral results in a transaction involving a particular type of security; or whether it results in multiple securities transactions; provided, however, that a referral fee may be contingent on whether a customer—
218.771 Exemption from the definition of <i>broker</i> for banks effecting transactions in securities issued pursuant to Regulation S	(1) contacts or keeps an appointment with a broker or dealer as a result of the referral; or
218.772 Exemption from the definition of <i>broker</i> for banks engaging in securities-lending transactions	(2) meets any objective, base-line qualification criteria established by the bank or broker or dealer for customer referrals, including such criteria as minimum assets, net worth, income, or marginal federal or state income tax rate, or any requirement for citizenship or residency that the broker or dealer, or the bank, may have established
218.775 Exemption from the definition of <i>broker</i> for banks effecting certain excepted or exempted transactions in investment company securities	
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* Section 218.781 is effective September 28, 2007. Sections 218.100 through 218.780 are effective December 3, 2007. Compliance is mandatory the first day of a bank’s first fiscal year that commences after September 30, 2008.

generally for referrals for securities brokerage accounts.

3-3502

(b)(1) *Incentive compensation* means compensation that is intended to encourage a bank employee to refer customers to a broker or dealer or give a bank employee an interest in the success of a securities transaction at a broker or dealer. The term does not include compensation paid by a bank under a bonus or similar plan that is—

- (i) paid on a discretionary basis; and
- (ii) based on multiple factors or variables and—

(A) those factors or variables include multiple significant factors or variables that are not related to securities transactions at the broker or dealer;

(B) a referral made by the employee is not a factor or variable in determining the employee's compensation under the plan; and

(C) the employee's compensation under the plan is not determined by reference to referrals made by any other person.

(2) Nothing in this paragraph (b) shall be construed to prevent a bank from compensating an officer, director, or employee under a bonus or similar plan on the basis of any measure of the overall profitability or revenue of—

(i) the bank, either on a stand-alone or consolidated basis;

(ii) any affiliate of the bank (other than a broker or dealer), or any operating unit of the bank or an affiliate (other than a broker or dealer), if the affiliate or operating unit does not over time predominantly engage in the business of making referrals to a broker or dealer; or

(iii) a broker or dealer if—

(A) such measure of overall profitability or revenue is only one of multiple factors or variables used to determine the compensation of the officer, director, or employee;

(B) the factors or variables used to determine the compensation of the officer, director, or employee include multiple significant factors or variables

that are not related to the profitability or revenue of the broker or dealer;

(C) a referral made by the employee is not a factor or variable in determining the employee's compensation under the plan; and

(D) the employee's compensation under the plan is not determined by reference to referrals made by any other person.

3-3503

(c) *Nominal one-time cash fee of a fixed dollar amount* means a cash payment for a referral, to a bank employee who was personally involved in referring the customer to the broker or dealer, in an amount that meets any of the following standards:

(1) the payment does not exceed—

(i) 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 includes the employee; or

(ii) 1/1000th of the average of the minimum and maximum annual base salary established by the bank for the current or prior year for the job family that includes the employee; or

(2) the payment does not exceed twice the employee's actual base hourly wage or 1/1000th of the employee's actual annual base salary; or

(3) The payment does not exceed 25 dollars (\$25), as adjusted in accordance with paragraph (f) of this section.

(d) *Job family* means a group of jobs or positions involving similar responsibilities, or requiring similar skills, education, or training, that a bank, or a separate unit, branch or department of a bank, has established and uses in the ordinary course of its business to distinguish among its employees for purposes of hiring, promotion, and compensation.

3-3504

(e) *Referral* means the action taken by one or more bank employees to direct a customer of the bank to a broker or dealer for the purchase or sale of securities for the customer's account.

(f) *Inflation adjustment.*

(1) *In general.* On April 1, 2012, and on the first day of each subsequent five-year period, the dollar amount referred to in paragraph (c)(3) of this section shall be adjusted by—

(i) dividing the annual value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index thereto), as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2006; and

(ii) multiplying the dollar amount by the quotient obtained in paragraph (f)(1)(i) of this section.

(2) *Rounding.* If the adjusted dollar amount determined under paragraph (f)(1) of this section for any period is not a multiple of \$1, the amount so determined shall be rounded to the nearest multiple of \$1.

3-3505

SECTION 218.701—Exemption from the Definition of *Broker* for Certain Institutional Referrals

(a) *General.* A bank that meets the requirements for the exception from the definition of *broker* under section 3(a)(4)(B)(i) of the act (15 USC 78c(a)(4)(B)(i)), other than section 3(a)(4)(B)(i)(VI) of the act (15 USC 78c(a)(4)(B)(i)(VI)), is exempt from the conditions of section 3(a)(4)(B)(i)(VI) of the act solely to the extent that a bank employee receives a referral fee for referring a high-net-worth customer or institutional customer to a broker or dealer with which the bank has a contractual or other written arrangement of the type specified in section 3(a)(4)(B)(i) of the act, if:

(1) *Bank employee.*

(i) The bank employee is—

(A) not registered or approved, or otherwise required to be registered or approved, in accordance with the qualifi-

cation standards established by the rules of any self-regulatory organization;

(B) predominantly engaged in banking activities other than making referrals to a broker or dealer; and

(C) not subject to statutory disqualification, as that term is defined in section 3(a)(39) of the act (15 USC 78c(a)(39)), except subparagraph (E) of that section; and

(ii) the high-net-worth customer or institutional customer is encountered by the bank employee in the ordinary course of the employee's assigned duties for the bank.

(2) *Bank determinations and obligations.*

(i) *Disclosures.* The bank provides the high-net-worth customer or institutional customer the information set forth in paragraph (b) of this section—

(A) in writing prior to or at the time of the referral; or

(B) orally prior to or at the time of the referral and

(1) the bank provides such information to the customer in writing within three business days of the date on which the bank employee refers the customer to the broker or dealer; or

(2) the written agreement between the bank and the broker or dealer provides for the broker or dealer to provide such information to the customer in writing in accordance with paragraph (a)(3)(i) of this section.

(ii) *Customer qualification.*

(A) In the case of a customer that is a not a natural person, the bank has a reasonable basis to believe that the customer is an institutional customer before the referral fee is paid to the bank employee.

(B) In the case of a customer that is a natural person, the bank has a reasonable basis to believe that the customer is a high-net-worth customer prior to or at the time of the referral.

(iii) *Employee qualification information.* Before a referral fee is paid to a bank employee under this section, the bank

provides the broker or dealer the name of the employee and such other identifying information that may be necessary for the broker or dealer to determine whether the bank employee is registered or approved, or otherwise required to be registered or approved, in accordance with the qualification standards established by the rules of any self-regulatory organization or is subject to statutory disqualification, as that term is defined in section 3(a)(39) of the act (15 USC 78c(a)(39)), except subparagraph (E) of that section.

(iv) *Good faith compliance and corrections.* A bank that acts in good faith and that has reasonable policies and procedures in place to comply with the requirements of this section shall not be considered a *broker* under section 3(a)(4) of the act (15 USC 78c(a)(4)) solely because the bank fails to comply with the provisions of this paragraph (a)(2) with respect to a particular customer if the bank—

(A) takes reasonable and prompt steps to remedy the error (such as, for example, by promptly making the required determination or promptly providing the broker or dealer the required information); and

(B) makes reasonable efforts to reclaim the portion of the referral fee paid to the bank employee for the referral that does not, following any required remedial action, meet the requirements of this section and that exceeds the amount otherwise permitted under section 3(a)(4)(B)(i)(VI) of the act (15 USC 78c(a)(4)(B)(i)(VI)) and section 218.700.

3-3506

(3) *Provisions of written agreement.* The written agreement between the bank and the broker or dealer shall require that:

(i) *Broker-dealer written disclosures.* If, pursuant to paragraph (a)(2)(i)(B)(2) of this section, the broker or dealer is to provide the customer in writing the disclosures set forth in paragraph (b) of this

section, the broker or dealer provides such information to the customer in writing—

(A) prior to or at the time the customer begins the process of opening an account at the broker or dealer, if the customer does not have an account with the broker or dealer; or

(B) prior to the time the customer places an order for a securities transaction with the broker or dealer as a result of the referral, if the customer already has an account at the broker or dealer.

(ii) *Customer and employee qualifications.* Before the referral fee is paid to the bank employee—

(A) the broker or dealer determines that the bank employee is not subject to statutory disqualification, as that term is defined in section 3(a)(39) of the act (15 USC 78c(a)(39)), except subparagraph (E) of that section; and

(B) the broker or dealer has a reasonable basis to believe that the customer is a high-net-worth customer or an institutional customer.

(iii) *Suitability or sophistication determination by broker or dealer.*

(A) *Contingent referral fees.* In any case in which payment of the referral fee is contingent on completion of a securities transaction at the broker or dealer, the broker or dealer, before such securities transaction is conducted, perform a suitability analysis of the securities transaction in accordance with the rules of the broker or dealer's applicable self-regulatory organization as if the broker or dealer had recommended the securities transaction.

(B) *Noncontingent referral fees.* In any case in which payment of the referral fee is not contingent on the completion of a securities transaction at the broker or dealer, the broker or dealer, before the referral fee is paid, either—

(1) determine that the customer—

(i) has the capability to evaluate investment risk and make independent decisions; and

(ii) is exercising independent judgment based on the customer's own independent assessment of the opportunities and risks presented by a potential investment, market factors and other investment considerations; or

(2) perform a suitability analysis of all securities transactions requested by the customer contemporaneously with the referral in accordance with the rules of the broker or dealer's applicable self-regulatory organization as if the broker or dealer had recommended the securities transaction.

(iv) *Notice to the customer.* The broker or dealer inform the customer if the broker or dealer determines that the customer or the securities transaction(s) to be conducted by the customer does not meet the applicable standard set forth in paragraph (a)(3)(iii) of this section.

(v) *Notice to the bank.* The broker or dealer promptly inform the bank if the broker or dealer determines that—

(A) the customer is not a high-net-worth customer or institutional customer, as applicable; or

(B) the bank employee is subject to statutory disqualification, as that term is defined in section 3(a)(39) of the act (15 USC 78c(a)(39)), except subparagraph (E) of that section.

3-3507

(b) *Required disclosures.* The disclosures provided to the high-net-worth customer or institutional customer pursuant to paragraphs (a)(2)(i) or (a)(3)(i) of this section shall clearly and conspicuously disclose—

- (1) the name of the broker or dealer; and
- (2) that the bank employee participates in an incentive compensation program under which the bank employee may receive a fee of more than a nominal amount for referring the customer to the broker or dealer and payment of this fee may be contingent on whether the referral results in a transaction with the broker or dealer.

(c) *Receipt of other compensation.* Nothing in

this section prevents or prohibits a bank from paying or a bank employee from receiving any type of compensation that would not be considered incentive compensation under section 218.700(b)(1) or that is described in section 218.700(b)(2).

3-3508

(d) *Definitions.* When used in this section:

(1) *High-net-worth customer.*

(i) *General. High-net-worth customer* means—

(A) 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 and, if applicable, his or her spouse; and

(B) any revocable, inter vivos or living trust the settlor of which is a natural person who, either individually or jointly with his or her spouse, meets the net-worth standard set forth in paragraph (d)(1)(i)(A) of this section.

(ii) *Individual and spousal assets.* In determining whether any person is a high-net-worth customer, there may be included in the assets of such person—

(A) any assets held individually;

(B) if the person is acting jointly with his or her spouse, any assets of the person's spouse (whether or not such assets are held jointly); and

(C) if the person is not acting jointly with his or her spouse, 50 percent of any assets held jointly with such person's spouse and any assets in which such person shares with such person's spouse a community property or similar shared ownership interest.

(2) *Institutional customer* means any corporation, partnership, limited-liability company, trust or other non-natural person that has, or is controlled by a non-natural person that has, at least—

(i) \$10 million in investments; or

(ii) \$20 million in revenues; or

(iii) \$15 million in revenues if the bank employee refers the customer to the broker or dealer for investment banking services.

(3) *Investment banking services* includes, without limitation, acting as an underwriter in an offering for an issuer; acting as a financial adviser in a merger, acquisition, tender offer, or similar transaction; providing venture capital, equity lines of credit, private investment-private equity transactions or similar investments; serving as placement agent for an issuer; and engaging in similar activities.

(4) *Referral fee* means a fee (paid in one or more installments) for the referral of a customer to a broker or dealer that is—

(i) a predetermined dollar amount, or a dollar amount determined in accordance with a predetermined formula (such as a fixed percentage of the dollar amount of total assets placed in an account with the broker or dealer), that does not vary based on—

(A) the revenue generated by or the profitability of securities transactions conducted by the customer with the broker or dealer; or

(B) the quantity, price, or identity of securities transactions conducted over time by the customer with the broker or dealer; or

(C) the number of customer referrals made; or

(ii) a dollar amount based on a fixed percentage of the revenues received by the broker or dealer for investment banking services provided to the customer.

3-3509

(e) *Inflation adjustments.*

(1) *In general.* On April 1, 2012, and on the first day of each subsequent five-year period, each dollar amount in paragraphs (d)(1) and (d)(2) of this section shall be adjusted by—

(i) dividing the annual value of the Personal Consumption Expenditures Chain-Type Price Index (or any successor index thereto), as published by the Department of Commerce, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2006; and

(ii) multiplying the dollar amount by the quotient obtained in paragraph (e)(1)(i) of this section.

(2) *Rounding.* If the adjusted dollar amount determined under paragraph (e)(1) of this section for any period is not a multiple of \$100,000, the amount so determined shall be rounded to the nearest multiple of \$100,000.

3-3530

SECTION 218.721—Defined Terms Relating to the Trust and Fiduciary Activities Exception from the Definition of *Broker*

(a) *Defined terms for chiefly compensated test.* For purposes of this part and section 3(a)(4)(B)(ii) of the act (15 USC 78c(a)(4)(B)(ii)), the following terms shall have the meaning provided:

(1) *Chiefly compensated—account-by-account test.* *Chiefly compensated* shall mean the *relationship-total compensation percentage* for each *trust or fiduciary account* of the bank is greater than 50 percent.

(2) The *relationship-total compensation percentage* for a *trust or fiduciary account* shall be the mean of the *yearly compensation percentage* for the account for the immediately preceding year and the *yearly compensation percentage* for the account for the year immediately preceding that year.

(3) The *yearly compensation percentage* for a *trust or fiduciary account* shall be—

(i) equal to the relationship compensation attributable to the *trust or fiduciary account* during the year divided by the total compensation attributable to the *trust or fiduciary account* during that year, with the quotient expressed as a percentage; and

(ii) calculated within 60 days of the end of the year.

3-3531

(4) *Relationship compensation* means any

compensation a bank receives attributable to a trust or fiduciary account that consists of—

(i) an administration fee, including, without limitation, a fee paid—

- (A) for personal services, tax preparation, or real estate settlement services;
- (B) for disbursing funds from, or for recording receipt of payments to, a trust or fiduciary account;
- (C) in connection with securities lending or borrowing transactions;
- (D) for custody services; or
- (E) in connection with an investment in shares of an investment company for personal service, the maintenance of shareholder accounts or any service described in paragraph (a)(4)(iii)(C) of this section;

(ii) an annual fee (payable on a monthly, quarterly, or other basis), including, without limitation, a fee paid for assessing investment performance or for reviewing compliance with applicable investment guidelines or restrictions;

(iii) a fee based on a percentage of assets under management, including, without limitation, a fee paid—

- (A) pursuant to a plan under 17 CFR 270.12b-1;
- (B) in connection with an investment in shares of an investment company for personal service or the maintenance of shareholder accounts;
- (C) based on a percentage of assets under management for any of the following services:
 - (I) providing transfer agent or sub-transfer agent services for beneficial owners of investment company shares;
 - (II) aggregating and processing purchase and redemption orders for investment company shares;
 - (III) providing beneficial owners with account statements showing their purchases, sales, and positions in the investment company;
 - (IV) processing dividend payments for the investment company;
 - (V) providing sub-accounting ser-

vices to the investment company for shares held beneficially;

(VI) forwarding communications from the investment company to the beneficial owners, including proxies, shareholder reports, dividend and tax notices, and updated prospectuses; or

(VII) receiving, tabulating, and transmitting proxies executed by beneficial owners of investment company shares;

(D) based on the financial performance of the assets in an account; or

(E) for the types of services described in paragraph (a)(4)(i)(C) or (D) of this section if paid based on a percentage of assets under management;

(iv) a flat or capped per-order processing fee, paid by or on behalf of a customer or beneficiary, that is equal to not more than the cost incurred by the bank in connection with executing securities transactions for trust or fiduciary accounts; or

(v) any combination of such fees.

3-3532

(5) *Trust or fiduciary account* means an account for which the bank acts in a trustee or fiduciary capacity as defined in section 3(a)(4)(D) of the act (15 USC 78c(a)(4)(D)).

(6) *Year* means a calendar year, or fiscal year consistently used by the bank for recordkeeping and reporting purposes.

3-3533

(b) *Revenues derived from transactions conducted under other exceptions or exemptions.* For purposes of calculating the yearly compensation percentage for a trust or fiduciary account, a bank may at its election exclude the compensation associated with any securities transaction conducted in accordance with the exceptions in section 3(a)(4)(B)(i) or section 3(a)(4)(B)(iii)-(xi) of the act (15 USC 78c(a)(4)(B)(i) or 78c(a)(4)(B)(iii)-(xi)) and the rules issued thereunder, including any exemption related to such exceptions jointly adopted by the Commission and the Board, provided that if the bank elects to exclude such compensation, the bank must exclude the

compensation from both the relationship compensation (if applicable) and total compensation for the account.

3-3534

(c) *Advertising restrictions.*

(1) *In general.* A bank complies with the advertising restriction in section 3(a)(4)(B)(ii)(II) of the act (15 USC 78c(a)(4)(B)(ii)(II)) if advertisements by or on behalf of the bank do not advertise—

(i) that the bank provides securities brokerage services for trust or fiduciary accounts except as part of advertising the bank's broader trust or fiduciary services; and

(ii) the securities brokerage services provided by the bank to trust or fiduciary accounts more prominently than the other aspects of the trust or fiduciary services provided to such accounts.

(2) *Advertisement.* For purposes of this section, the term *advertisement* has the same meaning as in section 218.760(h)(2).

3-3535

SECTION 218.722—Exemption Allowing Banks to Calculate Trust and Fiduciary Compensation on a Bankwide Basis

(a) *General.* A bank is exempt from meeting the “chiefly compensated” condition in section 3(a)(4)(B)(ii)(I) of the act (15 USC 78c(a)(4)(B)(ii)(I)) to the extent that it effects transactions in securities for any account in a trustee or fiduciary capacity within the scope of section 3(a)(4)(D) of the act (15 USC 78c(a)(4)(D)) if—

(1) the bank meets the other conditions for the exception from the definition of the term *broker* under sections 3(a)(4)(B)(ii) and 3(a)(4)(C) of the act (15 USC 78c(a)(4)(B)(ii) and 15 USC 78c(a)(4)(C)), including the advertising restrictions in section 3(a)(4)(B)(ii)(II) of the act (15 USC 78c(a)(4)(B)(ii)(II)) as implemented by section 218.721(c); and

(2) the aggregate relationship-total compensation percentage for the bank's trust and fiduciary business is at least 70 percent.

(b) *Aggregate relationship-total compensation*

percentage. For purposes of this section, the aggregate relationship-total compensation percentage for a bank's trust and fiduciary business shall be the mean of the bank's yearly bankwide compensation percentage for the immediately preceding year and the bank's yearly bankwide compensation percentage for the year immediately preceding that year.

3-3536

(c) *Yearly bankwide compensation percentage.* For purposes of this section, a bank's yearly bankwide compensation percentage for a year shall be—

(1) equal to the relationship compensation attributable to the bank's trust and fiduciary business as a whole during the year divided by the total compensation attributable to the bank's trust and fiduciary business as a whole during that year, with the quotient expressed as a percentage; and

(2) calculated within 60 days of the end of the year.

(d) *Revenues derived from transactions conducted under other exceptions or exemptions.*

For purposes of calculating the yearly compensation percentage for a trust or fiduciary account, a bank may at its election exclude the compensation associated with any securities transaction conducted in accordance with the exceptions in section 3(a)(4)(B)(i) or section 3(a)(4)(B)(iii)-(xi) of the act (15 USC 78c(a)(4)(B)(i) or 78c(a)(4)(B)(iii)-(xi)) and the rules issued thereunder, including any exemption related to such sections jointly adopted by the Commission and the Board, provided that if the bank elects to exclude such compensation, the bank must exclude the compensation from both the relationship compensation (if applicable) and total compensation of the bank.

3-3537

SECTION 218.723—Exemptions for Special Accounts, Transferred Accounts, Foreign Branches and a de Minimis Number of Accounts

(a) *Short-term accounts.* A bank may, in determining its compliance with the chiefly compensated test in section 218.721(a)(1) or

section 218.722(a)(2), exclude any trust or fiduciary account that had been open for a period of less than three months during the relevant year.

(b) *Accounts acquired as part of a business combination or asset acquisition.* For purposes of determining compliance with the chiefly compensated test in section 218.721(a)(1) or section 218.722(a)(2), any trust or fiduciary account that a bank acquired from another person as part of a merger, consolidation, acquisition, purchase of assets, or similar transaction may be excluded by the bank for 12 months after the date the bank acquired the account from the other person.

3-3538

(c) *Non-shell foreign branches.*

(1) *Exemption.* For purposes of determining compliance with the chiefly compensated test in section 218.722(a)(2), a bank may exclude the trust or fiduciary accounts held at a non-shell foreign branch of the bank if the bank has reasonable cause to believe that trust or fiduciary accounts of the foreign branch held by or for the benefit of a U.S. person as defined in 17 CFR 230.902(k) constitute less than 10 percent of the total number of trust or fiduciary accounts of the foreign branch.

(2) *Rules of construction.* Solely for purposes of this paragraph (c), a bank will be deemed to have reasonable cause to believe that a trust or fiduciary account of a foreign branch of the bank is not held by or for the benefit of a U.S. person if—

(i) the principal mailing address maintained and used by the foreign branch for the accountholder(s) and beneficiary(ies) of the account is not in the United States; or

(ii) the records of the foreign branch indicate that the account holder(s) and beneficiary(ies) of the account is not a U.S. person as defined in 17 CFR 230.902(k).

(3) *Non-shell foreign branch.* Solely for purposes of this paragraph (c), a non-shell foreign branch of a bank means a branch of the bank—

(i) that is located outside the United

States and provides banking services to residents of the foreign jurisdiction in which the branch is located; and

(ii) for which the decisions relating to day-to-day operations and business of the branch are made at that branch and are not made by an office of the bank located in the United States.

3-3539

(d) *Accounts transferred to a broker or dealer or other unaffiliated entity.* Notwithstanding section 3(a)(4)(B)(ii)(I) of the act (15 USC 78c(a)(4)(B)(ii)(I)) and section 218.721(a)(1) of this part, a bank operating under section 218.721(a)(1) shall not be considered a broker for purposes of section 3(a)(4) of the act (15 USC 78c(a)(4)) solely because a trust or fiduciary account does not meet the chiefly compensated standard in section 218.721(a)(1) if, within three months of the end of the year in which the account fails to meet such standard, the bank transfers the account or the securities held by or on behalf of the account to a broker or dealer registered under section 15 of the act (15 USC 78o) or another entity that is not an affiliate of the bank and is not required to be registered as a broker or dealer.

(e) *De minimis exclusion.* A bank may, in determining its compliance with the chiefly compensated test in section 218.721(a)(1), exclude a trust or fiduciary account if—

(1) the bank maintains records demonstrating that the securities transactions conducted by or on behalf of the account were undertaken by the bank in the exercise of its trust or fiduciary responsibilities with respect to the account;

(2) the total number of accounts excluded by the bank under this paragraph (d) does not exceed the lesser of—

(i) 1 percent of the total number of trust or fiduciary accounts held by the bank, provided that if the number so obtained is less than 1 the amount shall be rounded up to 1; or

(ii) 500; and

(3) the bank did not rely on this paragraph (e) with respect to such account during the immediately preceding year.

3-3560

**SECTION 218.740—Defined Terms
Relating to the Sweep Accounts
Exception from the Definition of *Broker***

For purposes of section 3(a)(4)(B)(v) of the act (15 USC 78c(a)(4)(B)(v)), the following terms shall have the meaning provided:

(a) *Deferred sales load* has the same meaning as in 17 CFR 270.6c-10.

(b) *Money market fund* means an open-end company registered under the Investment Company Act of 1940 (15 USC 80a-1 et seq.) that is regulated as a money market fund pursuant to 17 CFR 270.2a-7.

(c) (1) *No-load*, in the context of an investment company or the securities issued by an investment company, means, for securities of the class or series in which a bank effects transactions, that—

- (i) that class or series is not subject to a sales load or a deferred sales load; and
- (ii) total charges against net assets of that class or series of the investment company's securities for sales or sales promotion expenses, for personal service, or for the maintenance of shareholder accounts do not exceed 0.25 of 1 percent of average net assets annually.

(2) For purposes of this definition, charges for the following will not be considered charges against net assets of a class or series of an investment company's securities for sales or sales promotion expenses, for personal service, or for the maintenance of shareholder accounts:

- (i) providing transfer agent or sub-transfer agent services for beneficial owners of investment company shares;
- (ii) aggregating and processing purchase and redemption orders for investment company shares;
- (iii) providing beneficial owners with account statements showing their purchases, sales, and positions in the investment company;
- (iv) processing dividend payments for the investment company;
- (v) providing sub-accounting services to the investment company for shares held beneficially;

- (vi) forwarding communications from the investment company to the beneficial owners, including proxies, shareholder reports, dividend and tax notices, and updated prospectuses; or
- (vii) receiving, tabulating, and transmitting proxies executed by beneficial owners of investment company shares.

3-3561

(d) *Open-end company* has the same meaning as in section 5(a)(1) of the Investment Company Act of 1940 (15 USC 80a-5(a)(1)).

(e) *Sales load* has the same meaning as in section 2(a)(35) of the Investment Company Act of 1940 (15 USC 80a-2(a)(35)).

3-3562

**SECTION 218.741—Exemption for
Banks Effecting Transactions in Money
Market Funds**

(a) A bank is exempt from the definition of the term *broker* under section 3(a)(4) of the act (15 USC 78c(a)(4)) to the extent that it effects transactions on behalf of a customer in securities issued by a money market fund, provided that—

(1) the bank either—

- (i) provides the customer, directly or indirectly, any other product or service, the provision of which would not, in and of itself, require the bank to register as a broker or dealer under section 15(a) of the act (15 USC 78o(a)); or
- (ii) effects the transactions on behalf of another bank as part of a program for the investment or reinvestment of deposit funds of, or collected by, the other bank; and

(2) (i) the class or series of securities is no-load; or

(ii) if the class or series of securities is not no-load—

- (A) the bank or, if applicable, the other bank described in paragraph (a)(1)(B) of this section provides the customer, not later than at the time the customer authorizes the securities transactions, a prospectus for the securities; and

(B) the bank and, if applicable, the other bank described in paragraph (a)(1)(B) of this section do not characterize or refer to the class or series of securities as no-load.

(b) *Definitions.* For purposes of this section:

(1) *Money market fund* has the same meaning as in section 218.740(b).

(2) *No-load* has the same meaning as in section 218.740(c).

3-3585

SECTION 218.760—Exemption from Definition of *Broker* for Banks Accepting Orders to Effect Transactions in Securities from or on Behalf of Custody Accounts

(a) *Employee benefit plan accounts and individual retirement accounts or similar accounts.* A bank is exempt from the definition of the term *broker* under section 3(a)(4) of the act (15 USC 78c(a)(4)) to the extent that, as part of its customary banking activities, the bank accepts orders to effect transactions in securities for an employee benefit plan account or an individual retirement account or similar account for which the bank acts as a custodian if:

(1) *Employee compensation restriction and additional conditions.* The bank complies with the employee compensation restrictions in paragraph (c) of this section and the other conditions in paragraph (d) of this section;

(2) *Advertisements.* Advertisements by or on behalf of the bank do not—

(i) advertise that the bank accepts orders for securities transactions for employee benefit plan accounts or individual retirement accounts or similar accounts, except as part of advertising the other custodial or safekeeping services the bank provides to these accounts; or

(ii) advertise that such accounts are securities brokerage accounts or that the bank's safekeeping and custody services substitute for a securities brokerage account; and

(3) *Advertisements and sales literature for individual retirement or similar accounts.*

Advertisements and sales literature issued by or on behalf of the bank do not describe the securities order-taking services provided by the bank to individual retirement accounts or similar accounts more prominently than the other aspects of the custody or safekeeping services provided by the bank to these accounts.

3-3586

(b) *Accommodation trades for other custodial accounts.* A bank is exempt from the definition of the term *broker* under section 3(a)(4) of the act (15 USC 78c(a)(4)) to the extent that, as part of its customary banking activities, the bank accepts orders to effect transactions in securities for an account for which the bank acts as custodian other than an employee benefit plan account or an individual retirement account or similar account if:

(1) *Accommodation.* The bank accepts orders to effect transactions in securities for the account only as an accommodation to the customer;

(2) *Employee compensation restriction and additional conditions.* The bank complies with the employee compensation restrictions in paragraph (c) of this section and the other conditions in paragraph (d) of this section;

(3) *Bank fees.* Any fee charged or received by the bank for effecting a securities transaction for the account does not vary based on—

(i) whether the bank accepted the order for the transaction; or

(ii) the quantity or price of the securities to be bought or sold;

(4) *Advertisements.* Advertisements by or on behalf of the bank do not state that the bank accepts orders for securities transactions for the account;

(5) *Sales literature.* Sales literature issued by or on behalf of the bank—

(i) does not state that the bank accepts orders for securities transactions for the account except as part of describing the other custodial or safekeeping services the bank provides to the account; and

(ii) does not describe the securities order-taking services provided to the account more prominently than the other aspects

of the custody or safekeeping services provided by the bank to the account; and

3-3587

(6) *Investment advice and recommendations.* The bank does not provide investment advice or research concerning securities to the account, make recommendations to the account concerning securities or otherwise solicit securities transactions from the account; provided, however, that nothing in this paragraph (b)(6) shall prevent a bank from—

(i) publishing, using, or disseminating advertisements and sales literature in accordance with paragraphs (b)(4) and (b)(5) of this section; and

(ii) responding to customer inquiries regarding the bank's safekeeping and custody services by providing—

(A) advertisements or sales literature consistent with the provisions of paragraphs (b)(4) and (b)(5) of this section describing the safekeeping, custody, and related services that the bank offers;

(B) a prospectus prepared by a registered investment company, or sales literature prepared by a registered investment company or by the broker or dealer that is the principal underwriter of the registered investment company pertaining to the registered investment company's products;

(C) information based on the materials described in paragraphs (b)(6)(ii)(A) and (B) of this section; or

(iii) responding to inquiries regarding the bank's safekeeping, custody, or other services, such as inquiries concerning the customer's account or the availability of sweep or other services, so long as the bank does not provide investment advice or research concerning securities to the account or make a recommendation to the account concerning securities.

3-3588

(c) *Employee compensation restriction.* A bank may accept orders pursuant to this section for a securities transaction for an account described in paragraph (a) or (b) of this sec-

tion only if no bank employee receives compensation, including a fee paid pursuant to a plan under 17 CFR 270.12b-1, from the bank, the executing broker or dealer, or any other person that is based on whether a securities transaction is executed for the account or that is based on the quantity, price, or identity of securities purchased or sold by such account, provided that nothing in this paragraph shall prohibit a bank employee from receiving compensation that would not be considered incentive compensation under section 218.700(b)(1) as if a referral had been made by the bank employee, or any compensation described in section 218.700(b)(2).

(d) *Other conditions.* A bank may accept orders for a securities transaction for an account for which the bank acts as a custodian under this section only if the bank—

(1) does not act in a trustee or fiduciary capacity (as defined in section 3(a)(4)(D) of the act (15 USC 78c(a)(4)(D))) with respect to the account, other than as a directed trustee;

(2) complies with section 3(a)(4)(C) of the act (15 USC 78c(a)(4)(C)) in handling any order for a securities transaction for the account; and

(3) complies with section 3(a)(4)(B)(viii)(II) of the act (15 USC 78c(a)(4)(B)(viii)(II)) regarding carrying broker activities.

3-3589

(e) *Nonfiduciary administrators and recordkeepers.* A bank that acts as a nonfiduciary and noncustodial administrator or recordkeeper for an employee benefit plan account for which another bank acts as custodian may rely on the exemption provided in this section if—

(1) both the custodian bank and the administrator or recordkeeper bank comply with paragraphs (a), (c), and (d) of this section; and

(2) the administrator or recordkeeper bank does not execute a cross-trade with or for the employee benefit plan account or net orders for securities for the employee benefit plan account, other than—

(i) crossing or netting orders for shares

of open-end investment companies not traded on an exchange, or

(ii) crossing orders between or netting orders for accounts of the custodian bank that contracted with the administrator or recordkeeper bank for services.

(f) *Subcustodians*. A bank that acts as a subcustodian for an account for which another bank acts as custodian may rely on the exemptions provided in this section if—

(1) for employee benefit plan accounts and individual retirement accounts or similar accounts, both the custodian bank and the subcustodian bank meet the requirements of paragraphs (a), (c) and (d) of this section;

(2) for other custodial accounts, both the custodian bank and the subcustodian bank meet the requirements of paragraphs (b), (c) and (d) of this section; and

(3) the subcustodian bank does not execute a cross-trade with or for the account or net orders for securities for the account, other than—

(i) crossing or netting orders for shares of open-end investment companies not traded on an exchange, or

(ii) crossing orders between or netting orders for accounts of the custodian bank.

3-3590

(g) *Evasions*. In considering whether a bank meets the terms of this section, both the form and substance of the relevant account(s), transaction(s), and activities (including advertising activities) of the bank will be considered in order to prevent evasions of the requirements of this section.

(h) *Definitions*. When used in this section:

(1) *Account for which the bank acts as a custodian* means an account that is—

(i) an employee benefit plan account for which the bank acts as a custodian;

(ii) an individual retirement account or similar account for which the bank acts as a custodian;

(iii) an account established by a written agreement between the bank and the customer that sets forth the terms that will govern the fees payable to, and rights

and obligations of, the bank regarding the safekeeping or custody of securities; or

(iv) an account for which the bank acts as a directed trustee.

(2) *Advertisement* means any material that is published or used in any electronic or other public media, including any web site, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

(3) *Directed trustee* means a trustee that does not exercise investment discretion with respect to the account.

(4) *Employee benefit plan account* means a pension plan, retirement plan, profit sharing plan, bonus plan, thrift savings plan, incentive plan, or other similar plan, including, without limitation, an employer-sponsored plan qualified under section 401(a) of the Internal Revenue Code (26 USC 401(a)), a governmental or other plan described in section 457 of the Internal Revenue Code (26 USC 457), a tax-deferred plan described in section 403(b) of the Internal Revenue Code (26 USC 403(b)), a church plan, governmental, multiemployer or other plan described in section 414(d), (e), or (f) of the Internal Revenue Code (26 USC 414(d), (e), or (f)), an incentive stock option plan described in section 422 of the Internal Revenue Code (26 USC 422); a Voluntary Employee Beneficiary Association Plan described in section 501(c)(9) of the Internal Revenue Code (26 USC 501(c)(9)), a nonqualified deferred compensation plan (including a rabbi or secular trust), a supplemental or mirror plan, and a supplemental unemployment benefit plan.

(5) *Individual retirement account or similar account* means an individual retirement account as defined in section 408 of the Internal Revenue Code (26 USC 408), Roth IRA as defined in section 408A of the Internal Revenue Code (26 USC 408A), health savings account as defined in section 223(d) of the Internal Revenue Code (26 USC 223(d)), Archer medical savings account as defined in section 220(d) of the Internal Revenue Code (26 USC 220(d)), Coverdell education savings account as defined in sec-

tion 530 of the Internal Revenue Code (26 USC 530), or other similar account.

(6) *Sales literature* means any written or electronic communication, other than an advertisement, that is generally distributed or made generally available to customers of the bank or the public, including circulars, form letters, brochures, telemarketing scripts, seminar texts, published articles, and press releases concerning the bank's products or services.

(7) *Principal underwriter* has the same meaning as in section 2(a)(29) of the Investment Company Act of 1940 (15 USC 80a-2(a)(29)).

3-3600

SECTION 218.771—Exemption from the Definition of *Broker* for Banks Effecting Transactions in Securities Issued Pursuant to Regulation S

(a) A bank is exempt from the definition of the term *broker* under section 3(a)(4) of the act (15 USC 78c(a)(4)), to the extent that, as agent, the bank—

(1) effects a sale in compliance with the requirements of 17 CFR 230.903 of an eligible security to a purchaser who is not in the United States;

(2) effects, by or on behalf of a person who is not a U.S. person under 17 CFR 230.902(k), a resale of an eligible security after its initial sale with a reasonable belief that the eligible security was initially sold outside of the United States within the meaning of and in compliance with the requirements of 17 CFR 230.903 to a purchaser who is not in the United States or a registered broker or dealer, provided that if the resale is made prior to the expiration of any applicable distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the resale is made in compliance with the requirements of 17 CFR 230.904; or

(3) effects, by or on behalf of a registered broker or dealer, a resale of an eligible security after its initial sale with a reasonable belief that the eligible security was initially sold outside of the United States within the

meaning of and in compliance with the requirements of 17 CFR 230.903 to a purchaser who is not in the United States, provided that if the resale is made prior to the expiration of any applicable distribution compliance period specified in 17 CFR 230.903(b)(2) or (b)(3), the resale is made in compliance with the requirements of 17 CFR 230.904.

3-3601

(b) *Definitions.* For purposes of this section:

(1) *Distributor* has the same meaning as in 17 CFR 230.902(d).

(2) *Eligible security* means a security that—

(i) is not being sold from the inventory of the bank or an affiliate of the bank; and

(ii) is not being underwritten by the bank or an affiliate of the bank on a firm-commitment basis, unless the bank acquired the security from an unaffiliated distributor that did not purchase the security from the bank or an affiliate of the bank.

(3) *Purchaser* means a person who purchases an eligible security and who is not a U.S. person under 17 CFR 230.902(k).

3-3602

SECTION 218.772—Exemption from the Definition of *Broker* for Banks Engaging in Securities-Lending Transactions

(a) A bank is exempt from the definition of the term *broker* under section 3(a)(4) of the act (15 USC 78c(a)(4)), to the extent that, as an agent, it engages in or effects securities lending transactions, and any securities lending services in connection with such transactions, with or on behalf of a person the bank reasonably believes to be—

(1) a qualified investor as defined in section 3(a)(54)(A) of the act (15 USC 78c(a)(54)(A)); or

(2) any employee benefit plan that owns and invests on a discretionary basis, not less than \$ 25,000,000 in investments.

(b) *Securities-lending transaction* means a transaction in which the owner of a security

lends the security temporarily to another party pursuant to a written securities-lending agreement under which the lender retains the economic interests of an owner of such securities, and has the right to terminate the transaction and to recall the loaned securities on terms agreed by the parties.

3-3603

(c) *Securities-lending services* means—

- (1) selecting and negotiating with a borrower and executing, or directing the execution of the loan with the borrower;
- (2) receiving, delivering, or directing the receipt or delivery of loaned securities;
- (3) receiving, delivering, or directing the receipt or delivery of collateral;
- (4) providing mark-to-market, corporate action, recordkeeping, or other services incidental to the administration of the securities-lending transaction;
- (5) investing, or directing the investment of, cash collateral; or
- (6) indemnifying the lender of securities with respect to various matters.

3-3610

SECTION 218.775—Exemption from the Definition of *Broker* for Banks Effecting Certain Excepted or Exempted Transactions in Investment Company Securities

(a) A bank that meets the conditions for an exception or exemption from the definition of the term *broker* except for the condition in section 3(a)(4)(C)(i) of the act (15 USC 78c(a)(4)(C)(i)), is exempt from such condition to the extent that it effects a transaction in a covered security, if—

- (1) any such security is neither traded on a national securities exchange nor through the facilities of a national securities association or an interdealer quotation system;
- (2) the security is distributed by a registered broker or dealer, or the sales charge is no more than the amount permissible for a security sold by a registered broker or dealer pursuant to any applicable rules adopted pursuant to section 22(b)(1) of the Investment Company Act of 1940 (15 USC

80a-22(b)(1)) by a securities association registered under section 15A of the act (15 USC 78o-3); and

(3) any such transaction is effected—

- (i) through the National Securities Clearing Corporation; or
- (ii) directly with a transfer agent or with an insurance company or separate account that is excluded from the definition of transfer agent in section 3(a)(25) of the act.

3-3611

(b) *Definitions*. For purposes of this section:

(1) *Covered security* means—

- (i) any security issued by an open-end company, as defined by section 5(a)(1) of the Investment Company Act (15 USC 80a-5(a)(1)), that is registered under that act; and
- (ii) any variable insurance contract funded by a separate account, as defined by section 2(a)(37) of the Investment Company Act (15 USC 80a-2(a)(37)), that is registered under that act.

(2) *Interdealer quotation system* has the same meaning as in 17 CFR 240.15c2-11.

(3) *Insurance company* has the same meaning as in 15 USC 77b(a)(13).

3-3612

SECTION 218.776—Exemption from the Definition of *Broker* for Banks Effecting Certain Excepted or Exempted Transactions in a Company's Securities for its Employee Benefit Plans

(a) A bank that meets the conditions for an exception or exemption from the definition of the term *broker* except for the condition in section 3(a)(4)(C)(i) of the act (15 USC 78c(a)(4)(C)(i)), is exempt from such condition to the extent that it effects a transaction in the securities of a company directly with a transfer agent acting for the company that issued the security, if—

- (1) no commission is charged with respect to the transaction;
- (2) the transaction is conducted by the bank solely for the benefit of an employee benefit plan account;

(3) any such security is obtained directly from—

- (i) the company; or
- (ii) an employee benefit plan of the company; and

(4) any such security is transferred only to—

- (i) the company; or
- (ii) an employee benefit plan of the company.

(b) For purposes of this section, the term *employee benefit plan account* has the same meaning as in section 218.760(h)(4).

3-3620

SECTION 218.780—Exemption for Banks from Liability Under Section 29 of the Securities Exchange Act of 1934

(a) No contract entered into before March 31, 2009, shall be void or considered voidable by reason of section 29(b) of the act (15 USC 78cc(b)) because any bank that is a party to the contract violated the registration requirements of section 15(a) of the act (15 USC 78o(a)), any other applicable provision of the act, or the rules and regulations thereunder based solely on the bank's status as a broker when the contract was created.

(b) No contract shall be void or considered

voidable by reason of section 29(b) of the act (15 USC 78cc(b)) because any bank that is a party to the contract violated the registration requirements of section 15(a) of the act (15 USC 78o(a)) or the rules and regulations thereunder based solely on the bank's status as a broker when the contract was created, if—

(1) at the time the contract was created, the bank acted in good faith and had reasonable policies and procedures in place to comply with section 3(a)(4)(B) of the act (15 USC 78c(a)(4)(B)) and the rules and regulations thereunder; and

(2) at the time the contract was created, any violation of the registration requirements of section 15(a) of the act by the bank did not result in any significant harm or financial loss or cost to the person seeking to void the contract.

3-3621

SECTION 218.781—Exemption from the Definition of *Broker* for Banks for a Limited Period of Time

A bank is exempt from the definition of the term *broker* under section 3(a)(4) of the act (15 USC 78c(a)(4)) until the first day of its first fiscal year commencing after September 30, 2008.

Statutory Authority for Regulation R

3-3630

SECURITIES EXCHANGE ACT OF 1934

SECTION 3—Definitions and Applications

(a) *Definitions.*

* * * * *

(4) (A) The term “broker” means any person engaged in the business of effecting transactions in securities for the account of others.

(B) A bank shall not be considered to be a broker because the bank engages in any one or more of the following activities under the conditions described:

(i) The bank enters into a contractual or other written arrangement with a broker or dealer registered under this title under which the broker or dealer offers brokerage services on or off the premises of the bank if—

(I) such broker or dealer is clearly identified as the person performing the brokerage services;

(II) the broker or dealer performs brokerage services in an area that is clearly marked and, to the extent practicable, physically separate from the routine deposit-taking activities of the bank;

(III) any materials used by the bank to advertise or promote generally the availability of brokerage services under the arrangement clearly indicate that the brokerage services are being provided by the broker or dealer and not by the bank;

(IV) any materials used by the bank to advertise or promote generally the availability of brokerage services under the arrangement are in compliance with the Federal securities laws before distribution;

(V) bank employees (other than associated persons of a broker or

dealer who are qualified pursuant to the rules of a self-regulatory organization) perform only clerical or ministerial functions in connection with brokerage transactions including scheduling appointments with the associated persons of a broker or dealer, except that bank employees may forward customer funds or securities and may describe in general terms the types of investment vehicles available from the bank and the broker or dealer under the arrangement;

(VI) bank employees do not receive incentive compensation for any brokerage transaction unless such employees are associated persons of a broker or dealer and are qualified pursuant to the rules of a self-regulatory organization, except that the bank employees may receive compensation for the referral of any customer if the compensation is a nominal one-time cash fee of a fixed dollar amount and the payment of the fee is not contingent on whether the referral results in a transaction;

(VII) such services are provided by the broker or dealer on a basis in which all customers that receive any services are fully disclosed to the broker or dealer;

(VIII) the bank does not carry a securities account of the customer except as permitted under clause (ii) or (viii) of this subparagraph; and

(IX) the bank, broker, or dealer informs each customer that the brokerage services are provided by the broker or dealer and not by the bank and that the securities are not deposits or other obligations of the bank, are not guaranteed by the bank, and are not insured by the Federal Deposit Insurance Corporation.

(ii) The bank effects transactions in a trustee capacity, or effects transactions

in a fiduciary capacity in its trust department or other department that is regularly examined by bank examiners for compliance with fiduciary principles and standards, and—

(I) is chiefly compensated for such transactions, consistent with fiduciary principles and standards, on the basis of an administration or annual fee (payable on a monthly, quarterly, or other basis), a percentage of assets under management, or a flat or capped per order processing fee equal to not more than the cost incurred by the bank in connection with executing securities transactions for trustee and fiduciary customers, or any combination of such fees; and

(II) does not publicly solicit brokerage business, other than by advertising that it effects transactions in securities in conjunction with advertising its other trust activities.

(iii) The bank effects transactions in—

(I) commercial paper, bankers acceptances, or commercial bills;

(II) exempted securities;

(III) qualified Canadian government obligations as defined in section 5136 of the Revised Statutes, in conformity with section 15C of this title and the rules and regulations thereunder, or obligations of the North American Development Bank; or

(IV) any standardized, credit enhanced debt security issued by a foreign government pursuant to the March 1989 plan of then Secretary of the Treasury Brady, used by such foreign government to retire outstanding commercial bank loans.

(iv)

(I) The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of any pension, retirement, profit-sharing, bonus, thrift, savings, incentive, or other similar benefit plan for the employees of that issuer or its affiliates (as defined in section 2 of

the Bank Holding Company Act of 1956), if the bank does not solicit transactions or provide investment advice with respect to the purchase or sale of securities in connection with the plan.

(II) The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of that issuer's dividend reinvestment plan, if—

(aa) the bank does not solicit transactions or provide investment advice with respect to the purchase or sale of securities in connection with the plan; and

(bb) the bank does not net shareholders' buy and sell orders, other than for programs for odd-lot holders or plans registered with the Commission.

(III) The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of a plan or program for the purchase or sale of that issuer's shares, if—

(aa) the bank does not solicit transactions or provide investment advice with respect to the purchase or sale of securities in connection with the plan or program; and

(bb) the bank does not net shareholders' buy and sell orders, other than for programs for odd-lot holders or plans registered with the Commission.

(IV) The exception to being considered a broker for a bank engaged in activities described in subclauses (I), (II), and (III) will not be affected by delivery of written or electronic plan materials by a bank to employees of the issuer, shareholders of the issuer, or members of affinity groups of the issuer, so long as such materials are—

(aa) comparable in scope or nature to that permitted by the Commission as of the date of the en-

- actment of the Gramm-Leach-Bliley Act; or
- (bb) otherwise permitted by the Commission.
- (v) The bank effects transactions as part of a program for the investment or reinvestment of deposit funds into any no-load, open-end management investment company registered under the Investment Company Act of 1940 that holds itself out as a money market fund.
- (vi) The bank effects transactions for the account of any affiliate of the bank (as defined in section 2 of the Bank Holding Company Act of 1956) other than—
- (I) a registered broker or dealer; or
- (II) an affiliate that is engaged in merchant banking, as described in section 4(k)(4)(H) of the Bank Holding Company Act of 1956.
- (vii) The bank—
- (I) effects sales as part of a primary offering of securities not involving a public offering, pursuant to section 3(b), 4(2), or 4(6) of the Securities Act of 1933 or the rules and regulations issued thereunder;
- (II) at any time after the date that is 1 year after the date of the enactment of the Gramm-Leach-Bliley Act, is not affiliated with a broker or dealer that has been registered for more than 1 year in accordance with this Act, and engages in dealing, market making, or underwriting activities, other than with respect to exempted securities; and
- (III) if the bank is not affiliated with a broker or dealer, does not effect any primary offering described in subclause (I) the aggregate amount of which exceeds 25 percent of the capital of the bank, except that the limitation of this subclause shall not apply with respect to any sale of government securities or municipal securities.
- (viii)
- (I) The bank, as part of customary banking activities—
- (aa) provides safekeeping or custody services with respect to securities, including the exercise of warrants and other rights on behalf of customers;
- (bb) facilitates the transfer of funds or securities, as a custodian or a clearing agency, in connection with the clearance and settlement of its customers' transactions in securities;
- (cc) effects securities lending or borrowing transactions with or on behalf of customers as part of services provided to customers pursuant to division (aa) or (bb) or invests cash collateral pledged in connection with such transactions;
- (dd) holds securities pledged by a customer to another person or securities subject to purchase or resale agreements involving a customer, or facilitates the pledging or transfer of such securities by book entry or as otherwise provided under applicable law, if the bank maintains records separately identifying the securities and the customer; or
- (ee) serves as a custodian or provider of other related administrative services to any individual retirement account, pension, retirement, profit sharing, bonus, thrift savings, incentive, or other similar benefit plan.
- (II) The exception to being considered a broker for a bank engaged in activities described in subclause (I) shall not apply if the bank, in connection with such activities, acts in the United States as a carrying broker (as such term, and different formulations thereof, are used in section 15(c)(3) of this title and the rules and regulations thereunder) for any broker or dealer, unless such carrying broker activities are engaged in with respect to government securities (as defined in paragraph (42) of this subsection).
- (ix) The bank effects transactions in

identified banking products as defined in section 206 of the Gramm-Leach-Bliley Act.*

(x) The bank effects transactions in municipal securities.

(xi) The bank effects, other than in transactions referred to in clauses (i) through (x), not more than 500 transactions in securities in any calendar year, and such transactions are not effected by an employee of the bank who is also an employee of a broker or dealer.

(C) The exception to being considered a broker for a bank engaged in activities described in clauses (ii), (iv), and (viii) of subparagraph (B) shall not apply if the activities described in such provisions result in the trade in the United States of any security that is a publicly traded security in the United States, unless—

(i) the bank directs such trade to a registered broker or dealer for execution;

(ii) the trade is a cross trade or other substantially similar trade of a security that—

(I) is made by the bank or between the bank and an affiliated fiduciary; and

(II) is not in contravention of fiduciary principles established under applicable Federal or State law; or

(iii) the trade is conducted in some other manner permitted under rules, regulations, or orders as the Commission may prescribe or issue.

(D) For purposes of subparagraph (B)(ii), the term “fiduciary capacity” means—

(i) in the capacity as trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gift to minor act, or as an investment adviser if the bank receives a fee for its investment advice;

(ii) in any capacity in which the bank possesses investment discretion on behalf of another; or

(iii) in any other similar capacity.

(E) The term “broker” does not include a bank that—

(i) was, on the day before the date of enactment of the Gramm-Leach-Bliley Act, subject to section 15(e); and

(ii) is subject to such restrictions and requirements as the Commission considers appropriate.

(F) The Commission and the Board of Governors of the Federal Reserve System shall jointly adopt a single set of rules or regulations to implement the exceptions in subparagraph (B).

* * * * *

3-3631

(39) A person is subject to a “statutory disqualification” with respect to membership or participation in, or association with a member of, a self-regulatory organization, foreign equivalent of a self-regulatory organization, foreign or international securities exchange, if such person—

(A) has been and is expelled or suspended from membership or participation in, or barred or suspended from being associated with a member of, any self-regulatory organization, contract market or foreign equivalent designated pursuant to section 5 of the Commodity Exchange Act (7 U.S.C. 7), or any substantially equivalent foreign statute or regulation, or futures association registered under section 17 of such Act (7 U.S.C. 21), or any substantially equivalent foreign statute or regulation, or has been and is denied trading privileges on any such contract market;

(B) is subject to—

(i) an order of the Commission, other appropriate regulatory agency, or foreign financial regulatory authority—

(I) denying, suspending for a period not exceeding 12 months, or revoking his registration as a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer or limiting his activities as a foreign per-

* See 3-3632.

son performing a function substantially equivalent to any of the above;
or

(II) barring or suspending for a period not exceeding 12 months his being associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or foreign person performing a function substantially equivalent to any of the above;

(ii) an order of the Commodity Futures Trading Commission denying, suspending, or revoking his registration under the Commodity Exchange Act (7 U.S.C. 1 et seq.); or

(iii) an order by a foreign financial regulatory authority denying, suspending, or revoking the person's authority to engage in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof;

(C) by his conduct while associated with a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer or while associated with an entity or person required to be registered under the Commodity Exchange Act, has been found to be a cause of any effective suspension, expulsion, or order of the character described in subparagraph (A) or (B) of this paragraph, and in entering such a suspension, expulsion, or order, the Commission, an appropriate regulatory agency, or any such self-regulatory organization shall have jurisdiction to find whether or not any person was a cause thereof;

(D) by his conduct while associated with any broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or any other entity engaged in transactions in securities, or while associated with an entity engaged in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board

of trade, or foreign equivalent thereof, has been found to be a cause of any effective suspension, expulsion, or order by a foreign or international securities exchange or foreign financial regulatory authority empowered by a foreign government to administer or enforce its laws relating to financial transactions as described in subparagraph (A) or (B) of this paragraph;

(E) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person described by subparagraph (A), (B), (C), or (D) of this paragraph; or (F) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (D), (E), (H), or (G) of paragraph (4) of section 15(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within ten years of the date of the filing of an application for membership or participation in, or to become associated with a member of, such self-regulatory organization, is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4), has willfully made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, report required to be filed with a self-regulatory organization, or proceeding before a self-regulatory organization, any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein.

[15 USC 78c(a)(4) and (39). For amendatory history of 15 USC 78c, see 5-030.2.]

3-3632

GRAMM-LEACH-BLILEY ACT

Section 206—Definition of Identified Banking Product

(a) *Definition of identified banking product.* For purposes of paragraphs (4) and (5) of section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a) (4), (5)), the term “identified banking product” means—

- (1) a deposit account, savings account, certificate of deposit, or other deposit instrument issued by a bank;
- (2) a banker’s acceptance;
- (3) a letter of credit issued or loan made by a bank;
- (4) a debit account at a bank arising from a credit card or similar arrangement;
- (5) a participation in a loan which the bank or an affiliate of the bank (other than a broker or dealer) funds, participates in, or owns that is sold—

(A) to qualified investors; or

(B) to other persons that—

- (i) have the opportunity to review and assess any material information, including information regarding the borrower’s creditworthiness; and
- (ii) based on such factors as financial sophistication, net worth, and knowledge and experience in financial matters, have the capability to evaluate the information available, as determined under generally applicable banking standards or guidelines; or

(6) any swap agreement, including credit and equity swaps, except that an equity swap that is sold directly to any person other than a qualified investor (as defined in section 3(a)(54) of the Securities Act of 1934) shall not be treated as an identified banking product.

[15 USC 78c note.]