
DIVISION OF BANKING

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TO: SOUTH DAKOTA TRUST COMPANIES AND BANKS WITH TRUST POWERS

FROM: BRET AFDAHL, Division Counsel

RE: Regulation R

Background

The Gramm-Leach-Bliley Act (GLBA) lowered many of the barriers that were erected between the banking and securities industries via the Securities and Exchange Act of 1934 (Exchange Act). Although GLBA repealed the blanket exception that prevented banks from having to register as brokers, it provided conditional exceptions for banking activities. In accordance with the Financial Regulatory Relief Act of 2006, the SEC and Federal Reserve have adopted a uniform set of rules to implement those exceptions (Regulation R). The rules became mandatory on the first day of a bank's fiscal year that commenced after September 30, 2008. Section 3(a)(6) of the Exchange Act defines a bank as any institution exercising fiduciary powers under the laws of any State. Therefore, all South Dakota chartered trust companies as well as banks exercising fiduciary powers must develop and implement policies and procedures needed to comply with Regulation R.

In short, Regulation R allows banks/trust companies to continue performing certain securities related transactions without registering as a broker-dealer with the SEC, but limits those activities to certain broker exceptions as defined under Section 3(a)(4)(B) of the Exchange Act. The exceptions most likely to benefit South Dakota chartered institutions are:

- Third-Party Networking Arrangements – Section 3(a)(4)(B)(i)
- Trust and Fiduciary Activities – Section 3(a)(4)(B)(ii)
- Deposit “Sweep” Activities – Section 3(a)(4)(B)(v)
- Custody and Safekeeping Activities – Section 3(a)(4)(B)(viii)

In addition, smaller banks/trust companies having no more than 500 securities transactions as agent for its customers in a calendar year, may rely on the “de minimis exception” in Section 3(a)(4)(B)(xi) of the Exchange Act in lieu of any other available exception or exemption for such transactions. Important note: block trades and mutual fund trades are counted at the beneficial account level and not as a block. For example, if a mutual fund trade is made for 10,000 units but involved 20 accounts; this would be 20 trades as opposed to one. Also, it is highly unlikely that the “de minimis exception” will apply if the bank/trust company utilizes a daily cash management sweep to money market mutual funds due to the sheer number of transactions. Other administrative exceptions provided in Regulation R include transactions in Regulation S securities, non-custodial securities lending activities, as well as certain exemptions from the Exchange Act's Section 3(a)(4)(C)(i) trade execution requirements.

Networking Exception

The networking exception allows a bank/trust company to enter into a contractual or other written arrangement with a registered broker-dealer under which the broker-dealer offers brokerage services to bank/trust company customers. Although the exception does not limit the amount of compensation a broker-dealer may pay the bank/trust company for referrals, it prohibits incentive compensation to unregistered employees and limits the amount they may receive for referrals. Employees may receive only a nominal, one-time cash fee of a fixed-dollar amount for each referral to a broker-dealer. Although unlicensed employees may not provide investment advice or make recommendations to customers regarding securities, they may describe in general terms the types of investment vehicles available from the bank/trust company and the broker-dealer under the arrangement. The use of the “de minimis exception” is not available with this exception.

Trust and Fiduciary Exception

The trust and fiduciary exception permits a bank/trust company to effect securities transactions for its trust or fiduciary customers as long as the bank/trust company is chiefly compensated for those transactions by certain types of fees, referred to as "relationship compensation". Relationship compensation includes the following types of fees:

- Administration or annual fees;
- a percentage of assets under management;
- flat or capped per-order processing fees that do not exceed the cost the bank/trust company incurs in executing such securities transactions; or
- any combination of such fees.

Relationship compensation includes 12b-1 fees, service fees, and sub-transfer and sub-accounting fees that banks/trust companies receive from mutual funds or their service providers. Regulation R provides a number of other examples of the types of fees that qualify as relationship compensation.

Regulation R states that a bank/trust company may exclude trust and fiduciary accounts that were opened for fewer than three months during the relevant year or that were acquired during the previous 12 months as part of a merger and acquisition transaction. This exclusion applies to both the bank/company-wide approach and the account-by-account approach.

Please note that an advertising restrictions/prohibition applies to this exception. The prohibition on solicitation of brokerage business restricts the extent to which a bank/trust company can advertise that it effects securities transactions. In its advertisements, a bank/trust company may only indicate that it effects securities transactions in connection with its trust and fiduciary services. The fact that a bank/trust company effects securities transactions cannot be made more prominent than the material advertising the bank's/trust company's provision of trust and fiduciary services.

Chiefly Compensated Defined:

A bank/trust company that operates on a calendar-year basis must start monitoring its compliance on either an account-by-account basis or bank/trust company-wide basis beginning January 1, 2009, and must meet the applicable compensation restriction after the conclusion of 2010 (based on the average of the bank's/trust company's year-end compensation ratios for 2009 and 2010).

- Account-by account basis: The relationship-total compensation percentage attributable to each trust and fiduciary account is greater than 50 percent.
- Bank/trust company-wide basis: The relationship-total compensation attributable to the bank's/trust company's trust and fiduciary business as a whole is at least 70 percent of the bank's/trust company's total compensation attributable to the trust and fiduciary business.

- To allow for short-term fluctuations in compensation, the percentage of relationship-total compensation is to be calculated on a two year rolling average for the two immediate preceding years (calendar or fiscal). The calculation is to occur within 60 days of the end of the year.

The commonly used bank/trust company-wide approach is calculated as follows:

- Divide the relationship compensation (RC) attributable to trust and fiduciary business during each of the immediately preceding two years by the total compensation (TC) attributable to trust and fiduciary business during the relevant year.
- Translate the quotient obtained for each of the two years into a percentage.
- Take the average of the percentages obtained for each of the two immediately preceding years; for example:

$$\text{Relationship Total Compensation \%} = ((\text{RCy-1}/\text{TCy-1}) + (\text{RCy-2}/\text{TCy-2})) \times 100 / 2$$

In order to meet the bank/trust company-wide approach, the relationship total compensation percentage must be greater than or equal to 70 percent. In the example above, y-1 is first year of 2009, and y-2 is 2010.

Sweep Exception

The sweep exception allows a bank/trust company to sweep funds from accounts into "no-load" money market funds without registering as a broker-dealer. To qualify as a "no-load" fund, a fund must have no front-end or back-end loads and no more than 25 basis points in asset-based sales charges and service fees. Banks/trust companies are also permitted to sweep deposits into a "load" money market fund if, among other things, it does not characterize the fund as being "no-load" and provides the fund's prospectus to the customer before the sweep transactions are authorized. Furthermore, a bank/trust company is allowed to invest customer funds into a money market mutual fund if it provides the customer with some other product or service that would not require broker-dealer registration, such as an escrow, trust, or custody account.

The sweep exception is only used if a cash sweep arrangement is the only service provided for the account. If the daily sweep arrangement is ancillary to other services provided to the account, there is no need to consider the sweep exception. For example, if the bank/trust company acts as the trustee of a revocable trust with a daily cash sweep arrangement, it is exempt under the trust/fiduciary exception so there is no need to consider the sweep exception.

Safekeeping and Custody Exception

The safekeeping and custody exception permits a bank/trust company to perform specified services deemed as customary in connection with safekeeping and custody of securities without registering as a broker. The safekeeping and custody exception also sets a limitation that a bank/trust company may not rely on this exception if it functions as a "carrying broker". Regulation R provides key factors to assist a bank/trust company in identifying whether it is acting as an impermissible "carrying broker". Although, under Rule 760 of Regulation R, banks/trust companies may take orders for securities transactions: (a) from employee benefit plan accounts and individual retirement accounts for which the bank/trust company acts as a directed trustee and similar accounts for which the bank/trust company acts as a custodian, and (b) from other safekeeping and custody accounts on an accommodation basis.

If a bank/trust company accepts securities orders under Rule 760 with respect to a custody account, no bank/trust company employee may receive compensation from the bank/trust company, the executing broker or dealer, or any other person, that is based on whether a securities transaction is

executed for an account, or on the quantity, price, or identity of the securities purchased or sold by the account. These restriction, however, do not prevent a bank/trust company employee from receiving payments under a bonus plan that would be permissible under the networking rules.

Furthermore, a bank/trust company cannot advertise that it accepts orders for securities transactions for employee benefit plan accounts or IRAs, except as part of advertising the bank's/trust company's overall custodial or safekeeping services, and such accounts may not be advertised as securities brokerage accounts. Under subsection (e) of this exception, a bank/trust company acting as a non-fiduciary/non-custodial administrator or record keeper for a plan for which another bank/trust company acts as custodian may accept securities orders from such a plan without being considered a broker, provided both comply with the conditions specified in this exception.

IRA and Employee Benefit Plan Accounts:

Regulation R permits a bank/trust company, under certain conditions, to accept orders for securities transactions from IRA, employee benefit plan, and similar accounts for which the bank acts as custodian. This includes pension plans, retirement plans, profit sharing plans, bonus plans, thrift savings plans, and incentive plans, among other.

Accommodation Basis:

Conditions apply when a bank/trust company accepts securities orders for "other accounts" on an accommodation basis. The bank/trust company will not be able to advertise its securities order-taking services at all in public media. It will be permitted to distribute sales literature to customers and others describing the order-taking services provided to these accounts, so long as the order-taking services are not described independently of the bank's/trust company's other custody services. Moreover, the bank/trust company will not be able to provide investment advice or research or make recommendations concerning securities to the account or solicit securities transactions from the account. The amounts charged by the bank/trust company for effecting a securities transaction for the account cannot vary based on whether the bank/trust company accepted the order for the transaction, or on the quantity or price of the securities to be bought or sold.

Compliance

Even though most, if not all, of South Dakota chartered trust companies and banks will fall within one or more of the above described exceptions/exemptions, all banks/trust companies must develop and implement written policies and procedures to address Regulation R requirements. Written policies and procedures should be specific to bank/trust company operations.

Getting Started

Prior to analyzing activities under Regulation R, a bank/trust company should first engage in a general analysis of whether certain activities are broker-dealer activities. Management must address the following questions:

- Does the activity involve a security as defined under Section 3(a)(10) of the Exchange Act, which is not an exempted security as defined under Section 3(a)(12)?
- Is the activity considered to be a broker-dealer activity as defined under Sections 3(a)(4) and 3(a)(5) of the Exchange Act and applicable to SEC review?
- Does the activity fall within one of several exceptions provided under Section 3(a)(4)(B) or 3(a)(5)(C) of the Exchange Act, or under Regulation R?

Compliance Program

Management should consider and/or implement the following actions during the development of a comprehensive Regulation R compliance program:

- Thoroughly review Regulation R, Exchange Act “broker-dealer” exceptions, and GLBA.
- Identify and document applicable exceptions and/or exemptions.
- Analyze and understand the trust accounting software and discuss options with the system provider.
- Determine that account and fee codes are reliable or in need of adjustments.
- Separate fees assessed into appropriate buckets.
- Compile fees assessed to support the “chiefly compensated” calculations under the trust and fiduciary activities exception.
- Develop a recordkeeping mechanism or spreadsheet.
- Develop processes to ensure that the advertising restrictions are being followed.
- Develop written Regulation R policies and procedures including record retention policies and procedures to ensure retention of records to document the calculation of the “chiefly compensated” test, compliance with advertisement restrictions, and with safekeeping and custody provisions.
- Create an employee training program.
- Adjust risk management, audit, and compliance systems to include Regulation R compliance measures established.
- Inform board and/or committee(s) of progress in complying with Regulation R.