

December 4, 2001

Catherine McGuire
Associate Director & Chief Counsel
Division of Market Regulation
U.S. Securities and Exchange Commission
Mail Stop 10-1
450 5th St. NW
Washington, DC 20549

RE: Exception from Definition of Broker for Banks found in 15 U.S.C.
78c(a)(4)

Dear Ms. McGuire:

The Maine Office of Securities seeks the guidance of the Commission regarding the exception from the definition of broker for banks found in the Gramm Leach Bliley Act ("GLBA") changes to the Securities Exchange Act of 1934 ("the '34 Act"). Specifically, we seek the Commission's position regarding whether bank subsidiaries can claim to be excepted from the definition of broker when they engage in activities described in (3)(a)(4)(B)(i) of the '34 Act, 15 U.S.C. 78c(a)(4)(B)(i).

This issue arises for my office because the State of Maine passed legislation this year that largely mirrors GLBA to allow "depository institutions," a term that includes banks and credit unions, to engage in activities that are exempt under §201 of GLBA except the private securities offerings and the de minimis transactions. In interpreting Maine law, I want to harmonize to the extent possible with federal law.

It has come to my attention that in the context of negotiating third party broker-dealer arrangements, some broker-dealers are encouraging banks to set up subsidiaries for purposes of receiving commissions and otherwise participating in these arrangements. The reasons given for suggesting subsidiaries include limiting liability for the bank in the event of a lawsuit by an investor seeking restitution.

In that context, a number of broker-dealers and financial institutions have raised the issue of whether bank subsidiaries are "banks" and therefore qualify for the exception under GLBA when they enter into third party brokerage arrangements with NASD registered and Maine licensed broker-dealers. Section (3)(a)(6) of the '34 Act defines "bank" as

- (A) a banking institution organized under the laws of the United States,
- (B) a member bank of the Federal Reserve System,
- (C) any other banking institution whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to the first section of Public Law 87-7222, and which is supervised by State or Federal authority having supervision over banks, and which is not created for the purpose of evading the provisions of the Act, and
- (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

A plain reading of this definition would appear to include an institution chartered by state or federal authorities to engage in deposit or trust activities. There is no mention in the definition of subsidiaries, affiliates or entities owned by banks. This office has consistently taken the position that entities other than the bank ¹are not entitled to the exemption and must therefore be registered with the NASD and licensed with this office.

In summary, we would like to know whether the Commission will allow a bank subsidiary to claim the exception in (3)(a)(4)(B)(i) of the '34 Act for "banks." I am available to answer any questions you may have or to provide further information. Thank you very much for your attention to these questions.

Sincerely,

Christine A. Bruenn
Securities Administrator

¹ This term would include credit unions under Maine law.