Testimony of

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Federated Investors, Inc.

Before a Joint Hearing of the

Subcommittee on Financial Institutions and Consumer Credit

and the

Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises

"Pushing Back the Pushouts:

The SEC's Broker-Dealer Rules"

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Committee on Financial Services
U.S. House of Representatives
Washington, D.C.

Testimony of Eugene F. Maloney
Executive Vice President and Corporate Counsel
Federated Investors, Inc.

Mr. Chairman and Members of the Committee, I am Eugene F. Maloney, Executive Vice President and Corporate Counsel of Federated Investors, Inc., Pittsburgh, Pennsylvania, and a faculty member at Boston University Law School where I teach a course on Trust and Securities Activities of Banks.

My company is the sponsor and distributor of the Federated family of mutual funds with approximately $160 billion in total assets under management. Many of Federated's mutual funds are made available through bank trust departments to personal trust accounts, managed investment accounts, 401(k) plan accounts, individual retirement accounts ("IRAs"), corporate trust and escrow accounts, and other fiduciary relationships. Federated does business with approximately 1400 bank trust departments and approximately one-half of our assets under management come through banks.

Because of the importance we attach to our banking relationships, we have structured many of our investment products in accordance with the legal framework that governs the banking industry and have devoted substantial corporate resources to helping our bank clients comply with applicable banking, securities and trust laws when they use the Federated mutual funds as investment vehicles.

We have a substantial interest in the applicability to bank trust departments of Title II of the Gramm-Leach-Bliley Act and the Interim Rules issued by the Securities and Exchange Commission thereunder. The compliance obligations imposed on banks by Title II and the Interim Rules will affect how we structure our relationships with banks and how we will make the Federated funds available as fiduciary investments going forward.

In my testimony today, I would like to share with you some of Federated's concerns about the Interim Rules as well as some observations as to the compliance issues that we see facing our bank clients.

Federated's Experience with the SEC

As a preliminary matter, I would first like to note that Federated has had a very positive experience in interacting with the Commission's staff on the scope of the Title II exemptions for banks. We approached the staff earlier this year with three areas of concern in particular—corporate trust, investment management, and employee retirement accounts. We were invited to submit formal requests for guidance and relief in each area, which we did. The Commission substantially granted the relief we requested in its Interim Rules and, we believe, thereby demonstrated a willingness to work with the industry in developing a workable approach to functional regulation.

While it is regrettable that the Interim Rules were issued without the benefit of public comment and include provisions that appear to be unnecessarily burdensome, our experience gives us reason to be optimistic that the Commission will continue to work with the industry in developing a workable framework to implement the Title II provisions. The Commission's solicitation of public comments, its announcement that the Rules will be changed in response to the public comments, and its decision to further postpone the Rules' effective date all signify that the Commission is prepared to work constructively with the industry.

We have urged the Commission to pursue a progressive process aimed at maximizing compliance with Title II over time based on a mutual understanding with the industry as to how the investor protection concerns of the securities laws can best be effectuated in the banking context with minimal disruption to long-term fiduciary relationships and practices. In order to be effective, an ongoing compliance process will require a continuing dialogue with candor on both sides, including frequent communication with the federal banking regulators to ensure interagency coordination and cooperation. We also believe that Congressional oversight is appropriate given the structural implications of the SEC's Rules for bank trust departments and their customers and questions as to whether the Rules are consistent with Congressional intent.

I would like to make several points that we feel are crucial to understanding the impact of the Commission's Rules on bank trust departments and then offer some comments on specific provisions in the Rules.

The "Push-Out" Has Already Occurred

We feel it is important to recognize that "functional regulation" was a *fait accompli* long before Title II was enacted. Banks began to "push-out" their core retail securities brokerage activities almost as soon as they got into the business. The SEC's Rule 3b-9, issued in 1985, required banks to conduct their brokerage operations through registered broker-dealers. Even though the SEC's rule was overturned in the courts, most major banks formed separate registered broker-dealers to handle their retail brokerage activities both as a matter of institutional preference and in anticipation of Congressional codification of Rule 3b-9. Smaller banks entered into so-called "networking" arrangements by which third party broker-dealers made securities available to bank customers on the banks' premises. Even prior to enactment of GLBA, it was estimated that over 90 percent of all retail sales of securities on bank premises were conducted by registered broker-dealers. GLBA essentially codified the SEC's Rule 3b-9, as the SEC had long advocated, and ratified what had already occurred in the marketplace while making clear that certain traditional bank activities were not to be disturbed.

With the "push out" of retail bank brokerage activities complete, the Commission's exercise of its regulatory jurisdiction over bank securities activities has focused on the exemptions from broker-dealer regulation. The consequence, we believe, has been excessive regulatory treatment of the exemptions, resulting in unnecessary regulatory complexity and compliance burdens that are inappropriate for exempt activities.

Among other things, the Commission's approach of providing exemptive relief, as opposed to interpretive guidance, has created confusion as to whether certain trust activities that are not encompassed by the regulatory exemptions would require a separate exemption. While Federated and its bank clients have been the beneficiaries of these exemptions and we are grateful for the Commission's attention to the areas of concern that we raised, we believe it would be less burdensome if the Commission were to adopt a regulatory presumption that any activity performed by a bank in the capacity of "trustee" is covered by the trust exemption unless expressly found otherwise by the Commission. A bank acting as trustee should be presumed to be covered by the exemption unless it is clearly engaged in a commission-based brokerage business in contravention of the intent of Congress.

The Fiduciary Context Affords Significant Investor Protections

In our comment letter, we urged the Commission, in interpreting the trust exemption, to take into consideration the fiduciary law context in which bank trust departments operate. Banks are subject to standards of prudence and a strict duty of loyalty under the Uniform Prudent Investor Act—which has been adopted by nearly all of the states. In addition, banks that provide services to employee benefit plan accounts are subject to strict fiduciary duties under the Employee

Retirement Income Security Act ("ERISA"). These safeguards generally are not available from a registered broker-dealer.

The applicable fiduciary law framework has resulted in a conservative investment culture that customers have come to rely on in seeking investment services from bank trust departments. Many customers have chosen bank trust departments rather than registered broker-dealers for investment services because of the fiduciary culture and their belief that trust law affords greater protection than the securities laws. Indeed, the investor protection scheme of the securities laws—based primarily on the principle of "disclosure" rather than substantive standards of prudence and reasonableness—is viewed by many bank customers as affording little meaningful protection. Although the securities laws impose suitability requirements and training and testing qualifications on securities sales personnel, the commission-based sales culture of a broker-dealer is very different from that of a bank trust department governed by strict fiduciary duties.

Many bank trust customers would strenuously object to having their accounts transferred to a registered broker-dealer for these reasons, in addition to the fact that the fees charged by broker-dealers generally are higher than those charged by bank trust departments. The system of banking supervision and regulation also provides a measure of security not available from broker-dealers and is an important factor in the selection of bank trust departments as money managers.

The "Chiefly Compensated" Test Will Disrupt Carefully Established Mutual Fund Fee Arrangements with Bank Trustees

Federated's principal concern regarding the Interim Rules is the Commission's interpretation of the "chiefly compensated" test in the trust exemption to exclude fees received by bank trust departments from mutual funds. Under the Interim Rules, fees received by a bank from a mutual fund in which the bank invests fiduciary assets are treated either as "sales compensation" in the case of 12b-1 fees or "unrelated compensation" in the case of administrative or subaccounting fees. Such fees thus either are counted against a bank's qualifying "relationship compensation" or are neutral in calculating whether a bank trustee meets the "chiefly compensated" test.

Federated believes that the SEC's dichotomy between "relationship compensation" and "sales compensation" fails to take into consideration the fiduciary law context governing bank trustee compensation and penalizes legitimate compensation arrangements that are an integral part of the fiduciary services offered by bank trust departments.

As a mutual fund sponsor and administrator, Federated pays to bank trust departments fees for performing shareholder accounting and administrative services in connection with the investment of fiduciary assets in Federated's mutual funds. These fees have enabled bank trust departments to avoid increasing their account level fees and to offer fiduciary services at less cost than a customer would pay to a broker-dealer for the same services but without the fiduciary law protections that arise in a bank trust department setting.

Federated's arrangements with bank trust departments have been instituted after extensive review and analysis of applicable fiduciary law and relevant trust documents; amendment of trust law by state legislators to address such arrangements; issuance of supervisory guidance by federal banking regulators; adoption of policies and procedures designed to ensure that the fee arrangements are reasonable and otherwise comply with applicable trust law; amendment of trust instruments, fund prospectuses, and other documents; and disclosure to trust beneficiaries.

We are concerned that the Interim Rules will disrupt these carefully established fee arrangements. If bank trust departments cannot rely on fees paid by Federated as a source of qualifying compensation for the "chiefly compensated" test, they may be forced in many cases to restructure the pricing of their trust services by increasing their trustee fees. This result may occur in the case of certain 401(k) plan accounts, for example, where some bank trustees have chosen to not charge fees at the account level but receive all of their compensation in the form of mutual fund servicing fees. Federated also is considering whether it and/or the Federated Funds will need to establish new fee arrangements with banks and take other measures if the "chiefly compensated" test remains unchanged.

As noted in our comment letter to the Commission, the treatment of mutual fund fees under the Interim Rules appears to be based on a misunderstanding of the law governing bank fiduciary compensation and a reading of the "chiefly compensated" test in the statute to suggest that bank trust departments are paid sales commissions. Under trust law, bank trustees are not permitted to receive sales commissions or other compensation for "selling" investments or other services to their trust accounts. State trust law specifically addresses the types of compensation that bank trustees may permissibly receive from mutual funds and does not permit bank trust departments to receive "sales commissions" or other rewards designed to compensate them for promoting particular products and services.

In nearly all of the states, trust law permits bank trustees to receive fees for the performance of services in connection with investments of fiduciary assets in mutual funds. The fees that Federated pays to bank trust departments are pursuant to service contracts designed to comply with state trust law. Federated has obtained legal opinions from local trust counsel in nearly every state addressing the permissibility of the fees it pays to bank trust departments and in each case local counsel has opined that the fees are permissible service fees—not sales compensation—under applicable trust law.

Banks similarly are restricted in the type of compensation they may receive from mutual funds under ERISA. The Department of Labor, in various interpretive letters and class exemptions, has permitted banks acting as ERISA trustees to receive service fees from mutual funds while prohibiting them from receiving sales commissions.[1]

In our comment letter, we urged the Commission to reconsider the dichotomy it has drawn between "sales compensation" and "relationship compensation" and instead focus on the fiduciary principles and standards that apply to fiduciary compensation. Only in cases where a bank trust department receives sales commissions for effecting securities transactions for trust accounts should the chiefly compensated test become an issue. In such a case, the trust department likely will be in violation of applicable trust law.

The "Chiefly Compensated" Test Is Excessively Burdensome

Many of Federated's clients have expressed concern that it would be excessively burdensome to comply with the "chiefly compensated" test on an account-by-account basis as required by the Interim Rules. Although banks typically maintain fixed fee schedules, generally based on assets under management, many banks vary their prices by offering discounted fee arrangements on a customer-by-customer basis in order to take into account the bank's relationship with the trust customer, the size of the trust account or other

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[1] *See*, *e.g.*, Department of Labor, Prohibited Transaction Class Exemption (PTCE) 77-4, 42 Fed. Reg. 18,732 (April 8, 1977), exempting the investment of ERISA plan assets in proprietary mutual funds subject to certain conditions, including that the plan not pay a sales commission in connection with the investment.

factors, resulting in a wide range of fee variations. Bank trust departments also may grant fee waivers, rebates or credits with respect to accounts that are invested in mutual funds that pay fees to the bank or its affiliates. A bank may offset 12b-1 fees against trustee fees in order to comply with Department of Labor interpretations under ERISA, for example.

The Interim Rules do not address how such fee discounts, waivers, rebates, credits, or offsets are treated for purposes of the "chiefly compensated" test. In particular, the Rules do not indicate whether such fee concessions should be subtracted from a bank's compensation and, if so, whether the deduction should be made from "relationship compensation" or "sales compensation."

How a fee concession is characterized could determine whether a bank satisfies the chiefly compensated test or not. Assume, for example, that a bank receives $1000 in trustee fees from a trust account and $500 in 12b-1 service fees from a mutual fund in which the trust account has invested. Assume further that the bank credits the trust account with the $500 to offset the 12b-1 fees. If the definition of sales compensation in the Interim Rules remains unchanged, the bank will fail the chiefly compensated test because its relationship compensation will not exceed its "sales compensation." On the other hand, if the bank does not reduce its trust account fee but instead waives the $500 in 12b-1 fees, the bank will satisfy the "chiefly compensated" test because all of its compensation will be in the form of relationship compensation. In both cases, the bank is receiving, and the customer is paying, $1000 in fees.

This anomaly demonstrates the complexity of the chiefly compensated test and its uncertain implications for the structuring of trustee compensation arrangements. The chiefly compensated test should not become a determinative factor in how banks structure their trustee fees and we have urged the Commission to consider whether the chiefly compensated test in the Interim Rules can be simplified to avoid this result.

The chiefly compensated test appears to have been included in the trust exemption in order to prevent banks from conducting a commission-based securities brokerage operation in the trust department. We believe there is little danger of such an evasion and would urge the Commission to apply the chiefly compensated test in those situations where such an evasion is evident without imposing a major compliance burden on the rest of the industry.

Other Concerns

In our comment letter filed with the Commission, Federated expressed concerns about other aspects of the Interim Rules, including the 10 percent safe harbor provision, the treatment of custodial accounts, and the conditions attached to the exemption for investment management accounts. Rather than repeat our concerns in my limited time here, I have attached our comment letter as an appendix to my testimony. I would be happy to amplify my testimony or respond to any questions you may have.

Federated appreciated this opportunity to present its views to the Subcommittee Members. Thank you, Mr. Chairman.

Attachments:

Appendix A—Mr. Maloney's Biography

Appendix B—Comment Letter filed by Federated Investors, Inc. with the Securities and Exchange Commission

APPENDIX A

EUGENE F. MALONEY

Federated Investors, Inc.
Pittsburgh, PA

Executive Vice President and Corporate Counsel

Mr. Maloney is Director, Executive Vice President and Corporate Counsel of Federated Investors, Inc. and has been employed by the firm for twenty-nine years.

He also is an instructor in trust and securities law at Boston University School of Law, has been a visiting instructor at the Federal Financial Institutions Examination Council and the American Bankers Association's National Graduate Trust School at Northwestern University, and participates in programs leading to the designation of Certified Trust and Financial Advisor. Mr. Maloney has also served as an expert witness in both judicial and legislative settings on matters relating to fiduciary compensation, will construction, and prudent investing.

Mr. Maloney has appeared as a speaker at American Bankers Association gatherings and is a frequent speaker at State Bankers Association meetings on the following subjects: the Gramm-Leach-Bliley Act, the deregulation of the financial services industry, the Uniform Prudent Investor Act and the investment management process it contemplates, fiduciary compensation, and asset allocation as a means of optimizing return and minimizing risk.

Mr. Maloney has authored and co-authored a number of articles appearing in various financial and legal publications regarding the investment responsibilities of corporate fiduciaries. He has also been the architect of various educational videos and memoranda having to do with the Uniform Prudent Investor Act, the implications for trust banks of functional regulation under the Gramm-Leach-Bliley Act, asset allocation in a trust context, the prudence of international investing, fiduciary compensation, and the propriety of a corporate fiduciary utilizing a mutual fund to which it provides discrete services.

Mr. Maloney received his B.A. from Holy Cross College in Worcester, Massachusetts, and his J.D. from Fordham Law School in New York City. He attended Wharton School of the University of Pennsylvania focusing on the financial management of commercial banks. He was an officer in the United States Army from 1969 to 1972 and served as an infantry officer for one year in the Republic of Vietnam.

APPENDIX B

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July 2, 2001

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549-0609

RE: Interim Final Regulations Implementing the Gramm-Leach-Bliley Act, Title II, Release No. 34-44291; File No. S7-12-01; RIN 3235-Al19

Dear Mr. Katz:

This comment letter is filed on behalf of my client, Federated Investors, Inc., in response to the Commission's request for comment on the Interim Rules implementing the exemptions from broker-dealer regulation for banks in Title II of the Gramm-Leach-Bliley Act ("GLBA").

Federated is the sponsor and distributor of the Federated family of mutual funds registered under the Investment Company Act of 1940 with approximately $130 billion in total assets under management. Many of Federated's mutual funds are made available through bank trust departments acting in various fiduciary capacities, including as trustee and/or custodian for personal trust accounts, managed asset accounts, 401(k) plan and individual retirement accounts ("IRAs"), and trust indentures. Federated thus has a substantial interest in the applicability of the federal securities laws to such services offered by banks.

Federated appreciates this opportunity to address the specific issues on which the Commission has invited comment. In addition, we offer several suggestions for ways in which the Interim Rules might be clarified or modified to take into consideration the fiduciary context applicable to brokerage activities conducted by bank trust departments and the ways in which bank trustees are compensated for their services.

General Comments

Federated believes that, on the whole, the Interim Rules provide useful guidance to banks as to the scope of the exemptions and afford meaningful relief in areas where investor protection concerns are minimal or are addressed under applicable fiduciary law. In particular, Federated supports the exemptions for indenture trustees, trustees of 401(k) plan accounts and individual retirement accounts, and investment advisory accounts. Federated requested relief in these three areas in letters addressed to the Commission's staff earlier this year and is pleased that the Commission acted quickly to provide exemptive relief. These exemptions will enable bank trust departments to continue to offer traditional banking services, avoid disrupting established fiduciary relationships consistent with the intent of Congress, and reduce uncertainty as to the scope of the trust exemption. Federated's letters are attached hereto for the record.

The Commission's approach of providing exemptive relief as opposed to interpretive guidance, however, has created some confusion as to whether certain trust activities that are not encompassed by the regulatory exemptions would require a separate exemption. To eliminate this confusion, we would urge the Commission to adopt a regulatory presumption that any activity performed by a bank in the capacity of "trustee" is covered by the trust exemption unless expressly found otherwise by the Commission.

Need for Progressive Compliance Process

In any case, we would urge the Commission to remain open-minded in continuing to work with the banking industry to clarify the scope of the GLBA exemptions. We urge the Commission to maintain a dialogue with individual banks and the industry as a whole in a progressive process aimed at maximizing compliance with the Interim Rules over time based on a mutual understanding as to how the investor protection concerns of the securities laws can best be effectuated in the banking context with minimal disruption to long-term fiduciary relationships and practices. In order to be effective, an ongoing compliance process will require a continuing dialogue with candor on both sides. We would hope that this process would include frequent communication with the federal banking regulators in developing a cooperative approach to ensuring compliance with the Interim Rules.

Fiduciary Law Context of Bank Trust Activities

In interpreting the bank trust exemption, we urge the Commission take into consideration the fiduciary law context in which bank trust departments operate. Banks are subject to standards of prudence and a strict duty of loyalty under the Uniform Prudent Investor Act, which has been adopted by nearly all of the states. The few states that have not adopted the uniform Act have trust laws that impose similar fiduciary standards and duties upon trustees. In addition, banks that provide services to employee benefit plan accounts are subject to strict fiduciary duties under the Employee Retirement Income Security Act ("ERISA").

The applicable fiduciary law framework has resulted in a conservative investment culture that customers have come to rely on in seeking investment services from bank trust departments. Many bank customers have chosen bank trust departments rather than registered broker-dealers for investment services because of the fiduciary culture and their belief that trust law affords greater protection than the securities laws. Indeed, the investor protection scheme of the securities laws—based primarily on the principle of "disclosure" rather than substantive standards of prudence and reasonableness—is viewed by many bank customers as affording insubstantial protection. The system of banking supervision and regulation also provides a measure of security not available from broker-dealers and is an important factor in the selection of bank trust departments as money managers. Many bank trust customers would object to having their accounts transferred to a registered broker-dealer for these reasons, in addition to the fact that the fees charged by broker-dealers generally are higher than those charged by bank trust departments.

Treatment of Mutual Fund Fees

Federated's principal concern regarding the Commission's interpretation of the "chiefly compensated" test in the trust exemption under GLBA is the treatment of fees received by bank trust departments from mutual funds. Under the chiefly compensated test set forth in the Interim Rules, fees received by a bank from a mutual fund in which the bank invests fiduciary assets are treated either as "sales compensation" in the case of 12b-1 fees or "unrelated compensation" in the case of administrative or subaccounting fees. Such fees thus either are counted against a bank's qualifying "relationship compensation" or are neutral in calculating whether a bank trustee meets the "chiefly compensated" test.

Federated believes that the dichotomy between "relationship compensation" and "sales compensation" fails to take into consideration the fiduciary law context governing bank trustee compensation and penalizes legitimate compensation arrangements that are an integral part of the fiduciary services offered by bank trust departments.

As a mutual fund sponsor and administrator, Federated pays to bank trust departments fees for performing shareholder accounting and administrative services in connection with the investment of fiduciary assets in Federated's mutual funds. These fees have enabled bank trust departments to avoid increasing their account level fees and to offer fiduciary services at less cost than a customer would pay to a broker-dealer for the same services but without the fiduciary law protections that arise in a bank trust department setting.

Federated's arrangements with bank trust departments have been instituted after extensive review and analysis of applicable fiduciary law and relevant trust documents; amendment of trust law by state legislators to address such arrangements; issuance of supervisory guidance by federal banking regulators; adoption of policies and procedures designed to ensure that the fee arrangements are reasonable and otherwise comply with applicable trust law; amendment of trust instruments, fund prospectuses, and other documents; and disclosure to trust beneficiaries.

We are concerned that the Interim Rules will disrupt these carefully established fee arrangements. If bank trust departments cannot rely on fees paid by Federated as a source of qualifying compensation for the "chiefly compensated" test, they may be forced in many cases to restructure the pricing of their trust services by increasing their trustee fees. This result may occur in the case of certain 401(k) plan accounts, for example, where some bank trustees have chosen to not charge fees at the account level but receive all of their compensation in the form of mutual fund servicing fees. Federated also is considering whether it and/or the Federated Funds will need to establish new fee arrangements with banks and take other measures if the "chiefly compensated" test remains unchanged.

The treatment of mutual fund fees under the Interim Rules appears to be based on a misunderstanding of the law governing bank fiduciary compensation and a reading of the "chiefly compensated" test in the statute to suggest that bank trust departments are paid sales commissions. Under trust law, bank trustees are not permitted to receive sales commissions or other compensation for "selling" investments or other services to their trust accounts. State trust law specifically addresses the types of compensation that bank trustees may permissibly receive from mutual funds and does not permit bank trust departments to receive "sales commissions" or other rewards designed to compensate them for promoting particular products and services.

In nearly all of the states, trust law permits bank trustees to receive fees for the performance of services in connection with investments of fiduciary assets in mutual funds. The fees that Federated pays to bank trust departments are pursuant to service contracts designed to comply with state trust law. Federated has obtained legal opinions from local trust counsel in nearly every state addressing the permissibility of the fees it pays to bank trust departments and in each case local counsel has opined that the fees are permissible service fees—not sales compensation—under applicable trust law.

Banks similarly are restricted in the type of compensation they may receive from mutual funds under ERISA. The Department of Labor, in various interpretive letters and class exemptions, has permitted banks acting as ERISA trustees to receive service fees from mutual funds while prohibiting them from receiving sales commissions.[1]

We thus would urge the Commission to reconsider the dichotomy it has drawn between "sales compensation" and "relationship compensation" in the Interim Rules and instead focus on the applicable fiduciary principles and standards that apply to fiduciary compensation. Only in cases where a bank trust department receives sales commissions for effecting securities transactions for trust accounts should the chiefly compensated test become an issue. In such a case, the trust department likely will be in violation of applicable trust law.

If the Commission retains its current test for applying the "chiefly compensated" language, Federated urges the Commission to allow the service fees it pays to bank trust departments to be counted as qualifying compensation. These fees are "consistent with fiduciary principles and standards" and are asset-based fees, in accordance with the statutory language of the trust exemption.

We note that the statute does not limit the sources of a bank's compensation for purposes of the "chiefly compensated" test, and the purposes of the "chiefly compensated" test can be met without limiting qualifying compensation to fees paid directly by trust accounts. Congress enacted the trust exemption to allow banks to continue traditional fiduciary activities and included the "chiefly compensated" test to discourage banks from using the exemption to

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[1] *See, e.g.*, Department of Labor, Prohibited Transaction Class Exemption (PTCE) 77-4, 42 Fed. Reg. 18,732 (April 8, 1977), exempting the investment of ERISA plan assets in proprietary mutual funds subject to certain conditions, including that the plan not pay a sales commission in connection with the investment.

engage in the sale of securities on commission in the manner of a retail brokerage business. As noted above, fiduciary law bars a trustee from receiving sales commissions and thus it is unlikely that a bank trust department would be engaged in a retail brokerage business. In any event, to the extent that shareholder servicing fees are paid out of mutual fund assets, they are a direct charge against the assets of fund shareholders, *i.e*., the trust beneficiaries whose assets are invested in the funds. In this sense, such fees are paid directly by trust beneficiaries and may properly be counted as qualifying compensation for purposes of the "chiefly compensated" test.

401(k) and IRA Accounts

Federated supports the exemption for banks acting as trustees for 401(k) plan and IRA accounts as provided in the Interim Rules. We also believe that the exemption should encompass banks acting as custodial trustees for IRA accounts. While the language of the exemption appears to cover these custodial activities, the *Federal Register* notice states otherwise, creating confusion.

For the reasons stated in our letter to the Commission's staff dated March 13, 2001, Federated believes that a bank acting in the capacity of a trustee is entitled to the trust exemption under the express language of the Gramm-Leach-Bliley Act even if its fiduciary duties are limited. Particularly when a bank is designated as a "trustee" under federal law, such as under ERISA in the case of 401(k) plan accounts or the Internal Revenue Code in the case of individual retirement accounts ("IRAs"), Federated believes the Commission should honor the bank's trustee status and not deny the trust exemption, even when the bank's role is limited to that of a custodial trustee.

The absence of comprehensive fiduciary duties does not necessarily give rise to investor protection concerns. In the case of participant-directed 401(k) plan and IRA accounts, the bank's fiduciary duties are limited under federal law because the bank's role in effecting transactions for the investor is limited. The bank's role generally is limited to providing investment advice and custodial services and acting as an introducing broker. As noted in our March 13, 2001, letter, registered investment advisers who act as introducing brokers are not subject to broker-dealer regulation, and it would create a regulatory anomaly to subject banks to broker-dealer regulation for engaging in the same activities.

In any case, a directed trustee of a 401(k) plan is deemed to be a fiduciary for purposes of ERISA even if the trustee does not provide investment advice for a fee, lacks investment discretion, and the plan participant directs the trustee with respect to investments. In such a case, although a directed trustee is relieved of fiduciary liability for the direct consequences of a participant's exercise of control under section 404(c) of ERISA, the directed trustee is not relieved of its fiduciary status for other purposes under ERISA. The Internal Revenue Service ("IRS") also takes the position that a trustee for a self-directed IRA is a fiduciary for purposes of the prohibited transaction rules under the IRC.[2]

It is unclear what investor protection concerns would be addressed by broker-dealer regulation that are not addressed under ERISA. We are unaware of any abuses in the offering of participant-directed 401(k) plan or IRA accounts by banks that would justify disregarding the trust exemption and subjecting banks to broker-dealer regulation. The abuses cited in the Commission's *Federal Register* notice accompanying the Interim Rules involved registered broker-dealers, not banks.

In the *Federal Register* notice, the Commission recognized that a bank acting as an IRA custodian performs the same functions as an IRA trustee but concluded, mistakenly in our view, that the custodian is not entitled to the trust exemption because it lacks the label of "trustee":

> [A]n IRA custodian is virtually indistinguishable from an IRA trustee, but does not take on the "trustee" label. Thus, it is not eligible for the definitional exemption in Rule 3b-17(k).[3]

In fact, an IRA custodian does have the label of "trustee." As noted in our March 13, 2001, letter, under Section 408(h), a custodial IRA is treated as a trust and the custodian of such an account is treated as the trustee thereof:

> For purposes of this section, a custodial account shall be treated as a trust if the assets of such account are held by a bank . . .[I]n the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of such account shall be treated as the trustee thereof.[4]

Under the language of the Interim Rules, a bank acting as an IRA custodian would be entitled to the trust exemption because it is treated as a "trustee" under section 408(h). The Interim Rules define the term "trustee capacity" for purposes of the trust exemption to include a bank acting as trustee for a tax-deferred account described in Section 408 of the Internal Revenue Code of 1986. The *Federal Register* notice accompanying the Interim Rules has created

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[2] *See* 29 C.F.R. § 2509.75-8, D-3; 26 U.S.C. § 4975(e)(3).
[3] 66 Fed. Reg. at 27, 772.
[4] 26 U.S.C. § 408(h).

confusion, however, by stating that the exemption "does not apply to IRA custodians."[5]

We urge the Commission to clarify that the exemption *does* apply to IRA custodians, as provided in the Interim Rules. Absent such a clarification, many banks may feel compelled to change their IRA agreements with customers to substitute trust agreements for custodial agreements, but without any change in the services they provide. Such an effort would be costly, disruptive and potentially confusing to customers, and would seem an unreasonable and unnecessary burden on bank trust departments attempting to comply with the terms of the trust exemption.

In any event, as noted below, we believe that banks offering custodial IRA accounts are covered by the GLBA exemption for custody activities.

Account-by-Account Analysis for "Chiefly Compensated" Test

Many of Federated's clients have expressed concern that it would be excessively burdensome to comply with the "chiefly compensated" test on an account-by-account basis as required by the Interim Rules. Although banks typically maintain fixed fee schedules, generally based on assets under management, many banks vary their prices by offering discounted fee arrangements on a customer-by-customer basis, resulting in a wide range of fee variations. Moreover, a single customer may maintain several accounts with a bank that are priced differently.

The task of evaluating thousands of accounts to ensure compliance with the "chiefly compensated" test would be especially burdensome given the broad definition of "sales compensation" included in the Interim Rules.

Treatment of Fee Waivers and Discounts

As noted, bank trust departments often discount their trust account fees in order to take into account the bank's relationship with the trust customer, the size of the trust account or other factors. Bank trust departments also may grant fee waivers, rebates or credits with respect to accounts that are invested in mutual funds that pay fees to the bank or its affiliates. A bank may offset 12b-1 fees against trustee fees in order to comply with Department of Labor interpretations under ERISA, for example.[6]

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[5] 66 Fed. Reg. at 27,768 n. 83.
[6] *See, e.g.*, DOL Advisory Opinion 97-15A (Frost National Bank) (May 22, 1997).

The Interim Rules do not address how such fee discounts, waivers, rebates, credits, or offsets are treated for purposes of the "chiefly compensated" test. In particular, the Rules do not indicate whether such fee concessions should be subtracted from a bank's compensation and, if so, whether the deduction should be made from "relationship compensation" or "sales compensation."

How a fee concession is characterized could determine whether a bank satisfies the chiefly compensated test or not. Assume, for example, that a bank receives $1000 in trustee fees from a trust account and $500 in 12b-1 service fees from a mutual fund in which the trust account has invested. Assume further that the bank credits the trust account with the $500 to offset the 12b-1 fees. If the definition of sales compensation in the Interim Rules remains unchanged, the bank will fail the chiefly compensated test because its relationship compensation will not exceed its "sales compensation." On the other hand, if the bank does not reduce its trust account fee but instead waives the $500 in 12b-1 fees, the bank will satisfy the "chiefly compensated" test because all of its compensation will be in the form of relationship compensation. In both cases, the bank is receiving, and the customer is paying, $1000 in fees.

This anomaly demonstrates the complexity of the chiefly compensated test and its uncertain implications for the structuring of trustee compensation arrangements. The chiefly compensated test should not become a determinative factor in how banks structure their trustee fees and we would urge the Commission to consider whether the chiefly compensated test in the Interim Rules can be revised to avoid this result.

10 Percent Safe Harbor

Based on an informal survey of its bank clients, Federated believes that the 10 percent safe harbor concept in the Interim Rules would mitigate the compliance burden of the chiefly compensated test for many banks. Most of the banks Federated queried indicated that "sales compensation" represents less than 10 percent of their "relationship compensation" from fiduciary activities. Some of the banks indicated that they would feel more comfortable with a 15 percent safe harbor, however, in order to provide a larger margin for error due to uncertainty about the treatment of mutual fund fees for purposes of the chiefly compensated test.

Notwithstanding the benefits of the safe harbor, Federated is concerned that the procedural requirements of the safe harbor may substantially diminish its value as a relief measure. As we understand, the intent of the safe harbor is to eliminate the need for an account-by-account calculation to determine compliance with the chiefly compensated test. The procedural requirements, however, would require a bank to conduct such a calculation any time the bank changes its fees, which could be on an annual or more frequent basis. In addition, in applying the 10 percent test, a bank must review each account to exclude charges for non-securities transaction services, such as tax preparation, estate administration and other special services. The procedural requirements thus will result in a substantial compliance burden that may defeat the purpose for which the safe harbor was intended.

Accordingly, we would urge that the Interim Rules be amended to either eliminate the review procedures altogether or allow a bank to adopt an across-the-board fee increase without triggering the need for an account-by-account compliance review.

Investment Advisory Accounts

Under the Interim Rules, the trust exemption applies to an investment advisory account only if the bank provides "continuous and regular investment advice to the customer's account that is based on the individual needs of the customer" and the bank owes a duty of loyalty. As a preliminary matter, we note that this limitation on the exemption is not imposed by the statutory language of GLBA and may create uncertainty as to the scope of the exemption. Nevertheless, it appears to harmonize with past precedents of the Office of the Comptroller of the Currency describing the investment advisory activities of national banks[7] and is consistent with Federated's understanding of how such activities are performed by bank trust departments.

The *Federal Register* notice accompanying the Interim Rules indicates that a bank, in determining whether it provides "continuous and regular" investment advice, may rely on the standard used under the Investment Advisers Act for measuring when an investment adviser has "assets under management" of $25 million or more and thus is required to register with the Commission under the Investment Advisers Act.[8] For purposes of the Investment Advisers Act, "assets under management" are defined to mean accounts as to which the adviser provides "continuous and regular supervisory or management services."[9] The instructions to Form ADV provide examples of when an adviser may be deemed

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[7] *See, e.g.*, OCC Fiduciary Precedent 9.2100 stating that a national bank's investment department "will make continuous reviews and recommendations as to the holdings in a customer's portfolio, and arrive at an investment and general policy to be applied to each account."

[8] 66 Fed. Reg. at 27,771.

[9] 15 U.S.C. § 80b-3a.

to provide continuous and regular supervisory or management services for an account, including when the adviser:

> Has discretionary authority to allocate client assets among various mutual funds; or
>
> Does not have discretionary authority, but provides the same allocation services and has ongoing responsibility to select or make recommendations, based on the needs of the client, as to specific securities or other investments the account may purchase and sell and, if such recommendations are accepted by the client, is responsible for arranging or effecting the purchase or sale.

Federated believes that this guidance is useful to the extent that it would appear to encompass within the trust exemption most asset allocation services provided by bank trust departments.

We note that the Form ADV instructions indicate that an adviser is deemed *not* to provide "continuous and regular" supervisory or management services if it makes an initial asset allocation without continuous and regular monitoring and reallocation. We assume that the periodic rebalancing of asset allocation models by banks would be viewed as providing "continuous and regular" investment advice for which a bank would retain the trust exemption. It would be helpful if the Commission clarified that this view is correct.

Federated does have some concern that the "continuous and regular" requirement may create undesirable pressure on banks to recommend more frequent transactions in a customer's investment account than otherwise would be appropriate under sound investment principles. Many bank customers invest for the long-term and follow a "buy and hold" investment strategy in accordance with advice given by their investment counselors (and innumerable investment newsletters). Most investors understand that it is unwise to make frequent changes in their holdings because of the transaction costs and the risks of chasing the market by "selling low and buying high." Indeed, broker-dealer regulation discourages frequent trading by prohibiting "churning" of customer accounts. The Commission ought not to adopt a regulation that encourages unnecessary trading in a customer's account.

To avoid this possibility, we would urge the Commission to consider adopting a safe harbor rule under which a bank would be deemed to satisfy the requirements of the exemption if it reviews a customer's investment advisory account at least annually to determine whether the customer's investments remain appropriate in light of the customer's investment objectives and financial needs.

Recordkeeping Requirements

The Gramm-Leach-Bliley Act requires the federal banking agencies, after consulting with the Commission, to adopt recordkeeping requirements to ensure compliance by banks relying on the exceptions from broker-dealer regulation. The banking agencies are required to make available compliance information to the Commission upon request.

In view of this statutory mandate, it seems evident that Congress intended the Commission to rely on the banking agencies to ensure compliance with the exemptions rather than adopt its own compliance requirements, consistent with the separate scheme of federal banking supervision and regulation. To the extent that a bank is exempt from broker-dealer registration, the bank is not within the Commission's jurisdiction. The adoption by the Commission of separate compliance requirements would represent a major shift of jurisdiction that we do not believe Congress intended. Congress directed the banking agencies to consider the Commission's views in adopting recordkeeping requirements, and we would encourage the Commission to work with the banking agencies in establishing appropriate requirements designed fulfill the statutory intent.

Treatment of Escrow Activities

Banks frequently act as escrow agents for various business purposes. In this capacity, they act in a manner similar to that of an indenture trustee, holding and investing funds in no-load money market mutual funds according to the instructions of parties to a business transaction. In many cases, under a negotiated fee arrangement, the bank may rely on mutual fund fees rather than account fees as its primary compensation for performing escrow services, thus facing the same difficulty as indenture trustees in complying with the "chiefly compensated" test.

The Gramm-Leach-Bliley Act defines "fiduciary capacity" for purposes of the trust exemption to include "any other similar capacity" in addition to the fiduciary capacities specifically enumerated in the statute. A bank performing escrow services is acting in a "similar capacity" to an indenture trustee. Although the bank's role as escrow agent is primarily ministerial and its fiduciary duties are limited, the functions performed by the bank involve the same recordkeeping, custodial, and asset management functions of an indenture trustee. To the extent that the bank effects transactions in securities, such transactions are incidental to the bank's role as escrow agent. The typical escrow agreement is not entered into for the purpose of buying and selling securities but rather as a means of facilitating a business transaction through a trusted third party.

We do not believe that Congress intended to force banks to transfer their traditional escrow agent services to broker-dealer affiliates which, in many cases, lack familiarity with the types of business transactions that utilize escrow services and are ill-equipped to perform the duties of an escrow agent. Accordingly, we urge the Commission to adopt an exemption for escrow agent services similar to that for indenture trustees.

Custody Exemption

The exemption in the Gramm-Leach-Bliley Act for bank custodial activities specifically exempts a bank from broker-dealer registration when the bank "as part of customary banking activities . . . 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." The Commission has interpreted this exemption as not allowing a bank to effect securities transactions in its capacity as a custodial trustee for IRA accounts.

As noted above, we believe the trust exemption covers a bank when it acts as a custodial trustee for IRA accounts because the Internal Revenue Code deems the bank to be a "trustee." We also believe that the custody exemption covers a bank acting as a custodial trustee for IRA accounts.

The GLBA exemptions apply only if a bank is acting as a "broker." If the bank is not acting as a broker, the bank is not subject to broker-dealer registration and the exemptions are irrelevant to the bank's activities. The term "broker" is defined in the Securities Exchange Act of 1934 Act to mean "any person engaged in the business of effecting transactions in securities for the account of others."[10] Accordingly, if a bank is not "effecting transactions in securities," the bank is not subject to broker-dealer registration and does not need an exemption. The GLBA exemptions—including the custody exemption—thus must be read as exempting activities that involve "effecting transactions in securities."

The custody exemption may be read as allowing only limited "effecting transactions in securities" in the case of certain custodial functions of banks, such as securities lending or borrowing, where the exemption includes limiting language. The custody exemption for IRA accounts, however, is not so limited.

[10] 15 U.S.C. § 78c(a)(4)(A).

Whether under the trust or custody exemption, Congress clearly intended to allow banks to continue effecting transactions in securities for custodial IRA accounts. As stated in the Senate Banking Committee Report on the Gramm-Leach-Bliley Act:

> The Committee does not believe that an extensive "push-out" of or restrictions on the conduct of traditional banking services is warranted. Banks have historically provided securities services largely through their trust departments, or as an accommodation to certain customers. Banks are uniquely qualified to provide these services and have done so without any problems for years. . . . Under IRS regulations, banks must offer self-directed Individual Retirement Accounts ("IRAs") in either a trustee or custodial capacity. Services rendered as a trustee do not require registration as a broker-dealer to the extent that these services fall within the trust exemption. The Committee believes that bank custodial, safekeeping, and clearing activities with respect to IRAs do not need to be pushed-out into a Commission registered broker-dealer.[11]

It is highly unlikely that Congress would have provided an exemption allowing banks to act as custodians for IRA accounts without allowing them to effect transactions for such accounts. There simply is no market for an IRA account that does not allow the account holder to conduct transactions in the account. Such an IRA account does not exist.

Accordingly, we would urge the Commission to interpret the custody exemption to allow banks acting as custodial trustees for IRA accounts to effect transactions for such accounts.

Transactions by Bank-Affiliated Broker-Dealers

The *Federal Register* notice accompanying the Interim Rules cites an interpretive letter of the Office of the Comptroller of the Currency in which the OCC took the position that a national bank may not effect securities transactions for trust accounts through an affiliated broker-dealer, even on a nonprofit basis.[12] As a point of clarification, we note that the OCC has changed its position and now permits national banks to effect transactions for trust accounts through affiliated broker-dealers on a nonprofit basis. The OCC's new position is reflected in the

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[11] S. Rep. No. 106-44, 106th Cong., 1st Sess. 10 (1999).

[12] 66 Fed. Reg. at 27,774, n. 139, *citing* OCC Trust Interpretive Letter No. 273 (Sept. 23, 1992).

OCC's *Handbook on Conflicts of Interest* in which national bank examiners are instructed as follows:

> If the bank uses an affiliated broker to effect securities transactions for fiduciary accounts, determine that:
>
> - Applicable law does not prohibit the use of an affiliated broker to effect securities transactions;
> - The bank's payment of affiliated broker's fees for effecting brokerage transactions cover the cost of effecting the transaction and no more. Under no circumstances, unless authorized by applicable law, should the bank or its brokerage affiliate profit from a securities transaction effected for a fiduciary account.
> - The bank's records establish, through a detailed cost analysis, that the amount of the fee charged by the affiliated broker is justified by the cost of the securities transactions executed. All fees paid to an affiliated broker should be clearly disclosed. The bank should also ensure, when applicable, that the affiliated broker adheres to the NASD's best execution requirement.[13]

Conclusion

The Interim Rules offer many accommodations to traditional banking activities while serving the investor protection objectives of the Securities Exchange Act of 1934, consistent with the intent of Congress in the Gramm-Leach-Bliley Act. We have commented on certain areas where we believe additional clarification or relief to bank trust departments is needed.

Federated appreciated this opportunity to comment on the Interim Rules and would be pleased to answer any questions or provide additional information on the issues we have addressed at your request.

Sincerely,

Melanie L. Fein

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[13] OCC *Handbook on Conflicts of Interest* (June 12, 2000) at 22.

cc: Eugene F. Maloney, Esq.
Executive Vice President and Corporate Counsel
Federated Investors, Inc.

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Admitted in Virginia and the District of Columbia

March 30, 2001

Robert Colby
Deputy Director
Catherine McGuire
Associate Director and Chief Counsel
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Mail Stop 10-1
Washington D.C. 20549

Dear Mr. Colby and Ms. McGuire:

On behalf of my client, Federated Investors, Inc., I hereby request an exemption pursuant to Section 15(a)(2) of the Securities Exchange Act of 1934 (the "Act") from the broker-dealer registration provisions of the Act with respect to the purchase by banks, acting solely at the direction of an issuer of indenture securities under the Trust Indenture Act of 1939, of shares of open-end investment companies registered under the Investment Company Act of 1940 and that hold themselves out as money market mutual funds ("money market mutual funds") and for which Federated acts as investment adviser, when the bank receives all of its compensation for acting as indenture trustee in the form of service fees paid by such funds and/or Federated.

As you know, for the reasons we have previously communicated to you, we believe that a bank in such circumstances is entitled to the bank trust exemption under Title II of the Gramm-Leach-Bliley Act. Nevertheless, we understand that the Staff may not agree with our view and would prefer to address this matter in the context of an exemption request under Section 15(a)(2) of the 1934 Act. Accordingly, we are hereby requesting such an exemption.

Background

Since 1977, Federated has been instrumental in securing the passage of laws in all 50 states permitting an indenture trustee that is required to invest bond proceeds in U.S. government obligations to effectuate such instructions through the use of money market mutual funds which hold otherwise eligible securities. Federated also has been successful, through a combination of litigation, legislation and administrative determinations, in having distributions from its funds retain their character as U.S. government interest for state tax purposes.

At the present time, virtually every corporate trustee has elected to utilize eligible money market mutual funds in lieu of buying Treasury bills directly since, by doing so, all amounts they administer can be placed in an interest-earning vehicle and they are relieved of the time-consuming and expensive task of matching the maturity of an instrument with the often unpredictable draw schedule of the project the bond proceeds are to finance.

Corporate trust is a scale business and is intensely competitive. For over a decade, it has been customary for trustees to receive substantially all of their compensation for providing services to the issuer and bondholders in the form of fund level shareholder or administrative service fees rather than fees directly charged to the issuer or bondholders.

Indenture Trustees are Fiduciaries

A bank acts in a fiduciary capacity when it serves as a trustee for an indenture under the Trust Indenture Act. Although the fiduciary obligations of the trustee generally are limited to the terms of the indenture and the trustee's role often is ministerial, the Trust Indenture Act and state trust laws impose standards of fiduciary conduct and responsibility on indenture trustees designed to protect and enforce the rights and interests of bondholders.

The Trust Examiner's Manual of the Federal Deposit Insurance Corporation states that performance as trustee under a bond indenture "is normally the only true trust relationship administered by a corporate trust department."[1] The FDIC's Manual describes the duties of an indenture trustee as follows:

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[1] FDIC, Trust Examiners Manual § 6 at 1.

- Arranging for the printing and issuance of the bond instruments
- Maintaining required records, accounts and documentation
- Paying principal and interest
- Holding beneficial title to collateral
- Safeguarding and appraising collateral
- Investing idle cash (if permitted or directed under the indenture)
- Ensuring the issue is in compliance with legal requirements
- Monitoring for default under the indenture during the life of the bonds
- Identifying and reacting properly if a default occurs.[2]

With respect to the maintenance of funds held pursuant to a bond indenture, the FDIC's Manual describes the indenture trustee's duties as follows:

> Many bond trusteeships involve the maintenance of separate funds, used for sinking funds, construction, building maintenance, etc. The assets of these funds are invested according to the provisions of the bond indenture. The bank trustee usually has little or no discretion in such investments. Proper separation of the various funds, investment of their assets, and administration of these funds is essential.
>
> The trustee must not only provide reports and recordkeeping for the obligor, but must also protect the interests of the bondholders. Reporting of distributions, and interest and dividend payments, to both tax authorities and security holders is also required of the trustee. These responsibilities are important since the trustee can be held liable if the bonds

[2] *Id.* at 3.

> default and subsequent loss is attributable to the trustee's negligence. The acts of omission as well as commission by the trustee are critical in the event of default.
>
> Many bond issues have become exceedingly complex, imposing a host of additional duties on bank trustees. For instance, credit enhancements such as letters of credit and municipal bond insurance may have their own requirements for the trustee. The risks of managing such issues must be adequately addressed by the bank and reviewed by the examiner.[3]

The FDIC's Manual states that "[a]s in all areas of fiduciary administration, the bank should formulate and have adopted by the trust committee and board of directors written policies regarding account acceptability, conflicts of interest, internal operations, auditing, and profitability.[4] The Manual provides guidance as to appropriate policies in this regard.

Exemption Request

The exemption from broker-dealer registration for bank trust activities enacted in the Gramm-Leach-Bliley Act reflects a Congressional determination to allow banks to continue their traditional fiduciary activities without registering as broker-dealers.[5] The Staff has indicated, however, that the trust exemption may not apply when a bank trustee receives more than 50 percent of its compensation from fund level fees as opposed to account level fees.

Without necessarily agreeing with the Staff's view, we are requesting an exemption under Section 15(a)(2) of the 1934 Act to remove any doubt that a bank would be required to register as a broker-dealer when purchasing shares of Federated's money market mutual funds in the bank's capacity as indenture trustee and receiving all of its compensation for acting as indenture trustee in the form of service fees paid by such funds and/or Federated.

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[3] *Id.* at 8-9.
[4] *Id.* at 6.
[5] 15 U.S.C. § 78c(a)(4)(ii), *as amended by* Title II of the Gramm-Leach-Bliley Act.

Under Section 15(a)(2) of the 1934 Act, the Commission may exempt from broker-dealer registration any broker or dealer or class of brokers or dealers as it deems consistent with the public interest and the protection of investors. We believe that an exemption allowing banks to purchase money market mutual funds in their capacity as indenture trustees would be consistent with the public interest and the protection of investors.

Banks perform a valuable public service when acting as indenture trustees. The ability to utilize eligible money market mutual funds in lieu of buying Treasury bills directly is an important tool that enables bank trustees to administer indenture trust funds more efficiently consistent with the purposes of the Trust Indenture Act. As noted above, by placing funds in a managed investment vehicle with a stable net asset value such as a money market mutual fund, banks are relieved of the time-consuming and expensive task of matching the maturity of an instrument with the often unpredictable draw schedule of the project the bond proceeds are to finance. An exemption from broker-dealer registration would allow banks to continue their traditional role as indenture trustees without altering the form of compensation they receive in the form of fund level compensation rather than account level fees.

Investor protection concerns are not raised when banks purchase shares of mutual funds as indenture trustees because of the fiduciary context that governs the activities of banks under the Trust Indenture Act. Moreover, a bank acting as indenture trustee does not deal directly with individual investors, render investment advice to individual investors or handle any individual investor funds other than in connection with its duties under the trust indenture. The bank's employees do not receive any commissions or transaction-based compensation when acting in the bank's capacity as indenture trustee. Any securities transactions effected by the bank acting as indenture trustee arise not because a customer has come to the bank for brokerage or investment services, but because the bond issuer has selected the bank for its services as indenture trustee. The concerns that broker-dealer registration is intended to address are not present and no regulatory purpose would be served by requiring bank indenture trustees to register as broker-dealers when they invest funds held pursuant to a trust indenture in mutual funds.

We note that the Gramm-Leach-Bliley Act expressly exempted banks from broker-dealer registration when they offer sweep arrangements utilizing money market mutual funds.[6] The exemption is limited to money market mutual funds presumably because of the nature of such funds as highly liquid cash substitutes. The exemption reflects a Congressional determination that such arrangements do not give rise to the concerns that broker-dealer regulation was intended to address.

Congress also exempted banks with respect to transactions in exempted securities,[7] including primarily U.S. treasury securities, in recognition that such transactions do not give rise to broker-dealer regulatory concerns. Money market mutual funds that invest solely in U.S. Treasury securities have been viewed as the functional equivalent of exempted securities in many contexts, including state laws governing investments by indenture trustees and in interpretations of the Glass-Steagall Act.[8]

Conclusion

Based on the foregoing, we respectfully request an exemption under Section 15(a)(2) of the Securities Exchange Act of 1934 to allow banks acting as indenture trustees pursuant to the Trust Indenture Act of 1939 to invest assets held under a trust indenture in money market mutual funds for which Federated acts as investment adviser notwithstanding that such banks receive all of their compensation for such services in the form of asset-based service fees paid by such mutual funds and/or Federated.

Your attention to this matter is greatly appreciated.

Sincerely,

Melanie L. Fein

Melanie L. Fein

cc: Lourdes Gonzales

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[6] 15 U.S.C. § 78c(a)(4)(v), *as amended by* Title II of the Gramm-Leach-Bliley Act.
[7] 15 U.S.C. § 78c(a)(4)(iii), *as amended by* Title II of the Gramm-Leach-Bliley Act.
[8] *See, e.g.*, OCC Circular 220 (Nov. 21, 1986) and 12 C.F.R. § 208.124, allowing banks to purchase for their own account mutual funds that invest in government securities, based on the authority of banks to invest directly in government securities under the Glass-Steagall Act.

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Admitted in Virginia and the District of Columbia

March 13, 2001

Robert L. D. Colby, Deputy Director
Catherine McGuire, Associate Director and Chief Counsel
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
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Washington D.C. 20549

Dear Mr. Colby and Ms. McGuire:

On behalf of my client, Federated Investors, Inc. ("Federated"), I hereby request your confirmation that the Staff of the Division of Market Regulation concurs with our view that that a bank may act as trustee for participant-directed employee pension benefit plans pursuant to ERISA ("401(k) plan accounts") and as trustee/custodian for self-directed individual retirement accounts ("IRAs"), as described below, without registering as a broker-dealer under the Securities Exchange Act of 1934 (the "1934 Act").

Federated is the sponsor and distributor of the Federated family of investment companies registered under the Investment Company Act of 1940 ("mutual funds") with approximately $130 billion in total assets under management. Many of Federated's mutual funds are made available through 401(k) plan accounts and IRAs trusteed by banks. Federated thus has an interest in the applicability of federal securities to such services at banks. The legal basis for our request is set forth in the enclosed memorandum. We appreciate your consideration and attention to this matter.

Sincerely,

Melanie L. Fein

cc: Lourdes Gonzalez
Eugene F. Maloney, Esq.
Executive Vice President and Corporate Counsel
Federated Investors, Inc.

EXEMPT STATUS OF BANKS ACTING AS TRUSTEES TO PARTICIPANT-DIRECTED 401(K) PLANS AND IRAS UNDER THE SECURITIES EXCHANGE ACT OF 1934

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Based on the following legal analysis, we believe that banks acting as directed trustees to self-directed 401(k) plans and individual retirement accounts (IRAs) are exempt from registration as broker-dealers under the Securities Exchange Act of 1934 ("1934 Act") in the circumstances described below.

I. Trust Exemption under Gramm-Leach-Bliley Act

Title II of the Gramm-Leach-Bliley Act ("GLBA") amended the1934 Act to eliminate the bank exemption from broker-dealer registration effective May 12, 2001. After that time, banks will become subject to broker-dealer registration under the 1934 Act if they engage in the "business of effecting transactions in securities for the account of others" and do not qualify for an exception under the Act.[1]

GLBA provided eleven exceptions from broker-dealer registration for banks. Among the exceptions is an exception for certain bank fiduciary activities—the so-called "trust exemption."[2] The trust exemption is available under the following conditions:

> 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 in other trust activities.[3]

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[1] 15 U.S.C. § 78c(a)(4), *as amended by* Title II of the Gramm-Leach-Bliley Act.
[2] 15 U.S.C. § 78c(a)(4)(B)(ii).
[3] 15 U.S.C. § 78c(a)(4)(B)(ii).

The exception for trust activities does not apply unless (i) the bank directs trades in publicly traded securities to a registered broker-dealer for execution, (ii) the trade is a cross trade or other substantially similar trade of a security that is made by the bank or between the bank and an affiliated fiduciary, and 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 the SEC's rules and regulations.[4] For purposes of this memorandum, we assume that these requirements are met by a bank that acts as directed trustee for participant-directed 401(k) plans and IRAs. We also assume that the bank will not publicly solicit brokerage business, other than by advertising that it effects transactions in securities in conjunction with advertising in other trust activities.

II. Description of Exempt Activities

A. Participant-Directed 401(k) Plan Accounts

A bank trust department that serves as directed trustee to participant-directed 401(k) plan accounts typically performs the following duties pursuant to instructions:

- opening and maintaining individual participant accounts
- receiving contributions from the plan sponsor and crediting them to individual participant accounts
- investing contributions in shares of mutual funds or other securities and reinvesting dividends and other distributions
- redeeming, transferring, or exchanging shares of mutual funds or other securities
- making distributions from the plan to participants or beneficiaries
- maintaining custody of the plan's assets.

A bank trust department also may perform the following services for 401(k) plans, depending on the particular arrangement with the employer/sponsor of the plan:

- withholding amounts on plan distributions

[4] 15 U.S.C. § 78c(a)(4)(C).

- making sure all plan loan payments are collected and properly credited
- conducting plan enrollment meetings
- preparing newsletters and videos relating to the administration of the plan; and
- providing investment education to plan participants.

A bank trustee offering such services generally will provide information to assist the employer that acts as the plan sponsor in developing a selection of mutual funds to be made available as investment options to the plan's participants. If the bank has its own family of mutual funds, the employer may include those funds among the fund options available to plan participants.

As a general matter, bank employees do not make investment recommendations or discuss the specific investments made by individual 401(k) plan participants other than to give account related information, take transaction orders, or provide investment education services of the type allowed under DOL guidelines. The activities of bank employees are restricted in order to limit the bank's liability in accordance with section 404(c) of ERISA. Under that section, a bank trustee is not liable for any loss that is the direct and necessary result of the plan participant's exercise of control of his or her own account. If the bank exercises discretion over plan investments or gives investment advice for a fee, however, the bank is not relieved of liability for 401(k) plan investment losses resulting from its breach of fiduciary duty. The incentive for a bank trustee of participant-directed 401(k) plan accounts thus is to avoid directing or controlling the plan's investments.

The only communication the bank trustee has with plan participants generally is for the purpose of enrolling participants and responding to telephone inquiries for current balance and account information, changes in investment elections, withdrawals and terminations. The bank also may mail periodic account statements and otherwise perform administrative functions necessary to administer the accounts as described above. In the case of a 401(k) plan where the participant may invest in individual securities, the bank may take purchase and sale orders from the participant to be executed through a broker-dealer.

Bank employees who deal with 401(k) plan accounts are compensated on a normal salary plus bonus basis and do not receive any transaction-based compensation. Accordingly, there is no incentive for bank employees to "churn" 401(k) plan accounts.

All prospectuses and other information relating to the mutual funds within the menu of funds available to 401(k) plan participants are prepared by a registered broker-dealer (typically an affiliate of the mutual fund sponsor) and are delivered to the plan sponsor to be distributed to the plan participants. In some cases, the plan sponsor may ask the broker-dealer or the bank trustee to mail the information directly to the plan participants.

In some cases, the plan sponsor, in conjunction with the mutual fund sponsor or its broker-dealer affiliate and/or the bank trustee, may hold educational seminars for the purpose of educating 401(k) plan participants as to the investment options available under the plan and explaining the process for making investments and answering questions. Such seminars are conducted in accordance with DOL guidance on participant investment education and no individualized investment recommendations or advice is given to plan participants at such seminars.[5]

Although the fee structures applicable to 401(k) plans may vary,[6] a bank acting as a trustee to a participant-directed 401(k) plan generally is compensated by a fee calculated as a percentage of the participant's plan assets maintained by the bank. The fee may be charged to or debited from each plan participant's account or charged t the plan sponsor.

In addition, pursuant to the conditions described in DOL Advisory Opinions 97-15A and 97-16A,[7] bank trustees that offer Federated mutual funds within the menu of funds available to 401(k) plan participants may receive fees from Federated for performing shareholder services in connection with investments in such funds by plan participants. Such services include recordkeeping and subaccounting services, processing of mutual fund purchase and redemption transactions, and providing mutual fund prospectuses and other enrollment materials to plan participants. Other mutual fund families pay similar shareholder service fees also.

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[5] *Id*. As noted in the DOL interpretive bulletin relating to participant investment education, the DOL's regulation relieving a plan fiduciary from liability in connection with participant directed-accounts is conditioned, in part, on the plan participants being provided with sufficient investment information regarding the investment alternatives available under the plan in order to make informed investment decisions. As the DOL stated, "[c]ompliance with this condition, however, does not require that participants and beneficiaries be offered or provided either investment advice or investment education."

[6] *See generally*, Pension and Welfare Benefits Administration, Study of 401(k) Plan Fees and Expenses: Final Report (April 13, 1998), prepared for PWBA by Economic Systems, Inc.

[7] DOL Advisory Opinion 97-15A (May 22, 1997) (Frost National Bank); DOL Advisory Opinion 97-16A (May 22, 1997) (Aetna Services, Inc.).

B. Self-Directed IRA Accounts

Bank trust departments also act as trustees for self-directed IRA accounts. A bank trust department acting in such a capacity generally performs recordkeeping, accounting and safekeeping duties similar to those for 401(k) plan accounts, subject to fiduciary standards imposed under section 408 of the Internal Revenue Code ("IRC"). The trust department does not exercise investment discretion with respect to such accounts, but is responsible for implementing the investment instructions of the IRA customer and fulfilling the requirements of section 408 of the IRC.

Bank trustees may charge administrative fees to self-directed IRAs and receive shareholder service fees on a basis similar to that for 401(k) plan accounts. Bank employees who deal with IRA customers are compensated on a normal salary plus bonus basis and do not receive any transaction-based compensation.

III. Discussion

For the following reasons, we believe that a bank acting as directed trustee to participant-directed 401(k) plan accounts and IRA accounts is acting in a fiduciary capacity and is entitled to rely on the trust exemption under the 1934 Act, as amended by GLBA.

A. A Bank Trustee Acts in a Fiduciary Capacity for Participant-Directed 401(k) Accounts

In general, ERISA requires that "all assets of an employee benefit plan shall be held in trust by one or more trustees."[8] A plan trustee is a "fiduciary" for purposes of ERISA if the trustee:

- exercises any discretionary authority or control over management of the plan or any authority or control over management or disposition of its assets;

- renders investment advice for a fee or other compensation, direct or indirect, with respect to any plan moneys, or has any authority or responsibility to do so; or

- has any discretionary authority or responsibility in the administration of the plan.[9]

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[8] 29 U.S.C. § 1103.

Even when a bank does not exercise discretionary authority or control over the investments by a 401(k) plan account, or render investment advice for a fee, the DOL takes the position that a bank acting as a directed trustee for an employee benefit plan is deemed to be a plan fiduciary under ERISA "by the very nature of his position."[10] As such, the bank is subject to fiduciary duties prescribed in ERISA, including the duty of loyalty and prudent man standard of care which state:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.[11]

ERISA contains prohibited transaction rules under which certain classes of transactions involving a "party in interest" or self-dealing or conflicts of interest are prohibited, even if they otherwise would be prudent and otherwise satisfy ERISA's fiduciary standards.[12] A "party in interest" includes a plan fiduciary and persons who provide services to a plan, among others.

The courts have held that the fiduciary duties established by ERISA should be broadly construed.[13]

A directed trustee of a 401(k) plan thus is deemed to be a fiduciary for purposes of ERISA even if the trustee does not provide investment advice for a

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[9] 29 U.S.C. § 1002(21)(A).
[10] *See* 29 C.F.R. § 2509.75-8, D-3.
[11] 29 U.S.C. § 1104(a).
[12] 29 U.S.C. § 1106.
[13] *See Martin v. National Bank of Alaska*, 828 F. Supp. 1427 (D. Alaska 1992).

fee, lacks investment discretion, and the plan participant directs the trustee with respect to investments. In such a case, although a directed trustee is relieved of fiduciary liability for the direct consequences of a participant's exercise of control under section 404(c) of ERISA,[14] the directed trustee is not relieved of its fiduciary status for other purposes under ERISA.

For example, a trustee of a participant-directed 401(k) plan is deemed to have residual fiduciary responsibility for determining whether a participant's investment instructions are proper in accordance with the plan documents and do not violate ERISA. In addition, under DOL regulations, the trustee may be responsible for determining whether participant instructions could jeopardize the plan's tax qualified status under the Internal Revenue Code, result in a direct or indirect purchase of securities issued by the employee's employer except as permitted under regulations, or result in a loss in excess of a participant's or beneficiary's account balance.[15] Furthermore, such a trustee remains subject to ERISA's fiduciary rules in connection with those aspects if the transaction that are not participant directed.[16] For example, if a participant gives investment instructions that may be carried out in more than one way, such as by not specifying a particular broker-dealer through which the trustee is to execute transactions, the trustee may be liable for engaging in a prohibited transaction if it uses an affiliated broker rather than an unaffiliated broker.[17]

The DOL has stated, therefore, "it is the view of the Department that a directed trustee necessarily will perform fiduciary functions."[18]

Moreover, to the extent the bank recommends to the plan sponsor the advisability of investing in particular funds, monitors the performance of the funds, and reserves the right to add or remove mutual fund families that it makes

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[14] 29 U.S.C. § 1104(c).
[15] 29 C.F.R. § 2550.404c-1(d).
[16] 29 C.F.R. § 2550.404c-1(f)(7).
[17] *Id*.
[18] DOL Opinion No. 97-15A (May 22, 1997) re Frost National Bank.

available in a manner described in DOL Advisory Opinion 97-15, the bank will be acting as a fiduciary of a self-directed 401(k) plan subject to fiduciary duties.[19]

B. A Bank Trustee Acts in a Fiduciary Capacity for Self-Directed IRAs

A bank that acts as a directed trustee to an IRA is a trustee and is subject to fiduciary standards under section 408 of the IRC. Section 408 states, "the term 'individual retirement account' means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries" subject to specified requirements.[20]

Section 408 further states that, "[f]or purposes of this section, a custodial account shall be treated as a trust if the assets of such account are held by a bank . . . and, if the custodial account would, except for the fact that it is not a trust, constitute an individual retirement account . . . . [I]n the case of a custodial account treated as a trust by reason of the preceding sentence, the custodian of such account shall be treated as the trustee thereof."[21]

The Internal Revenue Service ("IRS") takes the position that a trustee for a self-directed IRA is a fiduciary for purposes of the prohibited transaction rules under the IRC.[22] Such a trustee thus is subject to the prohibited transaction restrictions to the same extent as a trustee for a participant-directed 401(k) plan. A bank trustee for a self-directed IRA will incur liability for engaging in a prohibited transaction, for example, if it invests the account's assets in deposits of the bank unless the investment is expressly authorized by the account holder.[23] The DOL administers the prohibited transaction restrictions with respect to IRA trustees and has addressed various situations in which the prohibited transaction provisions may be applicable to a self-directed IRA trustee. For example, the

[19] DOL Opinion No. 97-15A (May 22, 1997) re Frost National Bank ("The Department points out that the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or express plan language, is not a direct or necessary result of any participant direction of such plan."). If the bank trustee does not make any recommendations concerning the selection of particular mutual funds but another plan fiduciary independently selects, from mutual fund families made available by the bank, particular funds to be made available for investment by plan participants, these duties will not arise if the bank gives notice to the plan sponsor before modifying the list of funds available for investment by plan participants. *See* DOL Advisory Opinion 97-16A (May 22, 1997). *See also* 29 C.F.R. § 2550.404c-1(f)(8).

[20] 26 U.S.C. § 408(a).

[21] 26 U.S.C. § 408(h).

[22] *See* 29 C.F.R. § 2509.75-8, D-3; 26 U.S.C. § 4975(e)(3).

[23] *See* 26 U.S.C. § 4975(d)(4).

DOL has addressed whether the purchase of parent company stock by a bank acting as an IRA trustee at the sole direction of IRA account holders would constitute a prohibited transaction.[24]

One of the requirements for an IRA is that the trustee be a bank or "such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section."[25] A registered broker-dealer is not eligible to serve as a trustee/custodian for IRA accounts, for example, unless it satisfies certain fiduciary requirements under regulations issued by the IRS pursuant to section 408. The fiduciary requirements applicable to nonbank IRA trustees demonstrate the extent to which the IRS views an IRA trustee which is a bank as exercising fiduciary obligations as part of its trustee role.

Under the IRS regulations, a nonbank trustee of an IRA must "demonstrate in detail its ability to act within accepted rules of **fiduciary** conduct."[26] The nonbank trustee must "assure the uninterrupted performance of its **fiduciary** duties"[27] and "have **fiduciary** experience or expertise sufficient to ensure that it will be able to perform its **fiduciary** duties."[28] Evidence of fiduciary experience must include "proof that a significant part of the business of the applicant consists of exercising **fiduciary** powers similar to those it will exercise if its application [to act as an IRA custodian/trustee] is approved" and "proof that the applicant employs personnel experienced in the administration of **fiduciary** powers similar to those the applicant will exercise if its application is approved."[29]

The IRS regulations establish "**rules of fiduciary conduct**" for nonbank IRA trustee/custodians.[30] Such rules provide the following, among other requirements:

> "The owners or directors of the applicant will be responsible for the proper exercise of **fiduciary** powers by the applicant." Rule 1.408-2(e)(5)(i)(A)(1).
>
> "All employees taking part in the performance of the applicant's **fiduciary** duties will be adequately bonded." Rule 1.408-2(e)(5)(i)(B).

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[24] *See* DOL Letter dated April 15, 1988 re Bank of Prattville, 1988 WL 192826 (E.R.I.S.A.).
[25] 26 U.S.C. § 408(a).
[26] 26 C.F.R. § 1.408-2(e)(2).
[27] 26 C.F.R. § 1.408-2(e)(2)(i).
[28] 26 C.F.R. § 1.408-2(e)(2)(iii).
[29] *Id*.
[30] 26 C.F.R. § 1.408-2(e)(5).

> "The applicant will employ or retain legal counsel who will be readily available to pass upon **fiduciary** matters and to advise the applicant." Rule 1.408-2(e)(5)(i)(C).
>
> "At least once during each period of 12 months, the applicant will cause detailed audits of the **fiduciary** books and records to be made by a qualified public accountant. At that time, the applicant will ascertain whether the **fiduciary** accounts have been administered in accordance with law, this paragraph, and sound **fiduciary** principles." Rule 1.408-2(e)(5)(iii)(A).
>
> "Funds held in a **fiduciary** capacity by the applicant awaiting investment or distribution will not be held uninvested or undistributed any longer than is reasonable for the proper management of the account." Rule 1.408-2(e)(5)(iv).
>
> "[T]he investments of each account will not be commingled with any other property." Rule 1.408-2(e)(5)(v).
>
> "The applicant must keep its **fiduciary** records separate and distinct from other records." Rule 1.408-2(e)(5)(vii).

These rules apply to "passive trustees" of IRA accounts as well as to IRA trustees with investment discretion.[31]

The courts have recognized that IRA trustees act in a fiduciary capacity. Courts have held, for example, that a bank acting as an IRA custodian may not set off a debt of the IRA owner against the balance in the IRA account because the bank is acting in a fiduciary capacity rather than the general corporate capacity in which it acted as lender.[32]

In another case, the court held that a bank's offering of an IRA collective investment fund "constitutes a 'sale of fiduciary services' rather than a mere 'sale of investments'" and thus was a permissible activity for a national bank.[33] The court based its decision on the following analysis:

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[31] 26 C.F.R. § 1.408-2(e)(6).

[32] *See In re Sopkin*, 57 B.R. 43 (Bkrtcy. D.S.C. 1985); *First National Bank of Blue Island v. Estate of Philp*, 436 N.E.2d 15 (Ill. 1982); *In re Todd*, 37 B.R. 836 (Bkrtcy. W.D.La. 1984).

[33] *Investment Co Institute v. Clarke*, 630 F. Supp. 593, 597 (D.C. Conn.), *aff'd* 789 F.2d 175 (2d Cir.), *cert. denied*, 479 U.S. 940 (1986).

> [The bank] is the trustee under Connecticut law of both the Fund and the individual IRA trusts and therefore is required to administer all of these trusts "with the care of a prudent investor." [citation omitted] As the Comptroller [of the Currency] observed in his decision,
>
> > Connecticut law imposes upon the Trustee significant fiduciary duties and obligations, including the duty to obey the donor's instructions, to protect the fund, to exercise due diligence, to be completely loyal to the interests of the beneficiaries, and to avoid being influenced by any third-party or personal interest which may conflict with duties as Trustee.
>
> Moreover, [the bank's] relationship to the Fund and to the individual IRA trusts is regulated under ERISA as well as under Connecticut law. For example, ERISA requires that the individual IRA trusts be established "for the exclusive benefit of an individual or his beneficiaries" pursuant to written governing instruments that satisfy specified requirements. 26 U.S.C. § 408(a)(1). The trustee bank is prohibited under the Internal Revenue Code from engaging in various forms of self-dealing with the trusts. *See* 26 U.S.C. § 4975. A person may contribute no more than $2,000 per year to an IRA trust. *See* 26 U.S.C. § 408(a)(1). The assets in an IRA trust can be distributed only when the individual trustor reaches age 59½, dies or becomes disabled unless he is willing to incur a substantial tax penalty. *See* 26 U.S.C. § 408(f). The trustor's interest in his IRA is not transferable except by death, *see* 26 U.S.C. § 408(a), and is not to be used as security for indebtedness. *See* 26 U.S.C. § 408(e)(4).[34]

C. In Both Cases, the Bank is Exempt

In the case of both 401(k) plans and IRAs, a bank trustee qualifies for the trust exemption under the 1934 Act, as amended by the Gramm-Leach-Bliley Act.

In both cases, 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."

[34] *Id*. at 595-96.

The term "fiduciary capacity" is defined in the 1934 Act, as amended by GLBA, and includes acting "in the capacity as trustee."[35] The GLBA definition is identical to the definition of "fiduciary capacity" in the Comptroller of the Currency's trust regulations.

In 1995, the OCC and other banking agencies clarified that the Interagency Statement on Retail Sales of Nondeposit Investment Products is inapplicable to fiduciary accounts administered by a depository institution. The agencies clearly viewed 401(k) and IRA accounts as trust accounts, stating that, although such accounts would not be subject to the Interagency Statement, "[h]owever, the disclosures prescribed by the Interagency Statement should be provided to non-institutional customers who direct investments for their fiduciary accounts, *such as self-directed individual retirement accounts.*" (emphasis added)

Whether acting as trustee for a self-directed 401(k) plan or an IRA, the bank 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."

In neither case is there any danger of churning or other types of abuses at which broker-dealer regulation is aimed. Because the bank generally is compensated on the basis of a flat fee or percentage of assets fee and its employees receive no transaction-based compensation, the kind of salesman's stake that one might find in the sale of securities by a broker-dealer is absent. Moreover, as noted above, when a bank acts as trustee to a 401(k) plan or IRA, the bank is subject to fiduciary standards under ERISA and the Internal Revenue Code, as well as state trust law, that protect against conflicts of interest and self-dealing. To the extent that a bank receives compensation from a mutual fund in connection with fund investments by 401(k) plans and IRAs for which it acts as trustee, any such compensation must be in accordance with fiduciary standards under ERISA, the Internal Revenue Code, and state trust law.

IV. Conclusion

Based on the foregoing, it is our view that a bank acting as trustee for a self-directed 401(k) plan or IRA is not subject to broker-dealer registration under the 1934 Act. The bank in both cases has the title of "trustee" and is acting in a

[35] 15 U.S.C. § 78c(a)(4)(D).

fiduciary capacity subject to the fiduciary requirements and prohibitions of ERISA, the Internal Revenue Code, and state trust law. The bank thus is entitled to rely on the trust exemption from broker-dealer registration under the 1934 Act, as amended by the Gramm-Leach-Bliley Act.

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Admitted in Virginia and the District of Columbia

March 7, 2001

Robert Colby
Deputy Director
Catherine McGuire
Associate Director and Chief Counsel
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Mail Stop 10-1
Washington D.C. 20549

Dear Mr. Colby and Ms. McGuire:

On behalf of my client, Federated Investors, Inc. ("Federated"), for the reasons indicated in the enclosed memorandum, I hereby request your confirmation that the Staff of the Division of Market Regulation concurs with our view that banks in their capacity as fiduciaries may offer managed asset services, as described in the enclosed memorandum, without registering as broker-dealers under the Securities Exchange Act of 1934 (the "1934 Act").

Federated is a sponsor and distributor of mutual funds with approximately $130 billion in total assets. Many of Federated's mutual fund products and services are made available through managed asset services offered by banks. Federated thus has an interest in the applicability of federal securities laws to such services. Given the approach of the May 12, 2001, effective date of Title II of the Gramm-Leach-Bliley Act, your timely attention to this matter is appreciated.

Sincerely,

Melanie L. Fein

Enclosure

cc: Lourdes Gonzalez
Eugene F. Maloney
Federated Investors, Inc.

MEMORANDUM IN SUPPORT OF REQUEST FOR CONFIRMATION THAT BANK ASSET ALLOCATION PROGRAMS ARE EXEMPT UNDER GLBA

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A. The Gramm-Leach-Bliley Act

As you know, Title II of the Gramm-Leach-Bliley Act ("GLBA") amended the Securities Exchange Act of 1934 ("1934 Act") to eliminate the bank exemption from broker-dealer registration effective May 12, 2001. After that time, banks will become subject to broker-dealer registration under the 1934 Act if they engage in the "business of effecting transactions in securities for the account of others" and do not qualify for an exception under the Act.[1]

GLBA provided eleven exceptions from broker-dealer registration for banks. Among these is an exception for certain bank fiduciary activities—the so-called "trust exemption."[2]

Federated believes that certain investment management services offered by bank trust departments in a fiduciary capacity, as described below, are covered by the trust exemption and requests the Staff's assurance that a bank may offer such programs without registering as a broker-dealer under the 1934 Act.

B. Bank Managed Asset Services

Managed asset services are an important part of the fiduciary services provided by bank trust departments to trust clients seeking asset allocation and investment management services. Such services involve the management of fiduciary assets in mutual funds through asset allocation models established by the bank's trust department based on investment advice and recommendations given to an individual client after a review of the client's specific financial situation, needs and objectives as reflected in an interview with the client and the client's responses to a questionnaire. Such services are offered subject to the standards of prudence, diversification and loyalty prescribed in the Uniform Prudent Investment Act as adopted by nearly all of the States.

In the typical managed asset relationship, if the trust department determines that the client's managed asset needs and objectives can best be met by investing in mutual funds, the trust department will recommend an allocation of the customer's assets among different mutual funds sponsored by Federated and/or other mutual fund sponsors based on an asset allocation model designed to meet the customer's particular profile. In the case of the Federated funds, customer assets are allocated among no-load funds with institutional or trust classes of fund shares.

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[1] 15 U.S.C. § 78c(a)(4), *as amended by* Title II of the Gramm-Leach-Bliley Act.
[2] 15 U.S.C. § 78c(a)(4)(B)(ii).

If the client agrees with the trust department's recommendations, the trust department will invest the client's assets in accordance with the recommended asset management model. The trust department exercises discretion in selecting the asset management models and mutual funds that are recommended to clients and also may exercise discretion in making periodic adjustments in the asset allocation models to reflect changing market conditions and economic assumptions. The trust department generally has the discretion to substitute different mutual funds into the asset allocation formula.

Transactions in connection with the trust department's managed asset services are directed to the appropriate mutual fund transfer or servicing agent for execution. In the case of the Federated funds, purchase and redemption transactions generally are handled by Federated Securities Corp., a registered broker-dealer. No brokerage commission is charged for investments in the Federated no-load funds.

Trust clients who utilize the trust department's managed asset services generally are charged a fee, payable to the trust department, equal to a percentage of the client's assets that are invested through the program. Such fees may be in the range of 100-150 basis points and compensate the bank for providing investment advice and recommendations relating to the client's asset management needs, developing or selecting appropriate asset management models, making adjustments in the models as necessary, processing transactions, responding to the client's inquiries concerning its account, monitoring the client's account, and otherwise handling the client's account.

If permitted by applicable fiduciary law, the trust department also may receive compensation from Federated or the relevant mutual fund sponsor in the form of a shareholder servicing or administration fee generally in the amount of 25 basis points or less. This fee compensates the bank for performing recordkeeping and subaccounting services that the fund's administrator or transfer agent otherwise would need to provide. In the case of the Federated funds, the fee is not a 12b-1 fee charged to fund assets. Rather, it is paid directly by a Federated affiliate from the affiliate's own revenues.

Managed asset programs of the type described frequently are offered by community banks that do not have the resources to establish and maintain a broker-dealer affiliate. The customers of these banks are accustomed to obtaining investment advice and management services from the bank's trust department and may be uncomfortable transferring their accounts to an unaffiliated securities broker-dealer. Some bank customers might even object to doing business with an affiliated brokerage firm given the different sales culture of broker-dealers generally.

The trust exception afforded by GLBA was intended to allow bank trust departments to continue serving these customers. In some small communities, broker-dealer services might not be conveniently available and, if customers cannot obtain managed asset services from their local bank, they may be deprived of convenient access to such services altogether.

C. Bank Managed Asset Services Satisfy the GLBA "Chiefly" Test and Advertising Restriction

Managed asset programs offered by bank trust departments as described herein generally comply with the requirements as to compensation under the trust exception. Specifically, the trust department is "chiefly" compensated for such transactions in a manner consistent with fiduciary principles on the basis of an administration or annual fee or a percentage of assets under management. In the cases of which Federated is aware, more than 50 percent of the trust department's compensation from each account comes from a fee based on assets under administration. The shareholder servicing fee paid by Federated in no case exceeds fifty percent of the trust department's total compensation for asset allocation services for any single account, and is an asset based fee in any event.

In accordance with the trust exception under GLBA, bank trust departments that offer managed asset programs in reliance on the trust exception will comply with the provision in GLBA under which they may not "publicly solicit brokerage business other than by advertising that they effect transaction in securities in conjunction with advertising other trust services."

D. The Literal Language of GLBA Exempts Bank Managed Asset Services Regardless of Whether They Are Discretionary or Non-Discretionary

The literal language of the trust exception makes clear that managed asset services programs of the type described herein are entitled to the trust exception regardless of whether they are discretionary or nondiscretionary. The trust exception is applicable when a bank effects transactions in a trustee capacity or "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 meets certain other requirements. The term "fiduciary capacity" is expressly defined in the 1934 Act, as amended by GLBA, to include acting "as an investment adviser if the bank receives a fee for its investment advice":

> [T]he term 'fiduciary capacity' means—
>
> 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***;
>
> in any capacity in which the bank possesses investment discretion on behalf of another; or
>
> in any other similar capacity.[3]

Accordingly, under the literal language of the 1934 Act, a bank trust department is not required to possess investment discretion when acting as an investment adviser in order to qualify for the trust exception. The statute does not state that the bank, when acting as an investment adviser, must possess discretion in order to be deemed to be acting in a fiduciary capacity. Investment discretion is required if a bank is relying on clause (ii) of the definition of "fiduciary capacity" but not clause (i). Under rules of statutory construction, the omission of any reference to investment discretion in clause (i) may be construed to mean that Congress intended to omit it. If an investment adviser were required to possess discretion in order to be deemed to be acting in a fiduciary capacity for purposes of the trust exception, then the reference to investment advisers in clause (i) would be redundant and have no meaning.

This reading of the trust exception is consistent with Congressional intent as reflected in the legislative history of GLBA. The Senate Banking Committee Report indicates that Congress did not intend to force bank trust departments to dramatically alter their product offerings as a result of GLBA:

> The Committee does not believe that an extensive "push-out" of or restrictions on the conduct of traditional banking services is warranted. Banks have historically provided securities services largely through their trust departments, or as an accommodation to certain customers. Banks are uniquely qualified to provide these services and have done so without

[3] 15 U.S.C. § 78c(a)(4)(D) (emphasis added).

> any problems for years. Banks provided trust services under the strict mandates of State trust and fiduciary law without any problems long before Glass-Steagall was enacted; there is no compelling policy reason for changing Federal regulation of bank trust departments, solely because Glass-Steagall is being modified.[4]

The Conference Report on GLBA also makes clear that the trust exception is to be construed in such a manner as to avoid disrupting the services offered by bank trust departments: "The Conferees expect that the SEC will not disturb traditional bank trust activities. . . ."[5]

E. Investment Advice is a Fiduciary Activity under OCC Trust Regulations and ERISA

Under the trust regulations of the Comptroller of the Currency, a national bank that provides investment advice for a fee is deemed to be acting in a fiduciary capacity.[6]

Similarly, under the Employee Retirement Income Security Act of 1974 ("ERISA"), a person that provides investment advice for a fee to an employee benefit plan or exercises discretionary authority with respect to a plan is deemed to be a fiduciary.[7] The Department of Labor has indicated that a bank trustee offering managed asset services to participant-directed ERISA plan accounts may be deemed to be exercising discretionary authority if it reserves the right to add or remove mutual funds that it makes available to the plan accounts, even if the trustee does not recommend specific fund investments to individual plan participants.[8]

F. The Supreme Court and SEC Have Long Treated Investment Advice as a Fiduciary Service

The Supreme Court as long ago as 1963 made clear that an investment adviser is a fiduciary.[9] The SEC itself has long treated investment advisers as

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[4] S. Rep. No. 106-44, 106th Cong., 1st Sess. 10 (1999).
[5] H. Rep. No. 106, 434, 106th Cong., 1st Sess. 164 (1999).
[6] 12 C.F.R. § Pt. 9.
[7] 29 U.S.C. § 1002(21)(A).
[8] DOL Advisory Opinion 97-15A (May 22, 1997) (Frost National Bank). In such cases, however, the bank trustee is relieved of responsibility for the plan participant's investment decisions, but is otherwise a fiduciary. *Id*. at n. 9, citing 57 Fed. Reg. 46,906, 46,924 n. 27 (1992).
[9] *SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 191, 194 (1963).

acting in a fiduciary capacity regardless of whether they possess investment discretion.[10]

G. The SEC Does Not Require Non-Bank Investment Advisers to Register as Broker-Dealers When They Offer Asset Allocation Programs

The SEC does not require investment advisers that offer asset allocation programs to register as broker-dealers, even when such programs are non-discretionary. The SEC has taken the position that an investment adviser is not engaged in "effecting" securities transactions and is not required to register as a broker-dealer merely because it has discretionary authority to place orders with brokers and to execute securities transactions for client accounts without specific compensation for this function.[11]

A contrary position would require thousands of investment advisers to register as broker-dealers and would undermine the scheme of separate regulation of investment advisers and broker-dealers enacted by Congress. An inequitable regulatory scheme would result if the SEC required banks but not investment advisers to register as broker-dealers when they provide asset allocation services.

H. Broker-Dealer Registration Does Not Hinge on Whether a Broker is Exercising Discretion

Broker-dealers are required to register under the 1934 Act regardless of whether they exercise discretion. The definition of "broker" under the 1934 Act means "any person engaged in the business of effecting transactions in securities for the account of others" unless an exception applies.[12] The exercise of investment discretion is not a criterion in the basic registration requirement for broker-dealers.

I. A Contrary Position Would Negate the Exemption for Banks from Registration under the Investment Advisers Act

[10] 59 Fed. Reg. 13,464, 13, 469 (1994) ("Investment advisers are fiduciaries . . .").
[11] *See* Release No. IA-1000 (Dec. 5, 1985), 50 Fed. Reg. 49,835 49,839 (1985). An investment adviser thus may act in the role of an introducing broker without being required to register as a broker-dealer.
[12] Securities Exchange Act 3(a)(4)(A), *codified at* 15 U.S.C. § 78c(a)(4)(A).

A position that banks must register as broker-dealers if their trust departments offer managed asset services would have the effect of subjecting bank investment advisory activities to SEC regulation under the Investment Advisers Act of 1940 ("Advisers Act"), contrary to the express statutory exemption for banks from such regulation. Although GLBA repealed the bank exemption from broker-dealer registration under the 1934 Act, it did *not* repeal the bank exemption from investment adviser registration under the Advisers Act.

A broker-dealer is required to register as an investment adviser if it offers a discretionary or non-discretionary asset allocation program. Broker-dealers may perform advisory services without registering under the Advisers Act only if the advisory services are "solely incidental" to the conduct of a securities brokerage business and the broker receives no "special compensation" for advisory services.[13] SEC no-action letters and releases indicate that the offering of an asset allocation program is not "solely incidental" to the conduct of a securities brokerage business[14] and thus a broker-dealer that offers such a program is required to register as an investment adviser.[15]

Accordingly, while bank managed asset services are subject to neither the 1934 Act nor the Advisers Act under the Gramm-Leach-Bliley Act, they would become subject to both acts if the trust exception is interpreted by the Staff in such a way as to require such programs to be transferred to a registered broker-dealer that must also register as an investment adviser.

J. Bank Trust Departments are Subject to Fiduciary Duties and Standards That Protect Customers Who Utilize Managed Asset Services

Bank trust departments are subject to strict standards of fiduciary conduct under state trust law when they provide managed asset services to fiduciary customers. In addition to standards of prudence under the Prudent Investor Rule, bank fiduciaries are subject to the duty of loyalty which requires a fiduciary to act solely in the interests of the beneficiary and to refrain from self-dealing.

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[13] Investment Advisers Act § 202(a)(11)(c).

[14] Investment Management & Research, Inc. (pub. avail. Jan. 27, 1977), *cited in* Townsend and Associates, Inc. (pub. avail. Sept. 21, 1994); Investment Advisers Act Release No. 471 (Aug. 20, 1975), *cited in* Townsend and Associates, Inc.

[15] *See* Investment Advisers Act Release No. 1401 (Jan. 13, 1994); National Regulatory Services, Inc. (pub. avail. Dec. 2, 1992).

These fiduciary standards applicable to bank trust departments include a duty to ensure that recommended investments are suitable for investment advisory customers. Although the SEC at one time proposed imposing a suitability standard on investment advisers registered under the Investment Advisers Act of 1940, the proposal never was adopted.[16] Bank trust departments thus are subject to a higher standard of fiduciary conduct than an investment adviser.

While bank trust departments are exempt from broker-dealer and investment adviser registration, they are not exempt from the anti-fraud provisions applicable to broker-dealers and investment advisers under the federal securities laws. Moreover, to the extent that most trust department managed asset services involve investments in mutual funds, fiduciary clients benefit from all of the disclosure and other requirements that protect mutual fund shareholders under the Investment Company Act of 1940.

Accordingly, bank customers who avail themselves of managed asset services of bank trust departments are amply protected under the law and are not harmed or disadvantaged by the absence of broker-dealer or investment adviser regulation.

K. The Distinction Between "Discretionary" and "Non-Discretionary" Is Unclear and Not a Proper Basis for Registration

The SEC's own regulations and interpretations are inconsistent as to when an asset allocation program may be deemed to be discretionary or non-discretionary. The requirement for broker-dealer registration should not be based on such an unclear distinction.

1. Bank Managed Asset Services May Be Non-Discretionary under Form ADV

Managed asset services of the type offered by many bank trust departments could be treated as non-discretionary for purposes of Form ADV required if they were offered by a registered investment adviser under the Investment Advisers Act of 1940.

Part I of Form ADV requires investment advisers to provide information concerning discretionary and non-discretionary assets. Each investment adviser is

[16] 59 Fed. Reg. 13,464 (1994) (proposed rule).

required to state the aggregate market value of securities portfolios that receive "continuous and regular supervisory or management services" on both a discretionary basis and non-discretionary basis.[17]

The Instructions to Form ADV attempt to explain the distinction between discretionary and nondiscretionary accounts. The Instructions set forth a general criteria under which an investment adviser will be deemed to provide "continuous and regular supervisory or management services" if the adviser either:

(1) has discretionary authority over and provides ongoing supervisory or management services with respect to the account; or

(2) does not have discretionary authority over the account, but has an ongoing responsibility to select or make recommendations, based upon the needs of the client, as to specific securities or other investments the account may purchase or sell and, if such recommendations are accepted by the client, is responsible for arranging or effecting the purchase or sale.[18]

The Instructions give the following as an example of accounts that receive continuous and regular supervisory or management services:

> Accounts for which the [investment adviser] allocates assets of a client among mutual funds (even if it does so without a grant of discretionary authority, but only if the general criteria for non-discretionary accounts is satisfied and the factors suggest that the account receives continuous and regular supervisory or management services).[19]

Thus, the SEC's Form ADV recognizes that some asset allocation programs are discretionary and some are non-discretionary, even though both receive "continuous and regular supervisory or management services." While most managed asset services offered by bank trust departments likely would be considered discretionary for purposes of Form ADV, some such services might fall into the non-discretionary category.

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[17] Form ADV, Part I, Question 18.
[18] Form ADV, Instructions to Schedule I of Form ADV, Instruction 7.
[19] *Id*.

2. Bank Managed Asset Services are Treated as Discretionary under Rule 3a-4

The SEC addressed asset allocation programs similar to the managed asset services offered by bank trust departments when it adopted Rule 3a-4 under the Investment Company Act of 1940 in 1997.[20] Rule 3a-4 provides a nonexclusive safe harbor from the definition of investment company for certain programs under which investment advisory services are provided on a discretionary basis to a large number of advisory clients having relatively small amounts to invest.

When Rule 3a-4 was proposed for comment, several commenters asked the SEC to clarify that non-discretionary asset allocation programs generally do not need the safe harbor to avoid investment company status. The SEC responded that a non-discretionary program would not need to rely on the safe harbor. The SEC defined a "nondiscretionary" program as "one in which the investor has the authority to accept or reject each recommendation to purchase or sell a security made by the portfolio manager, and exercises judgment with respect to such recommendations."[21] The SEC suggested that some non-discretionary asset allocation programs would be deemed to be discretionary:

> Whether a program is nondiscretionary is inherently a factual determination. A program designated as "nondiscretionary" in which the client follows each and every recommendation of the adviser may raise a question whether the program in fact is nondiscretionary.[22]

As a result of this guidance, it is unclear whether certain asset allocation programs may be deemed discretionary or non-discretionary. Under the Rule 3a-4 guidance, most managed asset services offered by bank trust departments would be discretionary to the extent that the customer generally accepts the bank's asset allocation recommendations and the bank exercises discretion in periodically adjusting the asset allocation models.

3. The 1934 Act Provides a Different Distinction

The statutory definition of "investment discretion" in the Securities Exchange Act of 1934 adds further confusion as to when investment advice is discretionary and when it is non-discretionary. Under the 1934 Act, a person is

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[20] 62 Fed. Reg. 15,098 (1997).
[21] 62 Fed. Reg. at 15,101.
[22] 62 Fed. Reg. at 15,101, n. 18.

deemed to exercise "investment discretion" with respect to an account if the person “directly or indirectly”:

> is authorized to determine what securities or other property shall be purchased or sold by or for the account,
>
> makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or
>
> otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of this title and the rules and regulations thereunder.[23]

Under paragraph (B), a person could be deemed to exercise investment discretion if the person “indirectly” makes investment decisions without having actual discretionary authority. The Commission has not adopted a regulation pursuant to paragraph (C).

It should be noted that the 1934 Act designates the federal banking agencies—not the SEC—as the appropriate agencies with rulemaking authority with respect to persons exercising investment discretion over an account. Section 3(a)(34)(F) of the Act clearly states that the term "appropriate regulatory agency . . . when used with respect to a person exercising investment discretion with respect to an account” means the federal banking agencies.[24]

4. Bank Managed Asset Services are Discretionary under ERISA

As noted earlier, the Department of Labor has indicated that a bank trustee offering managed asset services to participant-directed ERISA plan accounts may be deemed to be exercising discretionary authority if it reserves the right to add or

[23] Securities Exchange Act of 1934, § 4(a)(35).

[24] This section is relevant for purposes of Section 11(a)(1) of the 1934 Act which states “It shall be unlawful for any member of a national securities exchange to effect any transaction on such exchange for its own account, the account of an associated person, or an account with respect to which it or an associated person thereof exercises investment discretion.” Under section 23 of the 1934 Act, the federal banking agencies have rulemaking authority to implement section 11(a)(1).

remove mutual funds that it makes available to the plan accounts, even if the trustee does not recommend specific fund investments to individual plan participants.[25]

L. Conclusion

For the foregoing reasons, Federated believes that it would be contrary to the language and intent of the Gramm-Leach-Bliley Act for the Commission to subject managed asset services offered by bank trust departments to broker-dealer registration. Accordingly, we respectfully request the Staff to confirm that it agrees with this view and will not recommend enforcement action to the Commission if a bank trust department offers managed asset services of the type described herein.

[25] DOL Advisory Opinion 97-15A (May 22, 1997) (Frost National Bank). In such cases, however, the bank trustee is relieved of responsibility for the plan participant's investment decisions, but is otherwise a fiduciary. *Id*. at n. 9, citing 57 Fed. Reg. 46,906, 46,924 n. 27 (1992).