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November 23, 2005

VIA E-MAIL

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549-9303

RE: First Citizens Bank and Trust Company, Inc.'s
Comments to Release No. 34-52635
File Number: S7-09-05

Dear Mr. Katz:

First-Citizens Bank & Trust Company ("FCB") has asked that we submit FCB's comments on the Commission's recent Release No. 34-52635, which proposes interpretations of Section 28(e) of the 1934 Act. FCB thanks the Commission for providing interested and affected parties the opportunity to comment.

As a bank that does not advise investment companies, FCB is not registered under the Investment Adviser Act of 1940.¹ FCB, principally through its Trust Department, provides fiduciary advisory and asset management services to its clients. Although it is not directly subject to the Commission's interpretations of Section 28(e), FCB generally conforms to these interpretations when it uses soft dollars in providing fiduciary services.

FCB has a real and significant interest in the proposed interpretations because compliance with 28(e) provides FCB with a safe harbor under state fiduciary laws for soft dollar use. The Commission's interpretations are likely to be viewed as persuasive by forums or authorities considering that safe harbor when applying those state fiduciary laws. Also, the Commission's interpretations will influence, if not determine, the soft dollar products and services available to

¹ FCB's two affiliated registered broker/dealers and investment advisers, First Citizens Investor Services, Inc. and Ironstone Securities, Inc., provide a limited menu of advisory services, and do not receive products or services through soft dollars.

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registered investment advisors and those in FCB's position (collectively, "Managers"). As the Commission has noted, these tools provide a real benefit to the investing public when properly employed; unnecessarily narrow interpretations could deprive Managers and their clients of these valuable tools, and retard the development of new ones.

FCB urges the Commission to approach these interpretations with a heightened awareness of their competitive impact and their effect on investors, particularly those investors who have consciously chosen the more personalized service provided by many smaller Managers. If the interpretations unnecessarily remove valuable tools from soft dollar practices, the larger Managers, such as mutual fund complexes with thousands of investors and many billions of assets under management, may be able to absorb the costs of the tools without significantly increasing their charges to investors. Smaller Managers and their clients, however, may lose the benefit of the tools, or be forced to pass on substantially higher charges to their clients. In either event, the clients of smaller Managers would be unnecessarily disadvantaged.

Unquestionably, there have been soft dollar abuses by a few Managers, and there may be a need for further guidance from the Commission. FCB appreciates the time and effort devoted by the Commission and Staff to these proposed interpretations, which reflect great thoughtfulness. As discussed below, however, FCB believes that the proposed interpretations do not reflect the true nature of some products and services, or their use for and value to clients. FCB also believes some of the proposed interpretations require clarification or explanation.

FCB finds the proposed interpretations' treatment of execution and order routing systems, and "order management systems" ("OMS"), particularly troubling. (Release, pp. 34-35.) The discussions seem to indicate a belief that a "bright line" exists between the two types of systems, and further appear to "bless" the former and flatly declare the latter to be outside acceptable soft dollar practices. If that is the Commission's intent, these interpretations do not reflect the nature or use of OMS in the current environment, and unreasonably exclude valuable investment tools.

Today, OMS provide Managers a toolbox of programs and features which can be employed for the clients' benefit. As a base-line, OMS generally interface with a Manager's executing brokers and serve as the systems for order entry, routing, and trade confirmation. OMS elements often include electronic trading strategy software which captures current, intra-day, information (and often historical data) across markets, and provides analysis and guidance on the most opportune time to execute trades. Other OMS programs provide algorithmic trading simulations,² a valuable tool for Managers as they evaluate securities, markets and client portfolios. The fundamental changes in the markets over the last decade — decimalization, electronic exchanges, quasi-exchanges, crossing-networks, and program trading, to name a few — make such tools as necessary to effective Managers as fundamental research on issuers.

² At page 35, the Proposed Interpretation seems to approve "algorithmic trading software" when housed at the executing broker/dealer. Today much of this programming and function is packaged into OMS.

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The proposed interpretations could be read as an opinion that today's OMS mainly provide administrative or operational support for Managers. FCB submits that OMS applications are now more vertically integrated and, in fact, any such support functions OMS may provide are subsumed by those directly used for the clients' benefits.

FCB respectfully asks that the Commission either revise its proposed interpretations to remove any implication that OMS may not be acquired through soft dollars, or conduct additional investigation into the current components and uses of OMS and address these tools appropriately in the final interpretations. If the Commission intends that the various elements of OMS should be evaluated in their appropriate context — research services or brokerage — then the Release should make that intent clear, and the current language regarding OMS should be removed.


The proposed interpretations provide a clear message as to the significance of, and the Commission's expectations regarding, "mixed-use" items. The interpretations also should provide Managers specific guidance on the approaches and valuations to be applied in mixed-use allocations, and the documentation which the Commission expects to demonstrate compliance with those processes. The Commission also should include specific guidance or proposed language for the mixed-use disclosures.

Finally, Section 28(e) provides a safe harbor for soft dollar usage; it does not provide that any usage outside its terms is de facto a breach of a Manager's fiduciary duties. FCB suggests that the final interpretations make that point clear.

FCB again thanks the Commission and Staff for the obvious effort devoted to this Release, and for the opportunity to comment on the proposed interpretations. Should the Commission have any questions regarding these comments, please contact the undersigned, who will engage the appropriate FCB officers.

Sincerely,

Ward and Smith, P.A.

By: 
Barry P. Harris, IV

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