

# SUNTRUST

August 31, 2004

Jonathan G. Katz, Secretary  
Securities and Exchange Commission  
By e-mail to rule-comments@sec.gov

**RE: Regulation B – File No. S7-26-04**

Dear Mr. Katz:

SunTrust Bank appreciates this opportunity to comment on Rule 770 in the Commission's proposed Regulation B. SunTrust Bank is a subsidiary of SunTrust Banks, Inc. ("SunTrust"), one of the ten largest Financial Services Holding Companies in the United States, through the operations of several registered investment advisors, broker-dealers, trust companies and SunTrust Bank, SunTrust is responsible for the management of more than \$130 billion in client assets

Proposed Rule 770 would, subject to stated conditions, exempt a bank from the definition of the term "broker" under the Securities Exchange Act of 1934 "to the extent that it effects transactions in securities of an open-end company in an account for a plan that is qualified under section 401(a) of the Internal Revenue Code of 1986 ... or a plan described in sections 403(b) or 457 of the Internal Revenue Code of 1986.

The first condition of Proposed Rule 770 is that

The bank offsets or credits any compensation that it receives from a fund complex related to securities in which plan assets are invested against fees and expenses that the plan owes to the bank...

It appears that condition is based, according to the proposal, on banks having advised the staff "that they do a dollar-for-dollar offset, or credit, of the compensation they receive from the funds that they offer to plans against the fees imposed on the plans themselves." The proposal further states that this practice is consistent with Department of Labor ("DOL") guidance, citing ERISA Advisory Opinion 97-15A. While the proposal acknowledges that the DOL also has issued ERISA Advisory Opinion 97-16A, , the staff said that no bank has advised it that it operates under that advisory opinion.

SunTrust Bank provides many services to retirement plan clients, including more than 500 401(k) and similar plans covering more than 100,000 participants having mutual fund holdings of more than \$4 billion. Since 1997 SunTrust Bank has structured its compensation with respect to those plans so as to follow the terms of ERISA Advisory Opinion 97-16A which describes circumstances that do not require an offset or credit of mutual fund fees received by a plan service provider acting in a non-discretionary capacity. SunTrust Bank services no retirement plans to which it provides a dollar-for-dollar offset or credit of fees which the Bank receives from mutual funds with respect to the plans.

We wish to point out that in addition to disrupting a long-established banking practice, the offset requirement in Proposed Rule 770 impose a stricter standard on a bank than that imposed by ERISA.

We do not believe that a bank should be held to a standard higher than that of ERISA in order to qualify for the exemption from broker registration under Rule 770.

Section IV.C.2.d. of the release regarding Proposed Rule 770 states,

We request comment on whether any banks will incur any costs as a result of this exemption.

We invite any bank that believes it will incur costs as a result of this proposed exemption specifically to delineate the nature of the costs that the bank will incur.

If Rule 770 is adopted as proposed and does not grant an exemption with respect to accounts operated as described in ERISA Advisory Opinion 97-16A, SunTrust Bank will incur costs estimated at more than \$1,750,000 to continue to offer the same services to plans without registering as a broker.

Although the time between the publication of the Rule and the comment date has been too short to permit a full analysis of the steps necessary to make this change<sup>1</sup> the staff of the bank has broken the project down into the required actions set out below and has made the accompanying cost estimates based upon their collective experience in many other projects of similar size and scope.

Required Actions	Estimated cost
Re-design account documents, promotional materials and client reports including disclosures <sup>2</sup>	>\$250,000
Redesign the system used to track ownership of fund shares at the participant and plan levels so as to track each dollar of mutual fund fees down to the participant level and offset them against the fees which would otherwise be charged against each participant <sup>3</sup> .	>\$1,000,000
Redesign revenue accounting system	>\$100,000
Bridge revenue and participant accounting systems taking into consideration the several month lag between investment holding and subsequent receipt of MF fees	>\$250,000
Obtain affirmative consent from each account <sup>4</sup>	>\$250,000
	Total >\$1,750,000

<sup>1</sup> Good practice for software changes of this scale require analysis of regulations by lawyers and business people, preparation of detailed specifications for the required systems changes, translation of the specifications into the kinds and amount of systems design and coding changes, estimates of time for code writing, definition of relevant test databases, testing of the changes and installation of the changes, the reader will see that just planning such changes is a large undertaking.

<sup>2</sup> The documentation required for each account for plans of this type typically runs in excess of 30 pages and is highly customized.

<sup>3</sup> The Commission has previously taken notice of the difficulties involved in tracking mutual fund fees just to the account level. Proposed Rule 724(i)(4)&(5) permit an allocation of such fees to accounts based on a last business day of the year “snapshot” to be used in defining Sales Compensation. That definitional tool is laudable, however SunTrust does not believe that it could be relied upon to meet the “dollar-for-dollar” standard of ERISA Advisory Opinion 97-15A, or Proposed Rule 770.

<sup>4</sup> ERISA Advisory Opinions 97-15A and 97-16A, require full disclosure to, and affirmative consent by, a second fiduciary to changes in either the amount or computation of a bank’s compensation. It is our experience that because the persons who must sign documents of this type are acting in a fiduciary capacity, they act with caution and according to their own schedule. Signers often act on complex fiduciary matters only after repeated requests and in person visits. We have, therefore, estimated that an average of one hour of professional support time will be required to obtain the necessary consents.

We appreciated this opportunity to comment on Rule 770.

Sincerely,

Z. Geoff Bujalski  
First Vice President and  
Fiduciary Counsel