

Comment Letter on FDIC Recordkeeping and Confirmation Requirements for Securities Transactions , January 1997

January 23, 1997

Jerry L. Langley
Executive Secretary
Attention: Room F-402
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Recordkeeping and Confirmation Requirements for Securities Transactions

Dear Mr. Langley:

The Investment Company Institute¹ appreciates the opportunity to comment upon the notice of proposed rulemaking issued by the Federal Deposit Insurance Corporation (the "FDIC") concerning proposed amendments to Part 344, the FDIC's regulations governing recordkeeping and confirmation requirements for securities transactions.² The Institute supports the FDIC's efforts to update, clarify and streamline Part 344 and to reduce unnecessary regulatory costs. The Institute urges the FDIC and the other bank regulatory agencies, however, to adopt a uniform rule excluding securities transactions that are already subject to the federal securities laws from their confirmation statement and securities trading requirements.

Part 344 currently imposes various recordkeeping and confirmation requirements with respect to securities transactions that are effected on behalf of customers of state nonmember banks. In recent years, the emergence of new delivery systems for bank customers' securities transactions has resulted in a regulatory overlap between federal banking and securities regulators. In particular, the FDIC has interpreted Part 344 to apply not only to securities transactions effected by bank employees, but also to situations in which broker-dealers conduct transactions for bank customers pursuant to "networking" or similar arrangements. Rule 10b-10 under the Securities Exchange Act of 1934, however, already governs the content and delivery of confirmation statements issued by registered broker-dealers. As a result, Part 344 apparently would require that the bank deliver an identical confirmation (or a separate written notification) to clients of a registered broker-dealer in many situations, even though this duplicative requirement provides no perceptible benefit to investors and, indeed, may confuse customers who receive two confirmation statements for the same transaction.

In its advance notice of proposed rulemaking, the FDIC acknowledged that this overlap "can create a competitive imbalance for banks [and] create customer confusion, regulatory uncertainty and additional costs to banks."³ Similarly, the FDIC's proposing release recognizes that "[r]egistered broker/dealers are already subject to the SEC's recordkeeping and confirmation rules" and states that the proposed revisions to Part 344 are intended to "reflect the supervisory role played by other Federal agencies charged with supervision of securities transactions."⁴ Accordingly, the FDIC proposes to exclude transactions effected for bank customers by registered broker-dealers from Part 344 if the broker-dealer is "fully disclosed to the bank customer" and the customer "has a direct contractual agreement with the broker/dealer." In addition, the FDIC would exclude a "person or account having a direct, contractual agreement with a fully disclosed broker/dealer" from Part 344's definition of a "customer."⁵

The Institute supports these revisions, which would reduce unnecessary and duplicative regulation without adversely affecting customer protection. The FDIC and the other federal banking agencies could further reduce regulatory overlap and inconsistency, however, by adopting a uniform rule excluding all securities transactions that are subject to the federal securities laws from their confirmation and securities trading requirements. This approach, which the Institute recommended in its comment letter on the FDIC's advance notice of proposed rulemaking,⁶ would be consistent not only with sound principles of functional regulation, but also with the Riegle Community Development and Regulatory Improvement Act of 1994 (the "CDRI").⁷ The adoption of a uniform rule would also ensure that state nonmember banks, state member banks and national banks, including banking institutions operating

within a single bank holding company structure, are subject to identical requirements.⁸

In addition, the Institute notes that proposed Rule 344(b)(6) would make clear that a state nonmember bank may satisfy the obligation to disclose the source and amount of remuneration received by the bank for mutual fund transactions by providing a customer with a current prospectus that discloses all current fees, loads and expenses at or before completion of the transaction. The Institute strongly supports this provision, which is consistent with current securities industry practice and the OCC's recent revisions to 12 C.F.R. Part 12,⁹ and agrees with the FDIC that its inclusion in part 344 will provide clearer guidance to banks, their counsel and bank examiners.

The Institute appreciates the opportunity to provide our comments on this important regulatory proposal. If members of the FDIC's Staff have any questions concerning the Institute's comments, they should feel free to contact me at 202/326-5813

Sincerely,

Marguerite C. Bateman
Assistant Counsel

ENDNOTES

¹ The Investment Company Institute is the national association of the American investment company industry. Its membership includes 6,170 open-end investment companies ("mutual funds"), 443 closed-end investment companies, and 10 sponsors of unit investment trusts. Its mutual fund members have assets of approximately \$3.49 trillion, accounting for approximately 95% of total industry assets, and have in excess of 59 million individual shareholders. The Institute has 102 bank members, accounting for approximately 92% of the assets of all bank-affiliated funds.

² 61 FEDERAL REGISTER 67729 (Dec. 24, 1996).

³ 61 FEDERAL REGISTER 26135, 26136 (May 24, 1996).

⁴ 61 FEDERAL REGISTER at 26135.

⁵ 61 FEDERAL REGISTER at 67735.

⁶ See Letter to Jerry L. Langley, Executive Secretary, Federal Deposit Insurance Corporation, from Thomas M. Selman, Associate Counsel, Investment Company Institute (June 21, 1996).

⁷ Section 303 of the CDRI, 12 U.S.C. § 4803(a), requires the federal banking agencies to work jointly to make uniform all regulations and guidelines implementing common statutory or supervisory policies. Precedent for this approach includes both the Interagency Statement on Retail Sales on Nondeposit Investment Products and the recent proposal by the federal banking agencies to establish uniform qualification requirements for banks that engage directly in retail sales or recommendations of securities through their employees. See 61 FEDERAL REGISTER 68824 (Dec. 30, 1996).

⁸ In addition to the FDIC, the Office of the Comptroller of the Currency (the "OCC") and the Board of Governors of the Federal Reserve System (the "FRB") have recently amended, or proposed to amend, their recordkeeping and confirmation requirements for securities transactions. The approaches taken or proposed by the OCC and the FRB, however, differ both in form and in substance from the FDIC's proposed approach. In particular, the OCC recently revised its recordkeeping and confirmation requirements to exclude securities transactions "effected by broker or dealer registered with the [SEC] where the SEC-registered broker or dealer directly provides the customer a confirmation; including, transactions effected by a national bank employee when acting as an employee of an SEC-registered broker/dealer." See 61 FEDERAL REGISTER 63958, 63965 (Dec. 2, 1996). In comparison, the FRB has proposed to redefine the term "customer" for purposes of its recordkeeping and confirmation requirements to exclude a broker or dealer with which "a State member bank effects or participates in effecting the purchase or sale of securities." See 60 FEDERAL REGISTER 66759, 66761 (Dec. 26, 1995). The Institute believes that a uniform exclusion of securities transactions that are already subject to the federal securities laws from the banking agencies' recordkeeping and confirmation requirements is preferable to the approaches taken by the FDIC, the OCC and the FRB, under which bank customers may still continue to receive duplicative confirmations from banks and broker-dealers (albeit in different circumstances depending on the bank's primary federal regulator).

⁹ See Letter to the Investment Company Institute from Roger D. Blanc, Chief Counsel, Division of Market Regulation, Securities and Exchange Commission [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82041 (Mar. 19, 1979) (SEC no-action position); 61 FEDERAL REGISTER at 63969 (OCC interpretation under 12 C.F.R. Part 12).

not constitute, and should not be considered a substitute for, legal advice.