Appendix B. Example Comments

Senator Scott Brown's letter from https://www.sec.gov/comments/df-title-vi/prohibitions/prohibitions-43.pdf
Union Bank letter from https://www.sec.gov/comments/s7-45-10/s74510-289.pdf

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COMMITTEES:
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
ARMED SERVICES
VETERANS' AFFAIRS
SMALL BUSINESS

June 28, 2011

The Honorable Secretary Timothy Geithner
The Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Secretary Geithner, Tim

I know that you and your staff are hard at work on an inter-agency basis to develop the new specific rules and regulations that will govern bank-affiliated asset management. As you develop these rules, I feel it is crucial to draw your attention to section (d)(1)(G)(ii) of the Dodd Frank act. This section of the bill is an area where members of both parties worked very hard to reach a compromise. My clear understanding of that compromise was that under the new rules, bank-affiliated investment funds would be able to continue to solicit investments from new qualified investors, provided that they abide by the SEC's longstanding rules governing these offerings.

As you know, banking entities are already subject to the SEC's requirement that they have a "substantive pre-existing relationship" ("SPR") with customers in order to satisfy the conditions for a private placement. It only makes sense for that standard to be apply to (d)(1)(G)(ii) as well. The FSOC study on this section of the bill has endorsed such an approach as one of the two possible standards. A SPR generally requires: awareness of financial experience and sophistication (an actual substantive relationship of a business nature), and a reasonable belief that the client is capable of evaluating the merits and risks of a proposed investment. Some of the examples of SPRs include existing clients of the banking entity, clients that previously invested in a hedge fund or private equity fund sponsored by the banking entity, potential investors who were previously solicited for other products, and potential qualified investors who are referred by another division of the banking entity, or an affiliate of the banking entity.

Unfortunately, the FSOC Study also proposed a possible alternative interpretation from other banking regulations that typically applies only to identity theft, privacy regulations and consumer provisions. These rules would restrict offerings to a much narrower definition of "customer" -- an individual or entity with an actual bank account or similar relationship with a bank. The application of this narrow definition - never intended for use in this context - would in my view likely lead to a wind-down of the bank affiliated asset management model, which would completely undermine the intention of the compromise that led to this section of the new law.

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If new qualified investors are not permitted to invest in bank affiliated asset management vehicles, those dollars will instead end up in the hands of less-regulated players in the asset management business, starving the bank-affiliated model of investment capital. Such an interpretation would also increase the investment risk profiles for municipalities and their pension plan participants since they would have a narrower universe of managers to choose from and would be relegated to the pool of less-regulated independent funds.

Thank you in advance for your careful consideration.

Sincerely,

Scott P. Brown
United States Senate

CC:
The Honorable Ben Bernanke, Chairman, The Board of Governors, Federal Reserve System
Ms. Sheila C. Bair, Chairman, Board of Directors, Federal Deposit Insurance Corporation
Mr. Edward J. DeMarco, Director (Acting), Office of the Director, Federal Housing Finance Agency
Mr. Gary Gensler, Chairman, The Commission, Commodity Futures Trading Commission
Mr. William S. Haraf, Commissioner, Department of Financial Institutions, Business, Transportation and Housing
Mr. John M. Huff, Insurance Director, Department of Insurance, Financial Institutions and Professional Registration, State of Missouri
Mr. David S. Massey, Securities Director, Department of the Secretary of State, State of North Carolina
Ms. Deborah Matz, Chairman, The Board, National Credit Union Administration
Mr. Michael T. McRaith, Director, Federal Insurance Office, Under Secretary for Domestic Finance, United States Department of the Treasury
Ms. Mary L. Schapiro, Chairman, Offices of the Commissioners, United States Securities and Exchange Commission
Mr. John G. Walsh, Comptroller of the Currency (Acting), United States Department of the Treasury
Mr. S. Roy Woodall, Member (Intention to Nominate), Financial Stability Oversight Council, Office of the Secretary, United States Department of the Treasury

February 18, 2011

VIA ELECTRONIC MAIL
rule-comments@sec.gov

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Registration of Municipal Advisors; Release No. 34-63576; File No. S7-45-10; 76 Fed. Reg. 4 (January 6, 2011)

Dear Ms. Murphy:

Union Bank, N.A. (the "Bank") respectfully submits this letter in response to your request for comment on the Securities and Exchange Commission's ("SEC" or "Commission") proposed rules and related proposed interpretations that would implement registration of municipal advisors (the "Proposal"). We greatly appreciate this opportunity to provide our comments.

I. Background

The Bank is headquartered in San Francisco, California. As of December 31, 2010, the Bank operated 401 banking offices in California, Washington, Oregon and Texas, as well as two international offices. The Bank is owned by UnionBanCal Corporation, which has assets of approximately $79.1 billion as of December 31, 2010. UnionBanCal Corporation is a wholly-owned subsidiary of The Bank of Tokyo-Mitsubishi UFJ, Ltd., which is a subsidiary of Mitsubishi UFJ Financial Group, Inc. (MUFG, NYSE:MTU), one of the world's largest financial organizations. The Bank is a full service commercial bank providing an array of financial services directly and through its subsidiaries, including private banking, consumer and business lending, investment and financial management, and trust and custody services.

The Bank administers approximately $250 billion in trust assets, a portion of which is managed by HighMark Capital Management, Inc., a SEC-registered investment adviser and wholly-owned subsidiary of the Bank. Broker-dealer activities are conducted through UnionBanc Investment Services LLC, also a wholly-owned subsidiary of the Bank that is a dually registered SEC-investment adviser and broker-dealer.

The Bank, like many other commercial banks, provides a wide variety of products and services to governmental entities (generally referred to as "municipal entities"). These services and products include savings and checking accounts, direct loans, certificates of deposit ("CDs"), public finance, and trust and custody services. The Bank also responds to requests for proposals

from municipal entities regarding the banking products we offer, such as interest-bearing bank deposits, CDs and certain investments we make available to trust customers, such as money market mutual funds and other securities. The Bank is also an investor in securities issued by municipal entities and extends credit to municipal entities, such as when a city or township wants to buy a fire truck or build a new school, library or other similar facility. Furthermore, the Bank provides fiduciary and agency services to municipal entities by acting as trustee, fiscal agent or in other agency capacities for municipal debt issuances, escrow accounts, governmental pension plans and other similar customary governmental activities.

We generally agree with the comment letters submitted by industry groups, including the Securities Industry and Financial Markets Association, Financial Services Roundtable and American Bankers Association. However, we wish to emphasize, through this individual letter, that the Proposal, if adopted, would be significantly detrimental to the banking and brokerage industries, without any significant offsetting regulatory benefit. Moreover, we believe that the Commission would penalize the very municipal entities it seeks to protect as well as local communities and the taxpayers generally, if it adopts the Proposal without significant revision.

II. The Commission Should Exercise its Authority to Exempt Banks.

Banks should be exempt from the definition of "municipal advisor" and related interpretive guidance found in the Proposal.[1] The definitions and interpretations in the Proposal are so broad as to explicitly capture banks handling any funds of a municipal entity, regardless of whether the funds are proceeds from a municipal securities offering. As written, we believe the Proposal would result in an unnecessary overhaul of the current regulations that apply to banking and brokerage activities when a municipal entity is involved. We submit the following in support of our position.

There is no indication that in enacting Section 975 of the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") Congress intended to include banks in the universe of entities defined as "municipal advisor". Rather, as discussed in greater detail below, we believe, as set forth in comment letters from various organizations, including the American Bankers Association and SIFMA, Congress sought to regulate a heretofore unregulated group that advises municipal entities. Banks and their interactions with municipal entities are highly regulated, as discussed below, and the regulatory regime already in place covers all the activities that the Commission could deem "municipal advisory activities."

Furthermore, many of the banking services offered to municipal entities are not advisory activities. Because the Proposal does not define "advice," however, it is unclear whether a variety of bank activities that traditionally are not considered advisory activities could be deemed municipal advisory activities under the Proposal. We believe that the traditional banking services described below are not the intended focus of Dodd-Frank and that Congress did **not** intend to capture in the definition of "municipal advisor" banks that provide such products and services to municipal entities. Rather, these are traditional banking services that should not

[1] Please note that our reference to "banks" in the letter is intended to include U.S. domestic depository institutions as well as U.S. branches of foreign banks. In our view, such U.S. branches of foreign banks should receive regulatory treatment in the U.S. that is comparable to that of U.S. domestic depository institutions.

trigger registration as a municipal advisor. For example:

1. When a bank responds to a municipal entity's request for proposal with information about the types of CDs or other deposit products that a bank offers, the bank is providing information about its deposit products.

2. When a banker informs a municipal entity that it can get a better interest rate on a deposit account instead of a checking account; notifies a municipal entity that a sweep account is an alternative to a deposit account and may reduce the impact of certain charges for the municipal entity; suggests various cash management alternatives; or discusses various types of borrowing alternatives with its municipal clients, the bank is providing important information about the bank's products, services and associated interest rates and fees.

3. In the corporate trust context, banks serving as corporate trustees, escrow agents, fiscal agents, or in other similar capacities, often provide a list or menu of investment or sweep products that a bank makes available which are permitted investments under the municipal entity's investment guidelines governing the account. A bank trustee or agent does not exercise discretionary investment authority on behalf of the municipal entity or provide investment advice regarding which product the municipal entity should select. In all cases, the municipal entity directs the specific investment and ensures that the investment complies with the municipal entity's investment guidelines. In these transactions, a bank, whether acting as a trustee or agent, functions as a custodian and, to the extent it accepts any orders to execute securities transactions, is required to do so in accordance with the SEC's Regulation R, which implements statutory exclusions for banks from the definition of "broker."

4. In the context of liquidity facilities for municipal bond issuances, a bank does not issue a letter of credit unless it is satisfied with the terms and structure of the issuance. A bank negotiates with the municipal entity before it enters into an agreement to provide a letter of credit to a municipal entity. In this case, a bank is protecting its interests as a traditional and customary lender extending credit in accordance with applicable legal restrictions and regulations.

5. When a bank provides the terms upon which it would purchase as principal for its own account, securities issued by a municipal entity or obligated person such as bond anticipation notes, tax anticipation notes, revenue anticipation notes or other types of obligations, a bank is entering into an arm's length transaction with the municipal entity and must protect the bank's interests.

We believe that the local towns and districts that are looking to have a bank hold funds for their libraries, fire stations, schools and the like, would be surprised to discover that a bank providing these services is an advisor and fiduciary. We believe that the Commission should exercise its exemptive authority to exclude banks from the definition of "municipal advisor" and exclude these traditional banking services from the definition of "municipal advisory activities." This would preserve the current regulatory regime applicable to these activities and provide clarity for municipal entities about the nature of the services banks provide to them.

Furthermore, the Commission's Proposal expands the definition of "proceeds" to include all funds held by municipal entities including, but not limited to, bank, trust and custody accounts holding any monies of a municipal entity that may be used for investment, regardless of whether they are proceeds of municipal securities offerings. If this is the Commission's intent, then if adopted, the Proposal would likely trigger municipal advisor registration by a bank providing advice given about ANY "funds held by or on behalf of a municipal entity," whether or not such funds are "proceeds" of municipal securities offerings. We do not believe that Congress intended this result in enacting Section 975 of Dodd-Frank because Congress did not explicitly refer to all such funds. The Commission should not extend the coverage of the rule beyond the explicit language of Dodd Frank.

Likewise, the Commission's proposed definition of "investment strategies" is so broad as to potentially capture traditional bank products and services such as deposit accounts, cash management products and loans to municipal entities. These banking and trust activities are already subject to comprehensive oversight by bank regulators as well as by state treasurers, and need not be regulated as municipal advisory activities any more than underwriting or investment adviser activities regulated by the Commission. Any final rules that the Commission adopts should explicitly clarify this point.

We firmly believe that the Commission should exempt banks from the definition of "municipal advisor" as noted above. However, if the Commission does not exempt banks, we urge you to propose a revised rule with a new comment period, and consider the exemptions and clarifications discussed below.

III. The Proposal Should Apply Only to Unregulated Entities; in Particular, the Proposal Should NOT Apply to Regulated Banks, Broker-Dealers or Investment Advisers.

The intent of the Section 975 was to require registration and regulation of persons (whether individuals or entities) advising municipal entities with respect to debt proceeds. Congress appears to have been focused on addressing the risks associated with unregulated persons and entities rendering advice with respect to municipal derivatives, guaranteed investment contracts, investment strategies, and the issuance of municipal securities. Dodd-Frank does not evidence that Congress intended to expand and increase the regulation of the banking and brokerage industries already subject to substantial regulation. However, by proposing the expansive interpretations discussed here, the Commission risks transforming the applicable section of Dodd-Frank into a wide-ranging program of duplicative regulation that will impact large portions of the banking and brokerage industry. Traditional bank and brokerage activities should not be covered by this Proposal because they already are well regulated and, we believe, were not the intended subjects of this provision of the statute.

Banks are subject to rigorous and frequent examinations, as well as extensive regulation with respect to their activities including deposit taking, lending and trust services, by federal regulators such as the Office of the Comptroller of the Currency ("OCC"), the Federal Reserve Board, the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision, or by state regulators. Banks are examined on-site by bank regulators on a regular basis. Some large

institutions, including the Bank, have permanent bank examiners onsite within the bank's premises throughout the year to continuously examine activities, including fiduciary activities. Banks are also subject to an additional layer of state laws, regulations, reporting and oversight that protect municipal entities, such as when a bank holds deposits made by municipal entities, a bank must comply with applicable state rules regarding collateralization. With respect to fiduciary accounts, state and federal regulations address various aspects of these activities, including the fiduciary obligations of a bank, potential conflicts of interest, and a bank's management of transactional, strategic, compliance, and reputational risks. Such extensive regulation, oversight and examination not only protect the interests of bank customers, including municipal entities, but also help ensure the safety and soundness of the banking institution.

The Federal Reserve and SEC together in Regulation R have articulated the specific conditions banks must satisfy in order to be exempt from broker-dealer registration with respect to securities related activities. The Proposal would impose a new layer of regulation on many of these activities when the client is a municipal entity without providing any additional benefit to municipal entities and potentially creating regulatory redundancy and potentially even conflict.

We believe that existing banking regulations, Regulation R and the regulators mentioned above already provide effective regulatory protection to all of a bank's customers who effect banking or securities transactions and that the additional regulatory scheme which the Proposal would mandate is not necessary for municipal entities, which constitute one client group that a bank serves.

Similarly, the Bank's two subsidiaries mentioned above, HighMark Capital Management, Inc. and UnionBanc Investment Services LLC, are already subject to a regulatory scheme applicable to their registered investment adviser and broker-dealer activities and ongoing regulatory examination by the SEC and FINRA. We do not believe that Congress intended for broker-dealers and registered investment advisers that already engage in regulated activities for their municipal clients to be subject to the additional layer of regulation that would accompany municipal advisor registration, nor do we think that municipalities would obtain any significant customer protection benefit if already regulated entities are subject to the additional regulatory burden and costs.

We believe that existing banking regulations, Regulation R and the other regulators mentioned above already provide thorough and effective regulatory protection to all of a bank's, registered investment adviser and broker-dealer's customers who effect banking or securities transactions and to all of a and that the additional regulatory scheme which the Proposal would mandate is not necessary for municipal entities, which constitute one client group that a bank and its subsidiaries and affiliates serve.

IV. Entities That Are Exempt From Registering Under the Advisers Act.

Dodd-Frank excludes from the definition of "municipal advisor" investment advisers registered under the Investment Advisers Act of 1940 (the "Advisers Act"). The Proposal would exclude from this statutory exclusion those investment advisers that engage in municipal advisory activities other than providing investment advice that would subject the adviser to the Advisers

Act. Therefore, it is possible that banks, which are statutorily excluded from the definition of investment adviser in the Advisers Act (except when they advise mutual funds), are not covered by the statutory or regulatory exclusions from the definition of municipal adviser because they are not investment advisers and therefore are not eligible to be registered under the Advisers Act. As a result, it is possible that activities involving municipal entities that are conducted pursuant to the statutory exception from the Advisers Act for banks could require municipal advisor registration by banks.

Congress long ago exempted banks from the definition of investment adviser and investment adviser registration and regulation because banks were already subject to extensive regulatory supervision and oversight.[2] We submit that the Commission should follow Congress' lead and, pursuant to Section 15B(a)(4) of the Exchange Act, exempt banks from the definition of "municipal advisor" when a bank provides any investment advisory services.

V. Entities that are Exempt Under the Exchange Act.

Banks also are excluded from the statutory definition of "broker" and "dealer" in the Securities Exchange Act of 1934 (the "Exchange Act"), to the extent that their securities activities are limited as enumerated in the Exchange Act as amended by the Graham-Leach-Bailey Act and further interpreted by Regulation R. The Proposal does not, however, recognize these statutory exclusions. We submit that the Commission should explicitly acknowledge that these activities will not be municipal advisory activities or otherwise cause banks to be municipal advisors when banks engage in these activities with municipal entities.

VI. Response to the Commission's Request for Comments.

A. Banks. With respect to the Commission's specific request for comments on the exclusions for banks proposed at 76 Fed. Reg. 824, 837, we submit that the Commission should provide specific exclusions from the definition of "municipal advisor," including those identified in the Proposal and listed below. We believe that these exclusions would be entirely consistent with the provisions of Dodd-Frank. The exclusions should at a minimum include:

1. "...banks providing advice to a municipal entity or obligated person concerning transactions that involve a "deposit," as defined in Section 3(l) of the Federal Deposit Insurance Act as an "insured depository institution," as defined in Section 3(c)(2) of the Federal Deposit Insurance Act, such as insured checking and savings accounts and certificates of deposit."[3]

A deposit is a traditional banking activity that does not involve giving advice. A deposit by a municipal entity is no different from any other deposit. Additionally, traditional banking activities are already subject to regulation at both the federal and state levels.

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[2] See the Advisers Act, Section 202(11).

[3] Please note that we also submit that such exclusion be broadened to include deposits at U.S. branches of foreign banks, consistent with our view that such U.S. branches should receive regulatory treatment comparable to that of U.S. domestic depository institutions.

2. "...banks that respond to requests for proposals ("RFPs") from municipal entities regarding other investment products offered by the banking entity, such as money market mutual funds or other exempt securities."

3. "...banks that provide to a municipal entity a listing of the options available from the bank for the short-term investment of excess cash (for example, interest-bearing bank accounts and overnight or other periodic investment sweeps) and negotiate the terms of an investment with the municipal entity."

4. "...banks that provide to a municipal entity the terms upon which the bank would purchase for the bank's own account (to be held to maturity) securities issued by the municipal entity, such as bond anticipation notes, tax anticipation notes, or revenue anticipation notes."

5. "...banks that direct or execute purchases and sales of securities or other instruments with respect to funds in a trust account or other fiduciary account in accordance with predetermined investment criteria or guidelines, including on a discretionary basis."

6. "...banks and trust companies that provide other fiduciary services to municipal entities, such as acting as trustees with respect to governmental pension plans and other similar capacities."

Banks should also be exempt from the definition of "municipal advisor" to the extent they provide advice that otherwise would subject them to registration under the Advisers Act, but for the operation of a prohibition to or exemption from registration.

7. "...entities that provide to municipal clients investment advice, such as research information and generic trade ideas or commentary that does not purport to meet the needs or objectives of specific clients, and is provided to a municipal entity as part of its ongoing ordinary communications."

B. Broker-Dealers. With respect to the Commission's request for comments regarding exclusions for broker-dealers, we submit that the Commission should provide such exclusions from the definition of "municipal advisor" as stated in the Proposal as follows, and that such exclusions would be entirely consistent with the provisions of Dodd-Frank:

1. "...a broker-dealer that provides a municipal entity with price quotations with respect to particular securities (or securities having particular characteristics) which the broker-dealer would be prepared to sell as principal or acquire for the municipal entity."

When a broker-dealer provides a municipal entity with price quotations or a list of securities it is not advice – the broker is not recommending one product over another but merely supplying product information.

2. "...a broker-dealer that provides to a municipal entity a list of securities meeting specified criteria that are readily available in the marketplace, but without making a

recommendation as to the merits of any investment particularized to the municipal entity's specific circumstances or investment objectives."

Although we acknowledge that in adopting Dodd Frank Congress did not provide a wholesale exclusion for brokers and dealers, but rather only when they are serving as an underwriter, we do not believe that Congress intended to impose an additional level of regulation on broker-dealers, when they are providing advice that is already subject to regulation. Advice that a broker or dealer provides that is "solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor" (Advisers Act, Section 202(a)(11)) should be excluded from the definition of "advice" that would make a broker or dealer who provides such recommendations a municipal advisor. In creating the Advisers Act exception from the definition of "investment adviser" for brokers and dealers who provide such advice, Congress recognized that this is a form of advice that does not require registration under the Advisers Act.

We do not believe Congress intended it to be subject to duplicative regulation pursuant to Dodd Frank. Brokers and dealers are regulated in connection with providing such advice by virtue of the suitability obligations to which brokers and dealers are subject under FINRA rules. We do not believe, that in adopting Dodd-Frank, Congress intended to impose an additional regulatory obligation on brokers or dealers when they provide recommendations to their municipal clients that are solely incidental to their business as brokers and for which they receive no special compensation. Accordingly, we urge the Commission to exclude broker-dealers who provide such advice or adopt a definition of "advice" that does not include broker-dealer recommendations that are solely incidental to their business.

VII. Burden of Implementation.

Implementing the Proposal as it currently stands would be burdensome and impose significant new costs on banks, requiring increased compliance and employee resources, customer service and relations, regulatory reporting, monitoring and recordkeeping and new and additional exams. Banks would likely have to internally reorganize their transactional operations, hire additional staff and compliance resources, retrain current employees and hire an outside vendor to comply with the recordkeeping requirements of the Proposal. Employees would also be stretched thin if they had to complete new registration forms (which we believe would require significantly more than the 6.5 hours noted by the Commission) and implement new procedures to comply with the new regulations. Also, if the Commission adopts the Proposal without modification, it is possible that banks may discontinue offering certain products and services to municipal entities that the municipal entities depend on banks to offer. Additionally, because the products and services banks offer to municipal entities already are regulated, we believe the burden of compliance with an additional regulation scheme would far outweigh any hypothetical benefits.

The Commission also seeks comment on whether it should permit "only separately identifiable departments or divisions of a bank (SIDs)". We believe that the Commission should not dictate the structure of a bank's municipal business. Rather, we urge the Commission to permit registration of SIDs on a voluntary basis. Given the dispersion of public finance activities throughout the bank, banks may not be able to consolidate the activities in a single department or division as is contemplated in the analogous language for municipal dealer SIDs. Currently, the

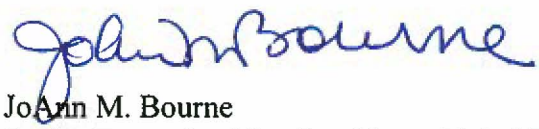
Bank is organized to provide services to a municipal entity from a variety of business units depending on the needs of the municipal entity. The Bank's activities with municipal entities (taking deposits, lending, corporate trust, etc…) are not isolated within one business unit. As a result, we do not think the referenced language is workable. The decision about how to best structure a bank and its products and services should rest with bank and should not be dictated by the Commission.

VIII. Allow Adequate Time to Implement Final Rules.

If the Commission decides to proceed with the Proposal without further modification, or even with subsequent revisions, we urge the Commission to allow adequate time for implementation of final rules. A bank may need sufficient time to assess whether the burden of municipal advisor regulation will be so significant that the bank must stop offering some or all of its products and services to municipal entities. Thus, an unintended consequence of Proposal, if adopted without modification, could be that municipal entities ultimately will have fewer service providers to choose from and the costs for existing services may escalate due to increased regulatory burdens.

Union Bank, N.A. is just as committed to protecting the financial interests of our customers, including municipal entities, as the Commission is to protecting investors. We believe that the comments discussed above are consistent with the goals of investor protection and making available financial services to investors at a reasonable cost. We thank you for this opportunity to comment and appreciate your consideration of our views. Should there be any questions regarding our comments, or if further information is needed, please feel free to contact Robin Dvorkin in the Bank's Legal Division at (415) 765-2183 or Robin.Dvorkin@UnionBank.com.

Sincerely,



JoAnn M. Bourne
Senior Executive Vice President, Global Treasury Management
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