July 9, 2004

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street N. W.
Washington, D.C. 20549

Re: Certain Thrift Institutions Deemed not to be Investment Advisers
File No. S7-20-04, 69 FR 25778 (May 7, 2004)

Dear Sir:

America's Community Bankers ("ACB")[1] welcomes the opportunity to comment on the proposal[2] issued by the Securities and Exchange Commission ("SEC") that would address the application of the requirements of the Investment Advisers Act (the "Advisers Act") to certain savings associations.

ACB Position

ACB strongly supports providing full parity for savings associations with banks under the Investment Advisers Act and strongly believes that full parity is the only fair result. After consultation with SEC staff and the Office of Thrift Supervision ("OTS"), we submitted a request with the SEC for rulemaking that would achieve this goal on July 31, 2001.[3] We believe that parity will ensure that savings associations and banks are under the same basic regulatory requirements when they are engaged in identical trust, brokerage and other activities that are permitted by law. As more savings associations engage in trust activities, there is no substantive reason to subject them to different requirements.

Except for a narrow provision identified below, we oppose the proposal as currently drafted and believe that its adoption would be detrimental to the ability of savings associations to serve the needs of their customers. ACB strongly urges the SEC to

[1] America's Community Bankers represents the nation's community banks. ACB members, whose aggregate assets total more than $1 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.
[2] 69 Fed. Reg. 25778 (May 7, 2004)
[3] Letter from Diane M. Casey to Paul Roye, dated July 31, 2001.

withdraw the proposal and reissue a proposal that would provide full parity for savings associations and banks that are engaged in the same business, as permitted by law. We are concerned that after working with industry and its primary regulator, the OTS, for a number of years the SEC has issued a proposal that places savings associations at a competitive disadvantage to both banks and registered advisors. The OTS has worked with the SEC to help the agency understand the industry, the nature of supervision and examination and the safety and soundness and customer protection oversight that as a primary regulator it provides all savings associations engaged in trust business.

In recent testimony before the Senate Banking, Housing and Urban Affairs Committee, OTS Chief Counsel, John Bowman, observed

> While the SEC applies the federal securities laws in two different manners depending on the business operations of a thrift, there is no distinction between these two categories of accounts under the HOLA and OTS regulations applicable to thrifts. The accounts in both categories are fiduciary accounts that receive the same protections under the HOLA and OTS regulations and are subject to similar examination scrutiny. There is no logical basis why thrifts, unlike banks, need duplicative regulatory oversight by the SEC of account activities that OTS already supervises and examines. This is far from functional regulation, but rather over-regulation that accomplishes nothing in the way of a legitimate policy objective.[4]

Further, we believe this proposal will drive savings associations to consider converting their charter to a bank if they see conversion as a way to operate under a less burdensome regulatory regime. One of ACB's important policy objectives is that each institution should be able to choose the charter that best meets its needs, we see this proposal promoting regulatory forum shopping which is the worst reason for any institution to change charters.

Also noted in the OTS testimony, the agency and the industry worked to have a legislative solution that would provide full parity offered in August 2000.[5] SEC staff made a commitment at that time to work with the industry and the OTS to resolve the disparity. Based on that commitment, the legislation was not offered. ACB believes that the industry and the OTS have been very patient and do not believe this proposal represents a resolution of the issue.

The preamble to the proposal notes the evolution and history of the involvement of savings associations in the provision of trust services for their customers and communities. The growth of this activity as part of the business of savings associations reflects the general transformation of the industry from one in which the institutions were primarily one- to four-family mortgage lenders to one in which the institutions provide the entire array of financial services products, including trust services. Just like banks

[4] Testimony of OTS Chief Counsel John Bowman, dated June 22, 2004, before the Committee on Banking, Housing and Urban Affairs, United States Senate.
[5] Id.

evolved and began to provide services not contemplated in 1940, savings associations have similarly changed. We expect that both banks and savings associations will continue to change within the bounds of the law as customer demands change.

In the rulemaking to implement the bank broker/dealer exemptions in Title II of Gramm-Leach-Bliley, [6] the SEC acknowledged that savings associations and savings banks are governed by a similar regulatory structure and therefore they deserve to operate under the same terms and conditions as banks.[7] As part of the interim final rule, the SEC adopted Rule 15a-9,which provides that savings associations and savings banks are exempt from the definitions of broker and dealer on the same terms and conditions that banks are exempted. We understand that a proposal has been issued that would repeal this regulatory provision and replace it with a provision that would not provide full parity for savings associations.[8]

In the preamble to the interim final rule, the SEC notes that because "the more general exemption for banks has been replaced and the differences between savings associations and banks have been narrowed; it seems reasonable to afford savings associations and savings banks the same type of exemptions. Moreover, insured savings associations are subject to similar regulatory structure and examination standards as banks. We find that extending the exemption for banks to savings associations and savings banks is necessary or appropriate in the public interest and is consistent with the protection of investors."[9]

Further, the preamble makes the point that, without extending these exemptions, there may be uncertainty for savings associations about whether registration is required if they wish to engage in the listed activities. "The exemption will allow savings associations and savings banks that are governed by a similar regulatory structure to operate under the same terms and conditions as banks."

We strongly urge the SEC to extend these same persuasive arguments to the question of whether savings associations should be exempt to the same extent that banks are from the requirements of the Investment Advisers Act.

Finally, we note that because this proposal reflects the views of the SEC, we can only believe that if the agency has an opportunity, it will revise the regulations governing banks in this area and limit the exemption applicable to banks to the extent possible. We do not believe that just because the SEC does not agree with an exemption contained in a law that institutions that compete on an equal basis should have different regulatory requirements.

---

[6] P.L. 106-102.
[7] 66 Fed. Reg. 27760 (May 18, 2001).
[8] 69 Fed Reg 39682 (June 30, 2004).
[9] 66 Fed. Reg. 27788 (May 18, 2001).

ACB does support the provisions of the proposal that would exempt the collective trust funds of savings associations from the registration and reporting requirements of the Securities Exchange Act of 1934 ("Exchange Act").

Background

As the preamble to the proposal describes, the Home Owners' Loan Act was amended by the Depository Institutions Deregulation and Monetary Control Act of 1980 to permit federal savings associations to offer trust services. The OTS has promulgated regulations that are substantially similar to those in effect for national banks. Savings associations and national banks are regulated in substantially the same manner. Examinations are conducted using the same procedures and examiner guidance is based on the same information.

The Proposal

The SEC is proposing to adopt a new regulation that would except savings associations from the Advisers Act when they provide investment advice as part of certain trust department fiduciary services. Under the proposal, a federal or state savings association would be deemed not to be an investment adviser if its investment advisory services are provided solely in its capacity as trustee, executor, administrator, or guardian for customer accounts created or maintained for a fiduciary purpose, or to its collective trust funds excepted from the Investment Company Act of 1940. In addition, the proposal would exempt savings associations' collective trust funds from the registration and reporting requirements of the Exchange Act.

Coverage of the Proposal

The proposal specifically applies to all federal and state savings associations. We believe that to the extent that it is unclear that state savings banks are not found to be banks and therefore are unable to avail themselves of the exception from the registration requirements of the Advisers Act, any final regulation must include a clarification that state savings banks are banks for these purposes. State savings banks are banks[10] for purposes of the Federal Deposit Insurance Act and are not included in the definition of savings association.[11]

Because these entities are state chartered, they are regulated by state banking authorities, as are all state-chartered banks and state trust banks. Further, the observations about which OTS chartered savings associations are engaged in trust activities are not relevant for this type of institution.[12] In most states, state savings banks have the same powers and supervision as do commercial banks.

---

[10] 12 U.S.C. 1813(g)
[11] 12 U.S.C. 1813 (b)
[12] 69 Fed Reg 25784

Scope of the Proposal

ACB disagrees with the SEC's approach of using section 3(c)(3) of the Investment Company Act as guidance on how to craft an exemption for savings associations. Section 3(c)(3) currently refers to "trusts, estates, or other accounts created and maintained for a fiduciary purpose." We believe that this standard is unnecessarily limiting for the savings associations engaged in the full array of trust services. For example, this approach would mean that those associations that act as agent for accounts that have a fiduciary purpose would not be covered under the proposal. Trust departments at savings associations, because they follow a business model that is the same as that of banks, provide assistance to individual fiduciaries. They provide investment advice as well as other services that retail advisers are not able to provide. Corporate fiduciaries who act as agent for other fiduciaries may provide principle and income accounting, prepare corporate fiduciary tax returns, assist with tax and other planning, assist in balancing the needs of the current and remainder beneficiaries, help prepare filings with government entities and numerous other activities.

Another situation in which this approach does not work is in the area of revocable trusts. ACB believes that all revocable trusts are established for a fiduciary purpose. In many states, a revocable trust is a much more efficient estate planning tool than other options. Probate costs may be too high or the trust may be established to plan for future events such as incapacity. Because some revocable trusts would not fall into the category of being established for a fiduciary purpose, the proposal would require savings associations to analyze all of its trust accounts to determine which accounts would not meet the fiduciary purpose test. This analysis would be burdensome and costly and may not achieve what the SEC intends.

Additional types of accounts that we believe would not be covered by the proposal are IRAs that have an estate planning component. IRAs are frequently used for estate planning purposes and in those situations can be distinguished from those that do not meet that need.

Finally, the preamble to the proposal confirms that the proposed exemption would not apply to all of the customer relationships at savings associations that believe they can take advantage of the proposal.[13] In order to qualify for the exception included in proposed 202(a)(11)-2, the association would be required to confirm with the SEC that it would provide access to all of its trust department records. This requirement represents an unreasonable burden for savings associations.

ACB believes that this provision is further indication that savings associations engaged in trust activities will not receive any relief as a result of this proposal. The SEC notes that without the ability to examine all of these records, the agency will not be able to determine whether the association has fairly allocated initial public offerings and other trades among advisory clients and other trust department clients. An important factor is

[13] 69 Fed Reg 25784

that all of the clients are considered fiduciary clients to the association. Further, the examination guidance provided by the OTS specifically establishes a requirement for policies, procedures and internal controls to address this concern. Savings associations would be examined by the OTS and the SEC for compliance while banks are examined only by the banking regulator.

A final note on the scope of the proposal, as part of Gramm-Leach-Bliley, Congress included a definition of "trust activities" in Title II that is broader than the fiduciary purpose standard in Section 3(c)(3) of the Investment Company Act. In that definition, a bank is found to be engaged in trust activities if "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…"[14]

Effects on Competition

ACB respectfully disagrees with the analysis of the nature of the savings association competition in the trust area described in the preamble.[15] The SEC believes that the savings associations that are more traditional deposit taking and lending institutions will be able to avail themselves of the exception provided in the proposal because they hold the majority of their trust assets in fiduciary purpose accounts. The preamble further notes that those associations that have significant trust assets in accounts that do not meet the fiduciary purpose standard are subsidiaries of holding companies and are owned by insurance companies or securities firms. This leads the SEC to the conclusion that granting a broader exemption to savings associations would create a disparity between those savings associations and regular investment advisory firms.

For savings associations that are in a more traditional lending and deposit-taking model, the provision of trust services is a portion of a business strategy that includes providing a full array of banking services to customers. All activities of these associations are examined and supervised on a regular basis and the OTS performs special trust examinations on a regular basis. Consumer protection is an important element in the examination of all activities. The trust activities of these more traditional associations have evolved over time and in most cases the operations have been modeled after the trust operations of banks. To not grant these institutions the same exemption available to banks creates a significant regulatory burden and leads management of these associations to decide that the trust business is not economically feasible for them.

Other savings associations that are engaged in trust activities, as the SEC notes are in holding companies and are owned by insurance and securities firms. We do not believe that granting a broader exemption would create a competitive disparity for registered investment advisors. As we have noted, all aspects of the business of savings associations are examined regularly and in particular trust activities are examined by trust specialists.

---

[14] P. L. 106-102
[15] 69 Fed Reg 25785

In addition, the holding companies of these trust-only entities are examined by the OTS as well as the relevant insurance or securities regulators. Because these entities have federal deposit insurance, the Federal Deposit Insurance Corporation also has examination authority. Finally, these entities face as much scrutiny, if not more than state trust banks.

Exchange Act Proposal

ACB supports the provision in the proposal that would promulgate a regulatory exemption from registration under the Exchange Act for collective investment funds established by savings associations. This is necessary to foster Congressional intent to put savings associations' collective investment funds on an equal footing with bank and trust company collective investment funds.

Conclusion

ACB strongly urges the SEC to reconsider the proposal. In an environment in which differences between savings associations and banks are indistinguishable to customers, it does not make sense for one group of institutions to be required to meet multiple regulatory requirements while the other does not. We are concerned that the proposal perpetuates a competitive disparity that does not make sense in today's regulatory and financial services environment.

We appreciate the opportunity to comment on this proposal and we stand ready to meet with the SEC and continue working with the agency to implement a solution that meets the needs of savings associations and their customers without unnecessary regulatory burden. If you have any questions, please contact Charlotte M. Bahin at (202) 857-3121 or cbahin@acbankers.org.

Sincerely,

Diane Casey-Landry
President and CEO