

# THE FINANCIAL SERVICES ROUNDTABLE



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

**RICHARD M. WHITING**  
EXECUTIVE DIRECTOR AND  
GENERAL COUNSEL

Re: Proposed Rule: Certain Thrift Institutions Deemed Not To Be Investment  
Advisers, File No. S7-20-04

Dear Mr. Katz:

The Financial Services Roundtable<sup>1</sup> (the “Roundtable”) appreciates the opportunity to comment on the proposal issued by the Securities and Exchange Commission (the “Commission”) on the proposed rule on the role of thrift institutions under the Investment Advisers Act of 1940 (the “Act”).

## **Background**

The Commission’s proposal addresses the application of the Act to certain thrift institutions, and also proposes a new rule under the Securities Exchange Act of 1934 (“Exchange Act”) addressing thrift institutions’ collective trust funds.

Banks and bank holding companies are excepted from the definition of investment adviser by section 202(a)(11)(A) of the Act. The Act does not contain a specific exception for thrift institutions, which are not banks as defined in the Act. The Commission is proposing a limited exception from the Act for thrifts. Thrifts would be excepted from the Act under new rule 202(a)(11)-2 to the extent they provide investment advice in their capacity as trustee, executor, administrator, or guardian for customer accounts created and maintained for a fiduciary purpose, or to its collective trust funds excepted from the Investment Company Act of 1940 (“Investment Company Act”). The proposed rule also exempts thrift institutions’ collective trust funds from the registration and reporting requirements of the Exchange Act.

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<sup>1</sup> The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine accounting directly for \$18.3 trillion in managed assets, \$678 billion in revenue, and 2.1 million jobs.

The Roundtable supports the Commission's proposal to provide relief for thrifts from the requirements of the Act. We are encouraged that the Commission has recognized that there are certain fiduciary activities which should not be subject to the Act. We believe this limited exception will help alleviate some of the burdens of dual regulation that thrifts encounter.

Roundtable member companies believe that since trust powers and activities have evolved over the years to mirror those activities conducted by banks, the Commission should consider granting a general exception for savings institutions and savings banks. Notwithstanding this request for a general exception, the Roundtable offers the following recommendations on the proposed rule.

### **Collective trust fund accounts**

Proposed rule 202(a)(11)-2(a)(2) would except a thrift institution from the Act to the extent it provides investment advisory services to its collective trust funds that are excepted from the definition of "investment company" under the Investment Company Act. The Investment Company Act excepted bank's collective trust funds from the definition of investment company and GLBA extended this exception to collective trust funds maintained by thrifts.

The Roundtable supports an exemption from the Act for thrifts advising collective trust funds (in addition to common trust funds) and for thrifts advising accounts, the assets of which are invested exclusively in those collective trust funds. In addition, we agree with proposed new rule 12g-6 which exempts thrift sponsored collective trust funds from the registration and reporting requirements of Section 12(g) of the Exchange Act.

In connection with the exception for collective trust funds, the Roundtable notes that thrifts would be exercising investment discretion consistent with state fiduciary laws and the regulations of the Comptroller of the Currency and would be acting in a fiduciary capacity with respect to the fund. The same analysis should apply to a situation in which a thrift is acting as a trustee for a qualified pension plan under which the plan sponsor or named fiduciary appoints the thrift to act as an investment manager of, or an adviser to, the plan. The plan might not want the trustee to commingle plan assets with a qualified trust. They may prefer management of a single ERISA or governmental plan trust account. Federal securities law already recognizes exemptions for single pension trust funds.<sup>2</sup>

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<sup>2</sup> See section 3(a)(2) of the Securities Act of 1933 (exempting interests or participations in a single trust fund in connection with specified plans) and section(3)(c)(11) under the Investment Company Act of 1940 (excluding any named trust or governmental plan).

Expanding the exemption to encompass single trust funds would be consistent with the thrift's fiduciary capacity with respect to the plans.

### **Scope of fiduciary purpose requirement**

To meet the fiduciary purpose requirement of the Act, the customer account must be established and maintained for an underlying fiduciary reason. Accounts established primarily for money management, custodial or administrative purposes (e.g., managed agency accounts, individual retirement accounts (IRA) trusts, indenture trusts, college savings trusts, ERISA trusts, "rabbi" trusts, and most revocable inter-vivos trusts) would not be included under the proposed rule.

The Commission has asked for comment on the scope of the proposed exception. The Roundtable believes that the proposed exception is an improvement and an appropriate first step toward addressing the disparity of treatment between banks and thrifts concerning trust powers. While we support the proposal, some of our members have the following concerns.

First, our members companies believe that most revocable trusts are established for estate planning purposes. Revocable trusts may be used as a substitute for a will in states with high probate costs or to provide for grantors in the event of incapacity. The proposed rule does not include most revocable trusts in the exception. We recommend that the Commission consider that all revocable trusts be deemed to be established for a fiduciary purpose. The line of demarcation is unclear under the proposed rule. We believe that thrifts would bear a large burden if forced to analyze each revocable trust to determine if it passes the fiduciary purpose requirement. We also believe this test would be subjective and it would be difficult to determine the objective of the customers who established the trusts. Likewise, IRA trusts are often used for estate planning and therefore have a fiduciary purpose.

Second, we believe the exception should include ERISA accounts. In addition to the reasons discussed above in connection with single trust fund, ERISA accounts should be exempt since these accounts are founded on fiduciary law.<sup>3</sup>

Third, we believe it would be appropriate for the Commission to expand the exception to permit thrifts to advise managed agency accounts that have a fiduciary purpose without being subject to the Act. As stated in the proposed rule, trustees of fiduciary purpose accounts often hire thrifts as an agent to manage the trust's assets. We believe the Commission should expand the exception to include

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<sup>3</sup> See section 3(21)(A) of ERISA, 29 U.S.C. section 1002(21)(A).

thrifts acting as an agent for accounts that have a fiduciary purpose. Thrift trust departments provide advisory services (other than investment advice) which retail advisers do not have the expertise to provide. These services include accounting services, preparing fiduciary tax returns, tax and post mortem planning, charitable trust valuations, prepare state filings, and generally assisting fiduciaries with discretionary distributions.

### **The proposed rule does not eliminate all competitive disadvantages faced by thrifts**

The Commission indicates that the proposed rule would eliminate regulatory disparities between banks and thrifts while not creating disparities between thrifts and regulator investment advisory firms. The Commission suggests that a broad exception for thrifts would give them a competitive advantage over investment advisers because thrifts would not be subject to the investment protection requirements under the Act. The Commission's argument is that most trust business is done by savings associations which are part of insurance companies or securities firms, not deposit taking institutions. Therefore, a limited exception is necessary to level the playing field between thrifts and investment advisers which the Commission believes are in direct competition.

The Roundtable disagrees with the Commission on this point. We believe that the proposed rule, while an improvement, still places thrifts at a competitive disadvantage with both retail investment advisers and bank trust departments. Bank trust departments are regulated primarily by bank regulators while retail advisers are regulated solely by the Commission. Although the proposed rule does grant some relief, thrifts would still be subject to the burden of dual regulation. Thrift's fiduciary activities would still be regulated by the Office of Thrift Supervision ("OTS") and the Commission.

Without broadening the exception, thrifts would have to deal with the costs of complying with two regulatory authorities and registering under the Exchange Act. These costs would ultimately be passed on to thrift customers. In addition, this burden may force additional OTS-regulated thrifts to convert to banks, which, according to some regulators, has already taken place.<sup>4</sup>

### **Thrift registration under the Act should be limited**

The Roundtable supports the Commission's proposed rule limiting thrift registration under the Act. Thrifts would be required to register with the

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<sup>4</sup> Statement of John E. Bowman, Chief Counsel, Office of Thrift Supervision concerning "Regulatory Burden Relief" before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, page 2. (June 22, 2004).

Commission with respect to those accounts for which the thrift provides investment advisory services that are outside the exemption. The proposed rule suggests that this limited registration would be possible if the thrift indicates through a Form ADV (Schedule D, Miscellaneous Section) that it undertakes to provide the Commission with all trust department records. The Commission is requesting continued access to these trust records in order to make determinations on whether the thrift institution has defrauded advisory clients by failing to fairly allocate initial public offerings and other trades between “advisory clients” and other trust department clients.

The Roundtable believes that the Commission should eliminate the requirement that thrifts make available to Commission examiners all trust department records rather than only the records that pertain to the covered accounts. This requirement diminishes the relief provided by the rule and creates further disparity for thrifts that choose to retain such business. We believe that the evaluation of thrifts’ policies, procedures and internal controls on trade allocations and initial public offerings that takes place as part of the OTS’s Portfolio Management Examination Program is an adequate safeguard for investors.

#### **A general exception for thrifts would not affect investor protection**

The Commission has expressed concern that granting thrifts a general exception may reduce or eliminate investor protection. Roundtable member companies believe that OTS regulation and examination authority adequately protects thrifts’ customers.

Thrifts engaging in fiduciary activities are subject to several OTS regulations and state laws on trusts and agency relationships. OTS regulations address fiduciary activities, including the administration of trust accounts, various transactions, recordkeeping requirements and advertising restrictions.

Thrifts are also subject to comprehensive examinations. These examinations involve a review of the thrift’s compliance with consumer protection regulations, safety and soundness considerations, a review of personnel and systems and examination of transactions and fiduciary activities. As OTS Chief Counsel John Bowman recently testified, “the OTS examines investment and securities activities of thrifts the same way the OCC and other federal banking agencies examine the same bank activities-with thrift and bank customers equally protected”.<sup>5</sup> Thrifts, like banks, are subject to federal and/or state regulation and supervision and examination by a team of professionals well versed in the business

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<sup>5</sup> Id.

of banking and in close coordination with the federal and state securities regulators.

### **The Commission should consider granting a general exception for thrifts**

The Roundtable believes that since thrifts' trust powers have converged with those of banks, the Commission should consider extending the exception for thrifts under the Act.

Thrifts were not included in the original exception to the Act because they did not have the ability to exercise fiduciary powers when the Act was first promulgated in 1940. Since then, thrift activities have changed. These changes have precipitated the need for regulatory and legislative action addressing thrift activities. In 1980, savings associations were given trust powers under the Depository Institutions Regulation and Monetary Control Act. Congress also amended the Home Owners' Loan Act to allow savings associations to engage in trust activities in a similar basis as national banks. In 1991, when the OTS revised their regulations on fiduciary activities in response to the Federal Deposit Insurance Corporation Improvement Act, they modeled their examination procedures and guidelines after those used by the OCC for national banks. In 1999, Congress amended the definition of "bank" in the Gramm-Leach-Bliley Act ("GLBA") to include thrifts.<sup>6</sup>

The Commission has recognized the need for parity for thrifts. In the May 11, 2001 Release of the interim final rules implementing the exceptions for banks from the definitions of "broker" and "dealer" that were added to the Exchange Act by the GLBA (the "Release"), the Commission 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. In the Release, the Commission states, "insured savings associations are subject to similar regulatory structure and examination standards as banks. Extending the exemption for banks and savings associations and savings banks is necessary or appropriate in the public interest and is consistent with the protection of investors."<sup>7</sup> In June 2004, John Bowman, Chief Counsel for the OTS, appeared before the Senate Committee on Banking, Housing and Urban Affairs and stated explicitly that "banks and thrifts provide the same investment adviser, trust and

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<sup>6</sup> GLBA amended section 2(a)(5) of the Investment Company Act to define "bank" as any "depository institution" as defined under the Federal Deposit Insurance Act. "Savings institutions" are depository institutions under the Federal Deposit Insurance Act.

<sup>7</sup> 66 Fed. Reg. 27788 (May 18, 2001). We recognize that the Commission has subsequently reversed its position on extending equal treatment to banks under the broker-dealer exemption. (SEC Proposed Rule: Regulation B, Release No. 34-49879, June 17, 2004). Roundtable members oppose this lack of parity for thrifts. We intend to provide detailed comments on proposed Regulation B.

custody, third party brokerage, and other related investment and securities services in the same manner under equivalent statutory authorities.”<sup>8</sup>

The Roundtable believes that there is a compelling argument to grant thrifts parity with banks under the Act. We believe that the evolution of thrift activities, along with subsequent regulatory and legislative action, mandate a full exception from the Act for thrifts.

## **Conclusion**

The Roundtable applauds the Commission for working with the industry on this important issue. While we believe the proposed rule provides regulatory relief for thrift institutions that conduct specific fiduciary activities, our members believe there are some areas where the scope of the proposed exception should be broadened. We believe there are other fiduciary activities and accounts, such as revocable trusts, IRA trusts, and ERISA accounts, which should be included in this exception. In addition, we recommend the Commission expand the scope of the exception to include thrifts acting as agents for accounts that have a fiduciary purpose.

Since banks and thrifts engage in similar activities, and are subject to equivalent examination rules and procedures, we urge the Commission to consider granting a general exception from the Act which would give thrifts parity with banks.

If you have any further questions or comments on this matter, please do not hesitate to contact me or John Beccia at (202) 289-4322.

Sincerely,

*Richard M. Whiting*

Richard M. Whiting  
Executive Director and General Counsel

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<sup>8</sup> Statement of John E. Bowman, Chief Counsel, Office of Thrift Supervision concerning “Regulatory Burden Relief” before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, page 2. (June 22, 2004).