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July 7, 2004

Securities and Exchange Commission
450 Fifth Street, NW
Washington, D.C. 20549

Re: File Number S7-20-04: Proposal to Partially Exempt Thrift Institutions as
Investment Advisers

Dear Sir or Madam:

The Independent Community Bankers of America (ICBA)¹ appreciates the opportunity to comment on the SEC's proposal to partially exempt thrift institutions from the Investment Advisers Act of 1940 (the "Advisers Act").

Background

The Advisers Act regulates the activities of "investment advisers" defined generally by section 202(a)(11) of the Advisers Act as persons whose regular business involves providing others with advice about securities for compensation. Under the Advisers Act, investment advisers must register with the SEC, fully disclose any material conflict that they have with their clients, provide their clients with an informational brochure, maintain records related to their activities, and submit to periodic examination by the SEC staff.

Banks and bank holding companies are exempted from the definition of investment adviser by section 202(a)(11)(A) of the Advisers Act. The Advisers Act, however, contains no exceptions for thrifts or savings associations which, according to the SEC, should not be considered "banks." Accordingly, thrifts that perform investment advisory services for their customers in connection with their trust operations generally are subject to the Advisers Act.

¹ The Independent Community Bankers of America represents the largest constituency of community banks of all sizes and charter types in the nation, and is dedicated exclusively to protecting the interests of the community banking industry. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace. For more information, visit ICBA's website at www.icba.org.

There are historical reasons for the absence of a thrift exception in the Advisers Act. When Congress enacted the Advisers Act in 1940, federal savings associations were not authorized to provide the types of services that would subject them to the Advisers Act. It was not until 1980 that Congress gave federal savings associations the authority to provide trust services, including the authority to act as an investment adviser.² There was never any Congressional intent to exclude the fiduciary activities of banks from the Advisers Act and include the fiduciary activities of thrifts. Rather, the current disparity in treatment is the result of unintended consequences and historical timing.

Proposed Rule

Proposed SEC rule 202(a)(11)-2(a)(1) exempts thrift institutions from the Advisers Act to the extent their investment advice is provided in their capacity as trustee, executor, administrator, or guardian for trusts, estates guardianships and other accounts created and maintained for a fiduciary purpose. Under the proposed rule, thrifts could not hold themselves out generally to the public as providing investment advisory services except in connection with the ordinary advertising of their services as trustee, executor, administrator, or guardian.

To meet the “fiduciary purpose” test, the customer account must be established and maintained for an underlying fiduciary reason. A customer account established primarily for money management reasons would lack an underlying fiduciary purpose and would not meet this requirement under the proposed rule. The SEC says that accounts established in connection with estate planning, conservatorships, guardianships, and under the Uniform Gifts to Minors Act would qualify as “fiduciary purpose accounts.” The Advisers Act would continue to apply to thrifts that provide managed agency accounts or “retail” financial planning services.

Proposed rule 202(a)(11)-2(a)(2) would also exempt thrift institutions from the Advisers Act to the extent that they provide investment advisory services to their collective trust funds that are not considered investment companies under the Investment Company Act of 1940.

ICBA Supports Parity Between Banks and Thrifts Under the Advisers Act

While ICBA supports the SEC’s proposed rule, in our view it does not go far enough to exempt thrift fiduciary activities. ICBA supports parity between banks and thrifts under the Advisers Act. Proposed rule 202(a)(11)-2(a)(1) should be amended to fully exempt thrifts from the Advisers Act for several reasons.

First, thrift institutions have fiduciary powers similar to commercial banks and are subject to similar regulation. For instance, most state savings associations are subject to the same state fiduciary law and regulation as are commercial banks. Federal savings

² Thrifts were not given the ability to exercise fiduciary powers until passage of the *Depository Institutions Deregulation and Monetary Control Act of 1980*.

associations are also subject to fiduciary regulation that is similar to national banks.³ Therefore, it is fundamentally unfair to fully exempt banks from the Advisers Act without fully exempting thrifts when both financial institutions are subject to similar supervision and regulation.

Secondly, thrift trust powers and bank trust powers have evolved to a point that they are now almost indistinguishable. In fact, Congress recognized this convergence of thrift and bank trust powers when it passed the Gramm-Leach-Bliley Act in 1999 and amended the definition of “bank” in the Investment Company Act of 1940 to include thrifts. As a result, common and collective trust funds sponsored by thrifts are exempted from the definition of “investment company” under the Investment Company Act and are subject to the same limitations and conditions as bank common and collective trust funds. Recently when the proposed new bank broker-dealer rules were issued, the SEC acknowledged that, with respect to their fiduciary activities and their impact on the securities laws, the distinctions between banks and thrifts were becoming insignificant. Under those proposed rules, savings associations and savings banks are exempted from the definitions of the terms “broker” and “dealer” under the Securities Exchange Act of 1934 on the same terms and under the same conditions that banks are exempted.⁴

Thirdly, we think that current state and federal regulation of banks and thrifts provide adequate protection to fiduciary customers and that thrifts do not need to be subject to additional regulation from the SEC under the Advisers Act. We disagree with the SEC that establishing a general exception for thrifts would “eliminate important investor protections afforded to advisory clients.” Thrift fiduciary activities must be conducted within a thrift’s trust department and are subject to scrutiny and regular examination by experienced trust examiners. Additionally, state statutes and common law pertaining to trusts and agency relationships impose a number of significant duties on both trustees and agents, including duties of loyalty and prudence. These laws also require full and fair disclosure of all facts relevant to transactions engaged in by trustees and agents for the benefit of grantors, beneficiaries, and principals. It is therefore unnecessary and burdensome for thrifts to also be subject to the supervision and regulation of the SEC under the Advisers Act.

SEC Should Exempt Collective Trust Fund Accounts Advised by Thrifts

Proposed rule 202(a)(11)-2(a)(2) also exempts thrift institutions from the Advisers Act to the extent that they provide investment advisory services to their collective trust funds that are excepted from the definition of “investment company” under the Investment Company Act of 1940. ICBA supports this exemption. The Investment Company Act has exempted banks’ collective trust funds from the definition of “investment company” since 1970 and in the Gramm-Leach-Bliley Act, Congress extended this exception to collective trust funds maintained by thrifts. The SEC’s proposed exemption is therefore consistent with GLBA.

³ For instance, when the Office of the Comptroller of the Currency revised its fiduciary rules in 1996 (12 CFR Part 9) governing the fiduciary powers of national banks, the Office of Thrift Supervision similarly revised their rules.

⁴ See Proposed SEC Regulation B, Section 242.773, proposed on June 17, 2004.

ICBA Supports Extending the Exemption to State Savings Banks

Proposed rule 202(a)(11)-2(c) defines the term “thrift institution” to mean a “savings association” as that term is defined in section 3(b)(1) of the Federal Deposit Insurance Act. This includes federal savings associations, federal savings banks, and state savings associations but does not include state savings banks. Since it is unclear whether the bank exemption under the Advisers Act includes state savings banks, we recommend that the proposed rule clarify the status of state savings banks so that it is clear they are exempted.

Conclusion

While ICBA supports the proposed rule to partially exempt thrift institutions from the Advisers Act, we recommend that the proposed rule should be amended to fully exempt thrift institutions from that law. We also support exempting thrift institutions from the Advisers Act to the extent that they provide advisory services to their collective trust funds. In addition, the proposed rule should clarify that state savings banks are exempted under the Advisers Act.

If you have questions or need any additional information, please do not hesitate to contact me at 202-659-8111 or at Chris.Cole@icba.org.

Sincerely,



Christopher Cole
Regulatory Counsel