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16

July 8, 2004

Jonathon G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: Notice of Proposed Rulemaking Concerning Certain Thrift Institutions Deemed Not To Be Investment Advisers ("Proposing Release") (Release Numbers 34-49639, IA-2232; File Number S7-20-04

Dear Mr. Katz:

A.G. Edwards Trust Company FSB ("A.G. Edwards Trust Company") appreciates the opportunity to comment on rules proposed by the Securities and Exchange Commission ("Commission") in its April 28, 2004 release ("Release"). Under proposed Rule 12g-6 under the Securities Exchange Act of 1934, an issuer that is a collective trust fund excluded from the definition of an investment company under section 3(c)(11) of the Investment Company Act of 1940 shall be exempt from the requirement to register any class of equity securities pursuant to section 12(g)(1) of the Securities Exchange Act of 1934. Under the proposed Rule 202(a)(11)-2 under the Investment Advisers Act of 1940 (the "Act"), a thrift institution that limits its investment advisory business to acting solely as trustee, executor, administrator or guardian for trusts, estates, guardianships and other accounts created and maintained for a fiduciary purpose[1] would not be deemed to be an investment adviser under the Act, provided that it does not hold itself out to the public as providing investment advisory services. If the thrift chooses to act in other advisory capacities, it would have to maintain its investment adviser registration and would be required to make all of its trust department records available to Commission examiners upon request, although the Act would not apply to accounts that fall within the exception.

A.G. Edwards Trust Company is a federal savings bank chartered and supervised by the Office of Thrift Supervision ("OTS") and is an FDIC-insured institution. It provides personal trust, employee benefit trust and custodial services to clients throughout the United States. In connection with its personal trust services, A.G. Edwards Trust Company may act as trustee, executor, administrator and guardian as well as agent for trustees, executors, administrators and guardians. We may also provide investment advisory services to accounts for individuals, charitable entities and other entities established for estate planning purposes. Additionally, we operate collective investment funds, which are exempt from the definition of an investment

[1] As described by the Commission, "'fiduciary purpose accounts' would include those where the thrift serves as trustee, executor, administrator, or guardian," but would not include those "established primarily for money management, custodial or administrative purposes such as investment management agency accounts, IRA trusts, ERISA trusts, "rabbi" trusts, and most revocable inter-vivos trusts."

company under section 3(c)(11) of the Investment Company Act of 1940. As a thrift institution, A.G. Edwards Trust Company is not considered to be a "bank" under the Act and accordingly is registered with the Commission as an investment adviser.

A.G. Edwards Trust Company commends the Commission Staff for undertaking these important initiatives and attempting to provide regulatory relief to thrifts that exercise fiduciary powers. With regard to proposed Rule 12g-6 under the Securities Exchange Act of 1934, we fully support the proposal and thank the Commission for correcting this disparate treatment of collective funds operated by thrifts.

With regard to proposed Rule 202(a)(11)-2 under the Act, we are pleased the Commission recognizes that the Act "cannot be meaningfully applied" to certain fiduciary activities of thrifts and that "these activities are subject to an alternative system of regulation." We recognize and appreciate the important work performed by the Commission and respectfully submit these comments for your consideration.

Legislative Intent

As noted in the Release, the absence of a thrift exception (similar to the bank exception) under the Act can be explained by historical context. Thrifts were not included in the exception in 1940 because at the time they did not provide services covered by the Act.[2] This context is important because it demonstrates that the omission of a thrift exception was not deliberate and that there was never any specific legislative intent to exclude the fiduciary activities of banks and include the parallel activities of thrifts. In fact, section 201 of H.R. 1375 includes a provision to grant thrifts a full exception to the Act similar to that currently enjoyed by banks. Additionally, Senator Evan Bayh stated in an August 18, 2000 letter to Arthur Levitt, former Commission Chairman, that savings associations should be provided a level playing field with banks and that he was withholding legislative action in anticipation of Commission rulemaking to resolve the issue.

Functional Regulation

The Commission states that it is not proposing to give thrifts an unlimited exception from the Act and that such an exception would be inconsistent with functional regulation principles.[3] The Commission clarifies that "functional regulation" means "regulation of the same functions, or activities, by the same expert regulator, regardless of the nature of the entity engaging in those activities."[4] Since different rules would apply to banks and thrifts when they are engaging in identical activities, we do not believe that the goal of functional regulation is accomplished under these proposed rules.

Fiduciary Capacity/Fiduciary Account

Under the proposed rule, thrift fiduciary accounts are segregated into two categories: 1) fiduciary-purpose accounts (where the thrift serves as trustee, executor, administrator, or guardian) and 2) retail advisory model accounts (investment management agency accounts, IRA

[2] Thrifts were not given the ability to exercise fiduciary powers until passage of the Depository Institutions Deregulation and Monetary Control Act of 1980.
[3] FR Vol. 69 No. 89 Page 25781
[4] FR Vol. 69 No. 89 Page 25781 footnote 33

trusts, ERISA trusts, "rabbi" trusts, and most revocable inter-vivos trusts). As previously noted, thrifts that provide services to accounts that the Commission defines as fiduciary purpose accounts will be exempt from registration under the Act and thrifts that provide services to accounts that the Commission defines as retail advisory model accounts will still be required to maintain registration under the Act.

OTS regulations include both categories of accounts in the definition of fiduciary capacity.[5] Additionally, the OTS defines "fiduciary account" as "an account that you administer acting in a fiduciary capacity."[6] These definitions are consistent with OCC regulations for national banks[7] and consistent with state bank fiduciary activities. However, in the Release, the Commission states that it is necessary to look beyond these definitions for the purposes of Commission analysis of federal securities laws. We do not believe that is necessary to look beyond the OTS definition of fiduciary capacity. Accounts defined by the Commission as "retail" accounts are considered fiduciary accounts by the OTS, receive the same protections under OTS regulations and are subject to similar examination scrutiny. We believe these protections are equivalent to those offered by bank regulations and examinations. In fact, the Commission recognized in its May 11, 2001 release of interim final rules exempting thrifts from the definition of broker and dealer that "insured savings associations are subject to a similar regulatory structure and examination standards as banks."

As previously noted, we believe that all of the accounts the Commission has identified as "retail" accounts should be considered "fiduciary purpose" accounts. We would like to offer specific comments relating to revocable trusts, employee benefit accounts and managing agency accounts.

Revocable Trusts

We respectfully disagree that revocable trusts generally do not have a fiduciary purpose and are apparently vehicles for money management. When a thrift serves as trustee of a revocable trust, it assumes duties beyond those that are merely incidental to money management. These fiduciary duties include, but are not limited to, administration of the trust according to its terms, bill payment, distributions to beneficiaries and the preparation of an annual tax information letter.

It has been our experience that the majority of revocable trusts are established for estate planning purposes. Revocable trusts are often used as will substitutes to avoid probate (either for cost or privacy reasons). While it is true that grantors retain certain controls over the account, the underlying intent is generally to achieve certain objectives in the event of incapacity or death. It is not logical to incur the costs associated with drafting a trust document if money management is the only object. The FDIC noted in their recent final rule regarding FDIC insurance and living trust accounts that "A living trust is an increasingly popular instrument designed to achieve specific estate planning goals."[8] If the rule is adopted in its current state, thrifts will be forced to undergo an analysis of existing and incoming trust accounts to identify

[5] 12 CFR 550.30
[6] 12 CFR 550.50
[7] 12 CFR 9.2(d) and 12 CFR 9.2(e)
[8] FR Vol. 69 No. 13 page 2825

those revocable trusts that would pass the Commission's "fiduciary purpose" test. This undertaking would be both time-consuming and prohibitively expensive. It would be challenging at best (or even subjective) to determine the underlying intent of the grantors who establish such trusts.

Although, we do not currently offer common trust funds, we do request clarification on how and when revocable trusts may invest in common trust funds. We understand that currently, revocable trusts may invest in common trust funds without restrictions or limitations. If this rule is adopted as proposed, will restrictions be placed on when revocable trusts may invest in common trust funds that are exempt from the Investment Company Act of 1940?

Employee Benefit Accounts

Employee benefit trusts are specialized accounts established to administer the funds contributed for employees' retirement income or welfare. Normally, these plans are exempt from taxation if they follow provisions of the tax laws; however, some non-tax-qualified plans exist. Most employee benefit plans, regardless of tax status, are required to comply with the Employee Retirement Income Security Act of 1974 (ERISA). The primary objective of ERISA is to protect the rights and interests of participants and their beneficiaries. Plans and accounts, which fall under ERISA are required to: have a trustee (unless fully funded by insurance), contain certain data, be properly administered in an arm's-length manner, make disclosures to employees and beneficiaries, and comply with government reporting requirements. Employee benefit plans that are exempt from ERISA are generally subject to State statutes, as well as the terms of the plan document.

As previously mentioned, employee benefit trusts are specialized accounts established to administer the funds contributed for employees' retirement income or welfare; therefore, we believe that they are established for a bona-fide fiduciary purpose. Furthermore, the trustee must act solely in the interest of the plan's participants and beneficiaries. These plans are created under written instruments that provide for the administration and investment of the plan assets. We believe the Act "cannot be meaningfully applied" to employee benefit plans and that "these activities are subject to an alternative system of regulation." Additionally, we believe that because of the expertise need to administer employee benefit accounts that "traditional retail" investment advisers do not typically provide this type of service and therefore do not compete with thrifts for these types of accounts.

Managing Agency Accounts

Thrifts may serve as investment manager for trust accounts, which would be considered "retail" accounts under the proposal. Often, a trustee will choose a thrift or bank trust department for these relationships because the trust department is able to provide services such as principal and income accounting, bill payment, beneficiary distributions and fiduciary tax return preparation. These are typically services not provided by "traditional retail" investment advisers.

Regulatory Burden /Competitive Disadvantage

The Commission has expressed concerns that a full exception for thrifts would create new regulatory disparities between thrifts and regular investment advisory firms. However, it is thrifts that are subject to regulatory disparity and face an unfair competitive disadvantage when compared to both banks and regular investment advisory firms. Bank trust departments are regulated and examined only by bank regulators (except when the bank is an investment adviser to a mutual fund).[9] Regular investment advisory firms are regulated only by the Commission. Thrifts that operate trust departments must register under the Act and are subject to duplicative Commission and OTS supervision and examination. Although the proposal provides limited parity with banks, it does not relieve the burden of dual regulation. It appears that the 34 registered thrifts cited in the proposal provide advisory services to both the "fiduciary" and "retail" account categories and would not be able to take advantage of a complete registration exception unless a portion of their advisory business is divested. Thus, thrifts are faced with the dilemma of divesting themselves of accounts that the Commission considers to be "non-fiduciary," which will adversely affect profitability and the safety and soundness of the thrift, or continuing to be subject to the costs and burdens associated with registration under the Act. The result of either choice is that thrifts are placed at a severe competitive disadvantage – either additional costs or limited products to offer clients if the thrift desired a complete exception from registration.

<u>Investor Protection</u>
The Commission is understandably concerned with investor protection and guarding the interests of the investing public. The Commission is concerned that a general thrift exception from the Act will eliminate or diminish the protections under the Act. We respectfully submit that the combination of federal banking regulation and applicable state or common law is more than adequate to protect clients (e.g. grantors, beneficiaries, or principals) of thrift trust departments. Thrifts must operate and administer their fiduciary accounts (as previously noted this includes accounts that the Commission considers "retail") under comprehensive OTS regulations, directives, and guidelines. These regulations, directives, and guidelines cover the operation and administration of fiduciary accounts, recordkeeping and confirmation requirements for securities transactions, advertising, and, as the Commission notes in the Release, conflicts of interest. Additionally, state statutes and common law pertaining to trust and agency relationships impose a number of significant duties on both trustees and agents, including duties of loyalty and prudence. They also require full and fair disclosure of all facts relevant to transactions engaged in by trustees and agents for the benefit of their grantors, beneficiaries and principals.

Thrift trust departments are also subject to regular and comprehensive examinations. In addition to examinations covering safety and soundness (e.g., capital adequacy, asset quality, management, earnings, liquidity and sensitivity to risk), information technology systems, and compliance with consumer protection regulations (including those governing privacy, and advertising), thrifts undergo a thorough examination of their fiduciary activities, including their asset management activities, by experienced and well-trained OTS examiners dedicated to the examination of fiduciary activities. The examination covers, among other things, a thrift's portfolio management activities, administration of marketable securities, selection and monitoring of mutual funds and handling of conflicts of interest. Written Reports of Examination addressing any or all of the above areas are presented by the OTS to a thrift's

[9] When a bank acts as an investment adviser to a registered investment company, the bank is subject to the Act and regulation by the Commission.

senior management and Board of Directors to apprise them of any recommended or required corrective actions.

Thrifts are subject to the same comprehensive regulations and examinations as banks. To our knowledge, the bank regulatory and examination environment has never been critiqued for failing to protect the investing public. Consequently, there is no logical basis as to why thrifts, unlike banks, require a duplicative regulatory and examination environment.

Conclusion

Again, we reiterate our support and thanks regarding proposed Rule 12g-6 under the Securities Exchange Act of 1934, which will correct this disparate treatment of collective funds operated by thrifts.

With regard to proposed Rule 202(a)(11)-2 under the Act, we urge the Commission to provide thrifts full parity with other banks by providing thrifts a general exception to the Act. Thrifts are subject to the same comprehensive banking regulations and examinations as other banks, and that level of regulation is more than adequate for the protection of investors. Because they are subject to dual regulation, thrifts are at a competitive disadvantage not only with banks but with retail advisers as well.

The practical effect of this proposed rule is that it provides a limited exception that is beneficial to few, if any, thrifts. We do not believe that a partial exception would provide any meaningful cost savings or regulatory relief and in fact may impose greater costs and compliance burdens. A.G. Edwards Trust Company offers advisory services to both account categories (fiduciary-purpose accounts and retail advisory model accounts) and would be required to maintain its registration unless "retail accounts" as defined by the Commission were divested. As a practical matter, we will not divest accounts that are permissible under our OTS charter; therefore this limited exception will not benefit A.G. Edwards Trust Company.

Thank you for your consideration of the foregoing items. I would welcome the opportunity to discuss these comments at greater length if you believe it would be of benefit.

Sincerely,

Richard F. Grabish

Richard F. Grabish, Ph.D.
Chairman and CEO