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Office of the General Counsel

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July 8, 2004

Via Airborne Express Overnight Delivery

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

Re: File No. S7-20-04
Proposed Rule: Certain Thrift Advisers Deemed Not To Be Investment Advisers
Securities and Exchange Commission Release Nos. 34-49639 and IA-2232

Dear Mr. Katz:

On behalf of The MassMutual Trust Company ("MMTC"), we appreciate the opportunity to comment on the Proposed Rule ("Proposed Rule") entitled "Certain Thrift Institutions Deemed Not To Be Investment Advisers" and the accompanying Securities and Exchange Commission Release Nos. 34-49639 and IA-2232 (the "Release").

MMTC is a limited purpose federal savings bank that operates a trust company business and provides fiduciary account services primarily to individual clients. MMTC does not currently engage in deposit taking or lending activity. MMTC is currently registered with the Securities and Exchange Commission ("Commission") as an investment adviser because a thrift is not considered a "bank" under the Investment Advisers Act of 1940 (the "Advisers Act"). We believe that MMTC applies a business model for delivering fiduciary services that is similar to the model used by many national banks and state banks, all of whom are not subject to investment adviser regulation of their fiduciary activities.

Thrift trust and fiduciary activities are subject to regulation and supervision by the Office of Thrift Supervision ("OTS"). This comprehensive regulatory and supervisory framework affords substantial protections to thrift fiduciary clients. In addition, a thrift's fiduciary activities are also regulated and examined by the Commission. The present regulatory structure unnecessarily subjects federal savings banks to dual regulation and creates unwarranted, disparate treatment between thrifts and banks in the area of trust and fiduciary services.

The disparity in treatment has been most obvious since the enactment of the Gramm-Leach-Bliley Act in 1999. We commend the Commission for recognizing this situation and for taking affirmative steps to address the current system of dual regulation. In the absence of a more comprehensive legislative solution, we applaud the Commission for its Proposed Rule and urge that it be made final soon. That said, we recommend that the scope of the exemptive relief be further expanded as more specifically suggested below.

The Release correctly notes the "convergence of bank and thrift trust powers and regulation" and represents a positive development in leveling the uneven playing field between banks and thrifts in this area. In response to specific questions from the Commission in the Release, we have offered suggestions for enhancements to the partial exemption in the Proposed Rule that further the goal of avoiding duplicative regulatory oversight. While we continue to believe that the convergence cited in the Release demonstrates that complete parity between thrifts and banks on this issue is the proper ultimate result, a less restrictive partial exemption should also provide more meaningful relief to thrifts by more fully reflecting the nature of their fiduciary services operations.

The Commission's own analysis, as articulated in the Release, indicates that the scope of exemptive relief offered through this Proposed Rule could be quite limited for most institutions and would still potentially subject a large portion of their trust department activities to the requirements of the Advisers Act. The Release explains that "[a]ll but one or two of the 34 savings associations currently registered with us as investment advisers" report trust assets to the OTS that would be outside the scope of the proposed exemption, as currently drafted. Given the recognition by the Commission of the convergence between thrift and bank trust powers and regulation, we respectfully request that the Commission consider expanding the scope of the exemption to more closely align the regulatory structure for thrifts with that applicable to banks. Thrifts should have the opportunity to conduct their fiduciary account activity on a substantially similar basis to national and state banks.

The Commission has also opined that revocable inter vivos trusts would be subject to a rebuttable presumption that such accounts are outside of the scope of the exemption contained in the Proposed Rule because, in the Commission's view, they are established for primarily money management purposes. Our experience reflects a different reality when clients seek to establish revocable inter vivos trusts. We find that most revocable trusts are established for estate planning purposes and not primarily for money management purposes. In addition, the circumstances under which a revocable trust can be terminated are often limited and may be remote in time and likelihood. Although revocable inter vivos trusts frequently involve significant fiduciary responsibilities, the Proposed Rule would place thrifts in the extremely difficult position of attempting to predict the likelihood of conditions subsequent and/or the intent of the grantor on a case-by-case basis. This is an exercise that our bank competitors are not required to undertake. Consequently, we urge the Commission to modify the Proposed Rule in order to cover revocable inter vivos trusts. If the Commission is unwilling to consider all revocable inter vivos trusts as fiduciary purpose accounts, we believe, at a minimum, the presumption should be that such accounts are within the scope of the exemption.

The Commission has specifically requested comment on whether a final rule should "permit thrifts to advise managed agency accounts that have a fiduciary purpose without being subject to the Act." We believe that thrifts should be able to handle such accounts without being subject to the Advisers Act. The OTS regulations do not distinguish between managed agency accounts and what the Commission has classified as fiduciary purpose accounts. As noted by the OTS in its recent written testimony before the Senate Committee on Banking, Housing, and Urban Affairs: "The accounts in both categories are fiduciary accounts that receive the same protections under HOLA and OTS regulations and are subject to similar examination scrutiny."[1] When serving in the agent for trustee capacity, the corporate fiduciary often assists the individual trustee in satisfying his or her fiduciary obligations, which would include accounting and recordkeeping support and advice regarding discretionary distributions. Because thrift agency accounts are already subject to the same regulatory scrutiny as other fiduciary accounts and thrifts generally exercise the same fiduciary responsibilities for such accounts, we cannot perceive any compelling reason for affording differing treatment to agency accounts.

The Commission has also posed the following questions for comment: "Do regular investment advisory firms compete, to any appreciable degree, with thrifts for fiduciary-purpose trust clients?" and "How many of these thrifts compete with banks for the same type of client?" Our experience demonstrates that we generally are not competing with investment advisory firms for clients. Clients that seek the services of a trust company/trust operation typically have unique needs that would not be satisfied by a regular investment advisory firm. In many instances, they desire the enhanced fiduciary recordkeeping and account management services that would generally only be available through a trust company/department, whether it be a thrift or bank. Because bank trust operations also offer similar recordkeeping and ancillary capabilities (e.g., guidance on handling discretionary distributions), we often find ourselves competing with banks for fiduciary account business. For this reason, the competitive analysis should focus on the environment in which banks operate and not on investment advisory firms. In the current environment, however, thrifts are subject to essentially the same comprehensive banking regulation and supervision as these other institutions and an additional level of regulation under the Advisers Act that only applies to thrifts. This places thrifts at an unwarranted competitive disadvantage because the comprehensive body of banking regulation and state law already provides substantial and appropriate protection to clients of a thrift's trust operations.

In the Release, the Commission has asserted that all Individual Retirement Accounts (IRAs), including IRA trusts, should not be included within the scope of the Proposed Rule. Particularly with IRA trusts, however, we do not perceive any appreciable difference with other accounts that the Commission has proposed to cover under the exemption in the Proposed Rule. IRA trust clients seek the same fiduciary capabilities from us as clients for other fiduciary accounts that would be covered under the Proposed Rule because, in many instances, IRAs are established for estate planning purposes or other fiduciary purposes. Instead of completely excluding IRAs from the proposed exemption, we recommend an approach that fully recognizes the client's expectations and intent and accords equal treatment to IRAs as other fiduciary purpose accounts.

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[1] Statement of John E. Bowman, Chief Counsel, Office of Thrift Supervision concerning Regulatory Burden Relief before the Committee on Banking, Housing, and Urban Affairs, United States Senate, page 4 (June 22, 2004).

The Commission also inquired how many thrifts would qualify to use the proposed exceptions from the Advisers Act or from section 12(g) of the Exchange Act. While many thrifts may be able to apply the exemption to some limited portion of their business, it is our expectation (based upon our understanding of the industry) that very few thrifts, if any, operate under a business model that would be completely covered by the Proposed Rule. The analysis in the Release also appears to recognize that situation and would strongly suggest that an expanded exemption represents the more appropriate means for addressing the banking regulatory convergence between banks and thrifts in the area of fiduciary activities.

Conclusion

Again, we applaud the Commission and its staff for taking affirmative steps to address the unwarranted discrepancy that currently exists between thrifts and banks in the area of investment adviser regulation by proposing a partial exemption under the Advisers Act. However, we encourage the Commission to reconsider some of the limitations placed on the scope of the exemption in the Proposed Rule so that the Rule might more fully address the actual disparity between thrifts and banks and would offer more meaningful relief to the thrifts that are exercising fiduciary powers.

Thank you again for the opportunity to comment on the Proposed Rule.

Sincerely,

James P. Puhala III
Second Vice President &
Associate General Counsel
MassMutual Financial Group