



57-20-04

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July 9, 2004

**Via E-Mail**

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

57-20-04

RE: File No. ~~57-27-04~~  
Proposed Rule: Certain Thrift Institutions Deemed Not To Be  
Investment Advisers (Release Nos. 34-49639 & IA-2232)

Dear Mr. Katz:

On behalf of Nationwide Financial Services, Inc. ("Nationwide"),<sup>1</sup> we are grateful for the opportunity to provide comment with respect to proposed rule 202(a)(11)-2 under the Investment Advisers Act of 1940 (the "Advisers Act") and proposed rule 12g-6 under the Securities Exchange Act of 1934 (the "Exchange Act") by the Securities and Exchange Commission (the "Commission").

The proposed rule would exempt thrift institutions from the definition of an investment adviser under the Advisers Act if the thrift's 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 excluded from the Investment Company Act of 1940. The proposed rule also would exempt thrifts from registration and reporting requirements under the Exchange Act with respect to interests in thrift sponsored collective trust funds.

Nationwide, together with various operating entities and holding companies, is registered as a unitary savings and loan holding company<sup>2</sup> under the Home Owners' Loan Act of 1933 (the "HOLA") and owns Nationwide Trust Company, FSB, a limited purpose federal savings bank chartered by the Office of Thrift Supervision in the U.S. Department of the Treasury. Pursuant to its federal

<sup>1</sup> Nationwide Financial Services, Inc. (member New York Stock Exchange) is the holding company for Nationwide Life Insurance Company and other companies that comprise the domestic trust, life insurance and retirement savings operations of the Nationwide group of companies, including Nationwide Trust Company, FSB, a wholly owned subsidiary.

<sup>2</sup> Nationwide Financial Services, Inc. is a majority owned subsidiary of Nationwide Corporation, which on a consolidated basis is wholly owned by Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company.



thrift charter, Nationwide was granted authority to exercise trust, custodial and agency powers consistent with the HOLA. Through Nationwide Trust Company, FSB, Nationwide offers a package of trust, fiduciary and custodial services to qualified pension plans and public sector deferred compensation plans. Nationwide serves as trustee or custodian with respect to such plans and in addition performs a number of administrative functions for the plans.

Nationwide commends the Commission for unanimously adopting the proposed exemptive rule. The rule carries the Congressional mandate in the Gramm-Leach-Bliley Act of 1999 (the "GLBA") to exempt thrift sponsored common and collective trust funds from registration under the Securities Act of 1933 and the Investment Company Act of 1940 through to the Advisers Act and the Exchange Act to the same extent as banks. The GLBA recognizes the principle of functional regulation and the SEC exemptive rule commendably fosters that Congressional policy and the intent of Congress to modernize the regulation of financial services in the United States. Under the proposed rule, to the extent Nationwide Trust Company, FSB sponsors and manages a collective trust fund for the benefit of its pension customers, the trust company, the fund and interests in the fund would be exempt from federal securities registration, however they would remain subject to federal securities antifraud requirements, regular examination by the Office of Thrift Supervision, state trust and fiduciary law, Regulations of the U.S. Comptroller of the Currency concerning collective trust funds as well as the fiduciary standards and disclosure requirements of the Employee Retirement Income Security Act of 1974 ("ERISA").

Proposed rule 202(a)(11)-2(a)(1) would permit a thrift to provide advisory services to customer accounts created or maintained for a fiduciary purpose in the thrift's capacity as trustee, executor, administrator or guardian, without being subject to the Advisers Act. The adopting release notes that to meet the "fiduciary purpose" requirement, the customer account must be established and maintained for an underlying fiduciary reason. The release further states that: "[a] customer account established primarily for money management reasons lacks an underlying fiduciary purpose and cannot meet this requirement." The release then lists examples of accounts established primarily for money management, custodial or administrative purposes and lists ERISA trusts. While we can agree with the principle articulated in the Release, we disagree with the categorical inclusion of ERISA trusts as an example of a nonfiduciary purpose. The final release should be clarified to permit a thrift that is serving as the trustee of an ERISA plan or an Internal Revenue Code Section 457 deferred compensation plan and is also appointed by the plan's sponsor or named fiduciary to serve as the investment manager to qualify for the exemptive rule.

Under the proposed rule, the Commission recognizes an exemption for thrift advisory activity with respect to collective trust funds. Under that construct, the thrift would be exercising investment discretion consistent with state fiduciary



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law and under the Regulations of the U.S. Comptroller of the Currency and would be acting in a fiduciary capacity with respect to the fund. Nationwide believes that this same analysis should apply to situations in which it is acting as a trustee of a qualified pension plan under which the plan sponsor or named fiduciary appoints Nationwide to act as an investment manager of or adviser to the plan. In that situation, the plan might or might not want the trustee to commingle plan assets with other qualified trusts in a collective trust fund. Plans that do not want commingling could prefer advice concerning the investment of assets of the single trust fund in other securities or could want the trustee to exercise investment discretion in that regard. Please note that interests in a single pension trust fund are exempt from registration under the Securities Act of 1933 in reliance upon Section 3(a)(2) thereof (exempting interests or participations in a single trust fund issued in connection with the specified plans). Moreover, the pension plan itself is excluded from the definition of "investment company" in reliance upon Section 3(c)(11) under the Investment Company Act of 1940 (excluding any employee stock bonus, pension or profit sharing trust meeting the qualification requirements of Section 401 of the Internal Revenue Code and governmental plans as well as collective trust funds consisting of the assets of both kinds of plans). This service for a single plan would be, by definition, a thrift fiduciary service (see Section 3(21)(A) of ERISA, 29 U.S.C. Section 1002(21)(A)) and should be exempt from the Advisers Act for the same reason that the management of collective trust funds that commingle assets among more than one plan are exempted. In both situations, a thrift would be required as a fiduciary to exercise the highest degree of care in managing plan assets and act in the best interests of the plan and its participants and beneficiaries.

In this connection, we note that recognition of an exemption for thrift advisory activity with respect to a single pension or governmental plan trust fund would be consistent with the definition of "fiduciary capacity" as contained in Section 3(a)(4)(D) of the Securities Exchange Act of 1934 as amended by the GLBA. That provision defines the term: "fiduciary capacity" for purposes of the bank trust exception from the definition of "broker" as in the trustee capacity or as an investment adviser if the bank receives a fee for its investment advice or in any capacity in which the bank possesses investment discretion on behalf of another or in any similar capacity. In this regard, we refer you to the adopting release to proposed Regulation B Release No. 34-49879 (publicly available June 17, 2004) in which the Commission proposes to define the phrase "investment adviser if the bank receives a fee for its investment advice" to mean that the bank has a fiduciary relationship with the customer under which the bank owes the customer a duty of loyalty, including an affirmative duty to make full and fair disclosure of all material facts and conflicts of interest and has an ongoing responsibility to provide investment advice based upon the customer's individual needs that includes selecting and making recommendations regarding specific securities and, that the definition "is intended to ensure that securities



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transactions the bank effects in an investment advisory capacity are effected subject to the bank's fiduciary obligations that attach when it is acting as an investment adviser for a fee." As trustee of a pension or governmental plan, a federal thrift should have the ability to serve as an adviser or manager with respect to the investment of plan assets and qualify for exemption just as it would qualify if it were advising a pooled collective fund consisting of the assets of several employee benefit or deferred compensation plans.

Nationwide strongly supports a regulatory regime that protects investors. Nationwide applauds the Commission in its efforts. Subject to a clarification in the final adopting release that would confirm thrift trusteeship of an ERISA plan and the advisory component thereto as a fiduciary activity, Nationwide would support the rule as proposed.

We thank the Commission for its consideration of our views.

Respectfully yours,

Nationwide Financial Services, Inc.

Mark R. Thresher  
President and Chief Operating Officer

cc: Susan A. Wolken - Chairman of the Board - Nationwide Trust Company, FSB