THE FINANCIAL PLANNING ASSOCIATION

By Electronic Mail

July 9, 2004

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: Release Nos. 34-49639, IA-2232; File No. S7-20-04; Proposed Rule: Certain Thrift Institutions Deemed Not To Be Investment Advisers

Dear Mr. Katz :

The Financial Planning Association ("FPA")[1] wishes to express its concern with the rule proposed by the Securities and Exchange Commission (the "Commission" or "SEC") that would except thrifts from the Investment Advisers Act of 1940 ("Advisers Act" or "Act") when they provide investment advice as a trustee, executor, administrator or guardian for customer accounts created and maintained for a fiduciary purpose, or to collected trust funds excepted from the Investment Company Act of 1940.

FPA is an organization representing primarily small financial planners and investment advisers that is committed to maintaining the integrity of the Advisers Act and maximizing consumer protection by limiting industry exemptions under the Act. We require member adherence to the FPA Code of Ethics -- comprised of the principles of the Certified Financial Planner Board of Standards Code of Ethics and Professional Responsibility ("CFP Board Code of Ethics") -- that requires them to place the interest of the client first, and to embrace competency standards.[2]

[1] The Financial Planning Association is the largest organization in the United States representing financial planners and affiliated firms, with more than 29,000 members. Most are affiliated with investment adviser firms registered with either the SEC or state securities administrators, or both. FPA maintains its headquarters in Denver and a government relations office in Washington, D.C.

[2] *See* Rule 202 of the CFP Board Code of Ethics, Rules that Relate to the Principle of Objectivity. "A financial planning practitioner shall act in the interest of the client."

We believe that anyone providing financial planning and investment advisory services should be subject to the same or comparable standards.

By providing the proposed exemption to the thrift industry, we respectfully submit that the SEC would:

- undermine its own public policy in favor of functional regulation of the financial services industry under the various securities acts;
- reduce investor protection by eliminating the disclosure of conflicts of interest, qualifications, and other critical information that clients of investment advisers -- but not of banks or thrifts -- must receive; and
- further erode the level playing field for investment advisers and financial planners -- as well as the integrity of the Advisers Act -- by adding to the list of industry-specific exemptions.[3]

Each of these issues is discussed below.

1. *The proposed rule is inconsistent with the Commission's own public policy declarations favoring functional regulation of securities activities.*

As the financial services industry accelerates its consolidation with repeal of the Glass-Steagall Act, many of the firms that are eager to expand their menu of new financial products and services are also resistant to accepting the obligations of functional regulation.[4]

In the 1999 congressional debate over Glass-Steagall reform, the SEC was emphatic in its support of functional regulation of the financial services industry with respect to securities regulation. In testimony before the House Committee on Commerce concerning H.R. 10 (which later became the Graham-Leach-Bliley Act), then SEC Chairman Arthur Levitt stated:

> H.R. 10 now creates too many loopholes in securities regulation – too many products are carved out, and too many activities are exempted. These loopholes would prevent the Commission from effectively monitoring and protecting U.S. markets and investors. Moreover, the scope of those loopholes, which are ambiguously drafted, may create even greater problems and uncertainties in the future. The Commission cannot ensure the integrity of U.S. markets if it is only able to supervise a portion of the participants in those markets. *Neither can it ensure fair and*

[3] *See* SEC Release Nos. 34-42088; IA-1845; File No. S7-25-88, "Certain Broker-Dealers Deemed Not To Be Investment Advisers" ("BD Exception").
[4] By functional regulation, we mean agency jurisdiction over a defined advisory or sales activity.

> *orderly markets if market participants operate by different sets of rules and investors receive different levels of protection….*[5] [emphasis added.]

The SEC subsequently re-affirmed its support for functional regulation in attempting to clarify its authority over a bank's brokerage activities. According to a May 11, 2001 Commission interim rule, the GLB Act

> codified the concept of functional regulation…by the same expert regulator, *regardless of the type of entity engaging in those activities* [emphasis added]. Congress believed that, given the expansion of the activities and affiliations in the financial marketplace, functional regulation was important to building a coherent financial regulatory scheme.[6]

2. *The proposed rule would reduce investor protection by eliminating the disclosure of conflicts of interest, qualifications, and other critical information that clients of thrift institutions would otherwise receive under the Advisers Act.*

When a person becomes a client of a registered investment adviser, the adviser is required to provide detailed information about the firm, conflicts of interest, the qualifications and disciplinary history of the adviser, and any material information that could affect their relationship. In addition, registered investment advisers are subject to minimum competency standards in the delivery of advisory services.

- Conflicts of Interest

An investment advisory firm registered under the Advisers Act is required to disclose at the outset of the engagement information regarding the manner in which it is compensated, its financial industry affiliations and its participation in client transactions – all of which is intended to make transparent any potential conflicts of interest between the firm and its clients. All of this information is contained in Form ADV ("Uniform Application for Investment Adviser Registration"), which is a uniform disclosure and registration document required under Section 206(3) of the Advisers Act and all state investment adviser statutes.

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[5] Testimony of SEC Chairman Arthur Levitt before the U.S. House Committee on Commerce Concerning H.R. 10, "The Financial Services Act of 1888"" May 5, 1999.

[6] *See* SEC Release No. 34-44281; File No. S7-12-01, "Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1834," at 8, May 11, 2001. Later in the Release, however, the SEC indirectly concedes its role of functional regulator to bank regulators with respect to investment advisory services offered by banks. "Because Congress believes that the 'examinations of bank trust departments are today rigorous in nature,' these examinations would provide customers with 'some basic protections' to mitigate the lack of federal securities law protections," the Release stated. Ibid., at 22.

Banks do not have any comparable disclosure obligations. Prior to or at the time an investment account is opened, a bank is only required to disclose to retail customers material relationships with affiliates and its role (and that of its affiliates) in the distribution, administration or management of any securities it offers for sale. We note that trust officers are not required to make any disclosures concerning personal or corporate conflicts of interest, such as principal transactions involving the sale by the bank of recommended securities out of its own inventory.

- Disciplinary History

Investment advisory firms are required to disclose any disciplinary history of the firm and its advisory affiliates that might be material to the advisory relationship. There are no specific regulations for banks concerning the disclosure of such matters to customers.[7]

- Minimum Competency Requirements and Disclosure of Qualifications

Nearly every state requires competency testing of individual investment advisers covering their knowledge of the equity markets and various investment strategies, securities laws and pension laws. SEC-registered investment advisers are generally subject to state testing because the Advisers Act permits states to license or otherwise qualify investment adviser agents of an SEC-registered firm who have a place of business in the state and who provide retail advisory services to the public.

In contrast, there is no OCC review of individual investment advisers or trust officers, even in an application to exercise trust powers specifically.[8] The OCC views the exercise of fiduciary powers as primarily a management decision.[9] Accordingly, it considers the competence, experience and integrity of management -- not individual advisers -- when reviewing an application or notice. Although the OCC will assess the qualifications of personnel in a supervisory examination, it does not require trust officers or other bank officials to complete a specific course of training or satisfy other specific requirements before providing investment advice to the public.

- Advertising Restrictions

Investment advisers are prohibited from using client testimonials in advertising and are subject to strict standards for advertising portfolio performance. Additionally, if an

[7] Bank organizers, senior executive officers, directors, and principal shareholders must, however, submit personal biographical and financial information to the OCC. *See* Comptroller's Corporate Manual, Background Investigations at 1 (April 1998); Interagency Biographical and Financial Report at Question5.

[8]See 12 C.F.R. §5.26(e) (governing procedures for obtaining approval to exercise fiduciary powers); Comptroller's Corporate Manual, Fiduciary Powers (April 1998).

[9]Comptroller's Corporate Manual, Fiduciary Powers at 3 (April 1998).

adviser pays a third-party for referrals, specific disclosure of the payments is required to the customer. In contrast, bank regulation does not address the use of customer testimonials, or prescribe standards for advertising historic investment performance. There is also no regulation regarding referrals.

3. ***Adding yet another exemption to the Advisers Act will exacerbate the uneven playing field for financial planners and place consumers at risk.***

Financial planners provide their services in one of the most heavily regulated professions in the United States today. Yet, they operate on a playing field increasingly tilted in favor of competitors, including broker-dealers, banks and, under the proposed rule, thrifts. This places financial planners at a disadvantage and exposes consumers – who are denied a consistent level of protection – to a greater level of risk.

Conclusion

The disclosure, advertising and competency standards accorded to the delivery of the fiduciary services contemplated by the proposed rule vary significantly between advisory firms and bank -- and, if the proposed rule is adopted, thrift -- trust departments.

Banks have never had the same level of transparency in their customer relationships as have investment advisers. If the proposed rule is adopted, thrifts would be added to the list of financial services institutions offering advisory and financial planning services without being subject to the same level of disclosure, oversight and minimum competency standards as registered investment advisers. In a period during which the SEC and Congress are focused upon creating greater transparency of conflicts of interest in the financial services industry, adoption of the proposed rule would constitute a step backwards in consumer protection.

We would be happy to discuss any of the above comments in greater detail. Please do not hesitate to contact me at 202-626-8558.

Sincerely,

Neil A. Simon, Esq.
Director of Government Relations