



1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
www.aba.com

4

*World-Class Solutions,
Leadership & Advocacy
Since 1875*

September 3, 2002

Regulation Comments

**Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552**

Sarah A. Miller
Director
Center for Securities, Trust
and Investments
202-663-5325
202-828-4548
Smiller@aba.com

**Re: Recordkeeping and Confirmation Requirements for Securities Transactions;
Fiduciary Powers of Savings Associations, Docket No. 2002-22, 67 Federal
Register 39886 (June 11, 2002).**

Dear Sir or Madam:

The American Bankers Association ("ABA") appreciates the opportunity to comment on the proposal issued by the Office of Thrift Supervision ("OTS") that would: (1) specify recordkeeping and confirmation requirements for savings associations, and (2) amend its regulations governing the fiduciary powers of federal savings associations. The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership – which includes community, regional, and money center banks and bank holding companies, as well as savings associations, trust companies, and savings banks – makes ABA the largest banking trade association in the country.

Our members are very interested in the OTS' proposal. Approximately twenty-eight percent of U.S. commercial banks, savings banks and savings and loan associations provide some form of retail investment services to their customers.¹ In addition, many of our federal savings association members serve as either trustee or fiduciary to over 90,000 accounts valued in excess of \$140 million.²

Recordkeeping and Confirmation Requirements

The OTS proposal would add new regulations specifying the recordkeeping and confirmation requirements for savings associations that effect securities transactions. The proposal is necessitated by the recent action of the Securities and Exchange Commission ("SEC"), permitting savings associations to perform

¹ See *American Bankers Association 2001 Survey Reports on Bank Retail Investment Services*, prepared by American Brokerage Consultants, Inc.

² Federal Financial Institutions Examinations Council, Trust Assets of Financial Institutions – 1999 at p. 8.

certain broker-dealer activities without registering with the SEC. In addition, the proposal will, when adopted, bring the OTS regulations in line with those of the other federal banking regulators.

As the OTS is aware, the ABA strongly supported the SEC's determination to provide savings banks and savings associations with much needed relief from broker-dealer registration and, in fact, urged the SEC to consider exempting these institutions from investment adviser registration under the Investment Advisers Act of 1940. In addition, we fully support the OTS' efforts to bring their regulations into conformity, as appropriate, with those of their fellow banking regulators. The ABA has long championed the notion that federal banking and savings association regulations should conform where appropriate. We would, however, note that the SEC has yet to issue final regulations implementing Title II of the Gramm-Leach-Bliley Act of 1999. Until they do, it is unclear whether any revisions will need to be made to applicable banking and savings association regulations, including the proposed recordkeeping and confirmation requirements addressed in this comment letter. Accordingly, we would urge the OTS, in considering whether to adopt the proposed recordkeeping and confirmation requirements, to be mindful of requiring savings institutions to put in place significant policies and procedures that could possibly be required to be substantially revised in the very near term.

Fiduciary Powers of Savings Associations

In addition, the OTS proposal would codify a series of OTS legal opinions regarding the fiduciary powers of federal savings associations. Specifically, the proposal codifies prior OTS opinions clarifying when a federal savings associations is "located" in a state for purposes of exercising fiduciary powers authorized under Section 5(n)(1) of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. 1464(n). "Location" is very important as the scope of a federal savings association's fiduciary powers is expressly tied to the laws of the state in which the federal savings association is located. The proposal also codifies prior opinions making clear that HOLA places no geographic limitations on the ability of a federal savings associations to exercise fiduciary authority on a multi-state basis.

The ABA strongly supports the OTS' proposal to codify its interpretations regarding the ability of federal savings associations to operate on a multi-state basis. It is very important for our members to be able to offer fiduciary services on a nationwide basis and in a seamless and efficient fashion. Codification of this authority both clarifies and bolsters the authority of federal savings associations to do just that.

We would, however, offer the following comments for consideration:

- Clarification is needed as to what type of state laws may be applicable to federal savings associations' fiduciary activities. This concept is used in Section 550.135(b). Does this mean that federal savings associations may

engage in any fiduciary activities authorized for state-chartered institutions in addition to those specified in Section 5(n) of HOLA? Are state securities laws requiring investment adviser licensing of both the federal savings association and its employees applicable state laws under Section 550.135(b)?

- Clarification of the term “materially different” as used in Section 550.70 is also needed. The narrative discussion in the proposing release suggests that geographic expansion of existing fiduciary services is not “materially different” and thus does not warrant OTS pre-approval. But pre-approval would be required when an association expands fiduciary services offered from personal trust services approved by the OTS in the initial trust application to employee benefit accounts. We assume that “materially different” would not require a federal savings association to obtain OTS pre-approval when it determines to implement its previously approved business plan on a graduated basis, i.e., personal trust services would be offered in year one but employee benefit services would not be offered until year two.

In conclusion, the ABA appreciates the opportunity to offer its views on the OTS’ proposals. Should you have any questions regarding the substance of our comments, please do not hesitate to contact the undersigned.

Sincerely yours,

Sarah A. Miller