Office of Thrift Supervision
Department of the Treasury

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Director

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July 9, 2004

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

RE: File Number S7-20-04

Dear Mr. Katz:

The Office of Thrift Supervision (OTS) appreciates the opportunity to comment on the Securities and Exchange Commission's (SEC's) proposed rule on Certain Thrift Institutions Deemed not to be Investment Advisers (Proposal).[1] Although the Proposal purportedly addresses the inequitable treatment of thrifts vis-à-vis banks and investment advisers under the Investment Advisors Act of 1940 (IAA), the Proposal fails to provide any meaningful relief to thrift institutions.

Specifically, of the approximately 130 thrifts that have applied for and received trust powers from OTS, 47 institutions are currently registered with the SEC as investment advisers. Not one of these 47 thrifts would be able to deregister as an investment adviser under the Proposal based on their current account activity—a fact made clear to the SEC Commissioners by the SEC staff during deliberations on the Proposal during the SEC's April 28, 2004, meeting.[2] Given that the Proposal provides no regulatory burden relief to these existing thrifts, it is unclear what is accomplished by the proposed rulemaking—the application of the IAA remains anything but charter neutral.

If the Proposal is finalized in its current form, banks—but not thrifts—will remain exempt from IAA registration. This will occur despite the fact that competing banks and thrifts may engage in the same types of activities covered by the IAA, and are subject to substantially similar supervision with respect to these activities. The inequity is equally glaring when viewed from the perspective of IAA-registered thrifts competing with other registered investment advisers. While registered investment advisers will be subject only

1. 69 Fed. Reg. 25778 (May 7, 2004).
2. The SEC staff advised the Commissioners that none of the thrifts currently registered under the IAA would be able to take advantage of the Proposal since all provide advisory services that fall within and outside the proposed exemption.

to the requirements of the IAA, IAA-registered thrifts will continue to be required to satisfy two sets of duplicative, overlapping and wholly redundant regulatory schemes with respect to their investment adviser activities. By the SEC's own admission, this will occur as a result of an historical anomaly. As the SEC notes in its preamble to the Proposal:

> The absence of a thrift exception in the [IAA] can, we believe, be explained by historical context. When Congress enacted the [IAA] Act in 1940, federal savings associations, for example, were not authorized to provide the types of services that would subject them to the Act. It was not until 1980 that Congress gave federal savings associations the authority to provide trust services, including the authority to act as an investment adviser. Today, thrifts may be granted trust powers similar to those of national banks. Such thrift trust activities also are subject to similar regulation and supervision by [OTS]. When they serve as trustees, thrifts and banks are both also subject to state trust laws.[3]

As detailed below, the practical effect of the Proposal is to place IAA-registered thrifts—and those considering engaging in comprehensive trust activities—in a dilemma requiring a choice that Congress clearly intended to avoid when it exempted banks from IAA registration. This requires thrifts either to take on the substantial costs and additional regulatory burden required by IAA registration in order to offer full-scale trust services to their customers, or to forego such activities and marginalize their trust operations by conceding this business to their bank competitors or other registered investment advisers.[4] Either choice carries with it a cost for thrifts not borne by their bank or investment adviser competitors.

Regarding the impact on other registered investment advisers of exempting thrifts from IAA registration, the SEC notes in its preamble to the Proposal that two groups of investment advisers oppose this based on the fact that "expanded relief would diminish investor protection by eliminating important safeguards that the [IAA] provides to advisory clients, would be inconsistent with principles of functional regulation, and would create an unfair competitive advantage for thrifts."[5] On the first two points—diminished investor protection and functional regulation—Congress has already satisfied

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3. 69 Fed. Reg. 25778, 25779.
4. A third option, of course, is for a thrift to convert to a bank charter in order to avail itself of the full IAA exemption. See discussion at note 10 and accompanying text.
5. 69 Fed. Reg. 25778, 25780.

itself that this argument is without merit with respect to banks. Moreover, it is unclear what in the way of investor protections or functional regulation will be gained by having banks or other investment advisers assume the trust activities of thrifts that elect to jettison trust accounts to avoid IAA registration.

With respect to investor protection, OTS examines the investment and securities activities of thrifts the same way as the other federal banking agencies (FBAs) examine the same bank activities—with thrift and bank customers equally well-protected. Banks and thrifts are subject to substantially similar customer protections with respect to the activities covered by the IAA registration requirements—which in large part are based on the SEC's own customer protection rules. Moreover, OTS, like the other FBAs, examines all aspects of an institution's operations—including trust activities subject to IAA registration for thrifts—annually for larger institutions (and at least every 18 months for smaller institutions). This is at least as frequent as the SEC's current review of IAA-registered investment advisers and significantly more comprehensive given that the FBAs must explore all aspects of an institution's activities and operations. In addition, like the other FBAs, between periodic safety and soundness exams OTS maintains ongoing supervisory contact with the institutions we regulate.

As stated in the SEC's own words from the preamble to the SEC's May 2001 interim final rule extending broker-dealer parity to thrifts, "insured savings associations are subject to a similar regulatory structure and examination standards as banks. We find that extending the exemption for banks to savings associations and savings banks is necessary or appropriate in the public interest and is consistent with the protection of investors."[6]

Regarding functional regulation, section 111 of the Gramm-Leach-Bliley Act (GLBA) squarely addresses this issue.[7] Pursuant to section 5(c)(4)(A) of the Bank Holding Company Act (BHCA), as added by section 111, the SEC is authorized to regulate the securities activities conducted in a functionally regulated subsidiary of a depository institution. Section 111 further provides, however, in BHCA section 5(c)(5)(A), that a "functionally regulated subsidiary" does not include a "depository institution" itself. Thus, but for being subject to registration as an investment adviser under the IAA, the precepts of functional regulation set forth in the GLBA would clearly preclude the SEC from any involvement or oversight of a thrift's trust activities or operations. If it has any effect, the principles of functional regulation set forth in section

6. 66 Fed. Reg. 27759, 27788 (May 18, 2001).
7. Public Law 106-102, 113 Stat. 1338, 1362 (November 12, 1999).

111 are intended to avoid duplicative oversight and regulation of depository institution activities by the SEC.

On the final issue of an unfair competitive advantage, it is disingenuous to make the argument that a competitor should be subject to the exact same regulatory requirements in the name of competitive equity when the result clearly subjects the competitor—in this case, thrifts—to a duplicative, overlapping and wholly redundant regulatory regime not borne by the investment advisers making the argument. There clearly is an unfair competitive advantage, but it is the application of a full-scale exemption for thrifts, not a limitation on the authority, that will restore competitive equity.

Assessing the Impact of the IAA and the Application of the Proposal to Thrifts

When Congress authorized thrifts to engage in trust activities in 1980, the authorization included Congress's stated intent that thrifts have the "ability to offer trust services on the same basis as national banks."[8] Although thrifts have substantially the same trust powers as national banks, their ability to offer trust services pursuant to this authority remains, almost 25 years later, not on the same basis as national banks.

While banks (along with trust companies and bank holding companies) are exempt from registration under the IAA,[9] thrifts that provide the same trust and investment advisory services—subject to substantially similar regulatory oversight of such activities—remain subject to IAA registration despite ongoing efforts during the last four years to address this competitive inequity. Based on information available to OTS, the burden imposed on thrifts is significant. Thrifts have indicated that costs, including registration fees, preparation and mailing of custody letters, the maintenance and update of SEC forms, personnel licensing fees, and audit requirements, are substantial. In addition, management and legal counsel must devote many hours to issues raised by duplicative SEC supervision, examination and oversight. An informal survey of the largest IAA-registered thrifts indicates aggregate annual IAA costs ranging from $75,000 to $518,200. Cumulatively, millions of dollars are spent annually by these institutions to satisfy what amounts to a redundant supervisory scheme under the IAA.

8. S. Rep. 96-368 at 13 (1980), *reprinted in* 1980 U.S.C.C.A.N. 248.
9. IAA § 202(a)11)(A).

In addition to these IAA-related costs, thrifts pay annual assessments to OTS, incur examination and auditing costs required by OTS, and spend significant resources monitoring the trust and related activities of thrifts, as required by OTS directives.

Thus, while banks incur the latter supervisory and regulatory costs associated with their ongoing trust operations, and registered investment advisors pay the former IAA-related costs, thrifts opting to engage in trust powers that include investment advisory services are subject to both sets of costs and are regulated by two agencies that supervise and examine the exact same activities.

Over the last five years, some previously OTS-regulated thrifts have converted to banks (or to state chartered trust companies) to avoid the IAA registration requirement.[10] In addition, some institutions have avoided opting for a thrift charter in the first place because of the IAA registration requirement. For any institution contemplating a trust operation strategy, IAA registration is a significant factor in weighing their charter choice—an issue recognized by Chairman Donaldson during discussions among the Commissioners and staff at the SEC's meeting on the Proposal.[11]

In July 2000, in an effort to stem this problem, U.S. Senator Evan Bayh offered an amendment before the Senate Banking Committee to extend the IAA exemption to thrifts.[12] At the time, the SEC assured Senator Bayh and the Committee that legislation was not needed to resolve the issue since the SEC could address the problem by extending parity to thrifts via an administrative rulemaking to exempt these institutions from the IAA.[13] Since January 2001, there has been extensive correspondence, as well as numerous meetings and telephone calls, between OTS and the SEC aimed at fulfilling the commitment made to Senator Bayh and the Committee to implement a rule granting full exemptive relief to thrifts under the IAA. Notwithstanding this considerable effort and in spite of the substantial resources that both OTS and the SEC have dedicated to attaining

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10. Among the first of these was ReliaStar Bank, an OTS regulated thrift providing trust and asset management services, that applied to the SEC in 1999 for an administrative exemption from the IAA. The application was withdrawn after discussions with SEC staff made it clear that it would be denied. Shortly thereafter, ReliaStar converted to a national bank and received full exemptive relief under the IAA. A number of other institutions have followed suit to escape the burden and expense of IAA registration.
11. Comment of SEC Chairman William Donaldson, at the April 28, 2004, SEC meeting discussing the Proposal.
12. See statement of Senator Evan Bayh before the Senate Banking Committee during consideration of the Competitive Market Supervision Act, S. 2107 (July 13, 2000) (copy attached).
13. Regarding the SEC's ability to provide exemptive relief to thrifts that is equivalent to that of banks, IAA § 202(a)(11)(F) authorizes the SEC to except from the definition of "investment adviser" (and therefore from all the provision of the Act) "such ... persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order."

this objective, the goal of meaningful relief for thrifts under the IAA remains as elusive today as it was four years ago.

Instead of meaningful relief, the Proposal provides a narrow IAA exemption to thrifts that agree to curtail their investment management and advisory services to a limited range of accounts.[14] Under the Proposal, thrift fiduciary accounts are segregated into two categories. Thrifts that provide services to accounts that include only traditional trust, estate, and guardianship accounts would be exempt from registration. Thrifts providing services to accounts that include investment management agency accounts and other accounts that the SEC has defined as not being for a fiduciary purpose would be required to register as an investment adviser. The practical effect of this approach is that it provides an extremely limited exemption that is beneficial to few, if any, thrifts. In fact, as stated previously, we are aware of no IAA-registered thrifts that would benefit from the Proposal and only one thrift that would avoid IAA registration if the Proposal is implemented in its current form. Given the limited benefit to one thrift and the clearly detrimental impact of the Proposal to all other thrifts, we note that a more appropriate manner to address the issues raised by the one institution may be a no-action letter rather than a regulation implementing policy that carries the full force and effect of law.

While the Proposal would apply the federal securities laws in two different manners depending on the business operations of a thrift, there is no distinction between these two categories of accounts under the Home Owners' Loan Act (HOLA) and OTS regulations applicable to thrifts. The accounts in both categories are fiduciary accounts that receive the same protections under the HOLA and OTS regulations and are subject to similar examination scrutiny. There is no logical basis why thrifts, unlike banks, need duplicative regulatory oversight by the SEC of account activities that OTS already supervises and examines. This is far from functional regulation, but rather over-regulation that accomplishes nothing in the way of a legitimate policy objective.

Limiting the types of accounts for which a thrift may provide investment management and advisory services to avoid IAA registration has the likely effect of negating any meaningful exemption. Generally, institutions will not opt to enter the trust and asset management business line and then decide to forego the most profitable aspects of the business activity. In fact, from a safety and soundness standpoint, we would have to question the rationale behind such an approach. Based on our experience and observations in connection with the oversight and supervision of thrift trust operations, however, the most profitable aspects of the trust and asset management business line are

14. In addition, thrifts would be limited in marketing the investment advisory services they offer.

represented by the accounts that the Proposal would require thrifts to remove from their books to avoid IAA registration. For several of the largest thrifts with trust powers, income from the accounts that the Proposal would require thrifts to exclude to avoid IAA registration represents over 50 percent of the institution's total income.

Thrifts providing investment management and advisory services should be encouraged to do so to the fullest extent practicable by maximizing profits and without concern for arbitrary triggers that could significantly increase their compliance costs and supervision. This is particularly important from a regulatory burden reduction perspective when you consider that a bank competitor will incur none of the regulatory costs and burdens imposed on a thrift for engaging in exactly the same activities.

Other Aspects of the Proposal

SEC Access to Thrift Records

Another troubling aspect of the Proposal is the requirement that IAA-registered thrifts provide access to the SEC to all of the institution's trust department records. The Proposal provides that continued access to these records will permit the SEC to determine whether a thrift has defrauded advisory clients, for example, by failing to disclose misallocations of initial public offerings or other trades in favor of other trust department clients.

Access to records and information not covered by IAA registration is contrary to the deference and examination limitations established under section 111 of the GLBA. IAA-registered thrifts already experience problems with SEC examiners requesting information regarding institution policies that extend well beyond trust department activities. As noted previously, if it has any effect, section 111 is intended to avoid duplicative oversight and regulation of depository institution activities by the SEC. In addition, OTS has exclusive visitorial powers over thrifts. SEC access to thrift records or other information not covered by IAA registration is inconsistent with this authority and would intrude upon OTS's exclusive jurisdiction of these activities. Thrifts with trust powers are already subject to regular and frequent safety and soundness examinations by OTS that include a review of the institution's consumer compliance practices, an OTS trust examination and an OTS examination of the institution's information technology programs and compliance systems.

Increased Administrative Burdens Under the Proposal

Among the most significant aspects of the Proposal is the fact that, in many respects, it will increase the administrative burden imposed on thrifts engaged in trust activities. The Proposal creates and defines a new category of trust accounts for thrifts that does not otherwise exist. The new category, referred to as "fiduciary purpose accounts," are the only trust accounts for which a thrift may provide investment advisory services without being subject to IAA registration. Such accounts must be established and maintained for an underlying "fiduciary" reason; but the Proposal provides that an account established primarily for "money management" lacks an underlying fiduciary purpose and cannot meet this requirement. Ironically, in describing accounts that are deemed to be for money management purposes,[15] the Proposal notes that activities related to these accounts fall within the OTS definition of "fiduciary capacities." Instead of deferring to OTS on the fiduciary status of these accounts, as would the courts,[16] the Proposal states that "it is necessary, however, to look beyond these designations for purposes of our analysis of federal securities law and any exemption for thrifts under the [IAA]."[17]

Complicating the matter is the fact that the Proposal does not permit a thrift to rely on fiduciary capacity, or even whether an account falls into one of the listed categories in the Proposal, in distinguishing between a "fiduciary purpose" versus a "money management purpose." Instead, the Proposal provides that "[w]hether a customer establishes a trust, or other account, for a fiduciary purpose depends not only on the terms of the trust instrument (or other documents establishing the account), but also on other facts and circumstances concerning the creation and use of the account."[18] Given the vague notions surrounding intent, this approach presents significant issues that will create difficulties for thrifts in determining how to categorize particular accounts. OTS and the other FBAs utilize "fiduciary capacity" because it presents a bright line for institutions to follow. A thrift providing trustee services knows it is acting in a fiduciary capacity under OTS regulations and understands what is required to meet its fiduciary obligations.

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15. These include managed agency accounts, individual retirement trust accounts, indenture trusts, college savings trusts, ERISA trusts, "rabbi" trusts and most revocable inter-vivos trusts.
16. Courts have long held that any reasonable construction of a regulatory statute adopted by an agency charged with enforcement of that statute should be given great weight. See, generally, Chevron v. Natural Res. Def. Council, Inc. , 467 U.S. 837 (1984).
17. 69 Fed. Reg. 25778, 25781, note 32.
18. 69 Fed. Reg. 25778, 25782, note 50.

Thrifts provide investment advisory services for many different types of customer accounts. Some may be "fiduciary purpose accounts" as defined in the Proposal, and some may be "money management purpose accounts." Regardless of the type of trust account involved, thrifts providing investment advisory services are subject to significant fiduciary standards of care that extend to all trust account holders. Under OTS regulations, thrifts providing investment services are acting in a fiduciary capacity.[19] The fiduciary designation—not the account type—triggers OTS regulatory protections, as well as the protections afforded by state trust laws and common law. In monitoring thrift trust operations, OTS conducts comprehensive examinations of all thrift fiduciary activities. These examinations are performed by experienced, well-trained OTS examiners, utilizing the same rating scale and risk focused approach used by the FBAs.

Given that the protections under OTS regulations, state trust laws and common law are the same for all fiduciary accounts, and the fact that distinctions between account types under the Proposal will likely increase the burden imposed on both IAA-registered and IAA-exempt thrifts, there appears to be little supportable justification for the Proposal's artificial and arbitrary distinction between "fiduciary purpose accounts" and "money management purpose accounts."

Purported Cost Savings

As noted in the Proposal, many thrifts will be forced to maintain their existing IAA registration because of the scope of their ongoing trust advisory activities. While the Proposal purports to lessen the regulatory burden and expenses for IAA-registered thrifts because IAA requirements would no longer apply to customer accounts not covered by the Proposal, the only expense reduction would be for account specific costs, i.e., copying and mailing, related to excluded accounts. In fact, the bulk of the costs and burden imposed on thrifts by the IAA, including registration, compliance and licensing requirements, would continue. Any asserted cost savings are marginal, particularly given that accounts would have to be continually monitored—by both IAA-registered and exempt thrifts having trust operations—to determine their account status under the Proposal.

Conclusion

For all of the reasons articulated above, we continue to maintain, as we have stated in various hearings before the House Financial Services Committee and the Senate

19. 12 C.F.R. § 55.30. OCC regulations reach a similar result, see 12 C.F.R. § 9.2.

Banking Committee, as well as in the numerous meetings, conversations and correspondence we have shared with the SEC and its staff, that anything short of equal treatment with banks is insufficient to achieve parity for thrifts under the IAA. While we continue to pursue legislation to achieve this objective, we remain willing to explore ways to achieve this goal pursuant to the type of rulemaking envisioned by Senator Bayh in August 2000. In this regard, we ask that the SEC provide us with the opportunity to appear before the full Commission to present our views on the Proposal prior to taking any action to finalize the Proposal in its current form.

Thank you for the opportunity to comment on the Proposal. We would be happy to discuss any aspect of these comments at your convenience.

Sincerely,

James E. Gilleran
Director

Attachments (2)

August 18, 2000

The Honorable Arthur Levitt
Chairman
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Dear Chairman Levitt:

As you are aware, on July 13, 2000, the Senate Banking Committee held a markup on S. 2107, The Competitive Market Supervision Act, among other legislation. Although I was unable to attend the markup, I submitted a written statement for the record. I thought you might be interested in seeing a copy of the statement, which I attached for you.

In my written statement, as a co-sponsor of S. 2107, I reiterated my belief of the appropriateness of the legislation and its benefits to Americans. Separately, I commented on the Securities and Exchange Committee's rulemaking initiative to exempt savings associations from the Investment Advisors Act. Savings associations should be provided a level playing field with banks, which historically have been exempt from the Act. Because SEC staff determined that this parity issue may be resolved through rulemaking and agreed to move forward with the rulemaking process, I withheld legislative action at the July 13 markup. I look forward to the SEC's timely resolution of this issue.

If I or my staff may be of assistance in this rulemaking effort or other matters, please do not hesitate to call.

Sincerely,

Evan Bayh

STATEMENT OF SENATOR EVAN BAYH
SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS
COMPETITIVE MARKET SUPERVISION ACT
SAVINGS ASSOCIATION EXEMPTION FROM THE INVESTMENT ADVISORS ACT
July 13, 2000

One of the bills that is before us today is the Competitive Market Supervision Act. This bill, which I have co-sponsored, does two important things for the people of the United States. First, the bill reduces securities fees for a large number of Americans. These fees, while relatively small, put an unnecessary burden on all investors, including those with retirement funds or pension funds. Second, the bill would provide for pay parity for Securities and Exchange Commission professional employees, by permitting the SEC to bring their pay in line with that of employees of other financial regulatory agencies. The SEC is charged with ensuring that investors receive the highest level consumer protections. This bill would help the SEC to attract – and retain – the best minds to fulfill its obligations to the American people.

On a separate issue, I have become aware of disparate treatment between savings associations and banks under the Investment Advisors Act. This Act exempts banks from its scope but does not exempt savings associations. This differing treatment puts savings associations at a competitive disadvantage, without reason. A similar disparity used to exist under a related law, the Investment Company Act of 1940; however, last year the Gramm-Leach-Bliley Act corrected the discordant treatment.

In the past few months, my staff has had discussions with the Securities and Exchange Commission and industry representatives. The SEC has determined that it has the statutory authority to exempt individual institutions and groups of institutions – including savings associations – from the scope of the Investment Advisors Act. Since the SEC has concluded that this parity issue may be resolved through rulemaking and has agreed to work with the industry to reach such resolution, I withhold legislative involvement. I appreciate their commitment and look forward to their resolution.