

Town of Hampton



Trustees of the Trust Funds
100 Winnacunnet Road
Hampton NH 03842

December 29, 2015

To The Hampton Board of Selectmen:

Reference:

Letter dated November 20, 2015 by Thomas J Donovan, Director of Charitable Trusts

Letter dated December 15, 2015 by Hampton Board of Selectmen

The September 3, 2015 SEC Administrative proceeding against Warren J. Mackensen and his company, Mackensen & Company, Inc. (MCI), has raised some questions and concerns about the assets under management in various NH town trusts. While some concerns may appear valid and potentially impact certain NH towns, others do not. This letter will address these concerns as they pertain to Hampton Trust Funds.

At Issue:

Warren J. Mackensen and his company MCI, a Hampton, NH, based company entered into a settlement agreement with the US Securities and Exchange Commission on September 3, 2015 over an issue of MCI's past advertising practice. The inquiry focused on Mr. Mackensen, the principal of MCI distributing letters referencing the comparative performance of its "hypothetical model portfolio." The SEC charged that this practice violated Sections 206(2) and 206(4) of the Advisors Act. As a consequence, Mr. Mackensen and MCI entered into a settlement agreement with the SEC with Mr. Mackensen and MCI neither admitting nor denying the SEC findings.

Background:

In November 2010, the Trustees of the Trust Funds decided to end their relationship with TD Wealth Management. The Trustees published a Request for Proposal (RFP) for investment advisor services in February 2011 and sent out proposals to thirty-three firms. Twenty firms submitted bids. Eight were selected for public interviews on April 18, 2011.

After considering all aspects of investment advisor responsibilities, the Trustees awarded the contract to Mackensen and Company, Inc. to provide investment advice and accounting services. National Advisors Trust of Overland Park, Kansas remained as investment custodian.

In June of 2012, Mr. David Mayes purchased full interest in MCI becoming its President. The minutes of the 07/23/2012 Trustee of the Trust Funds meeting reflected this change in ownership.

Concerns:

Has the Town of Hampton and its Trust Funds missed out on a higher rate of return?

In early 2011, eight firms were interviewed for the financial advisor position as a result of an RFP. None of the five Trustees then involved in the process had ever been solicited with MCI literature involving a “hypothetical portfolio” or were ever aware of such a solicitation as described in the SEC’s administrative proceeding. Without knowledge of such a solicitation, it appears it would have been impossible for the Town of Hampton to have missed out on a higher rate of return with another investment advisor. Additionally back testing any “hypothetical portfolio” would be a paper chase. The Real Estate Trust Fund maintains a diverse number of investments with a target of 40% in equities (mutual funds and Exchange Traded Funds) and 60% in fixed income securities and individual bonds. The fund is structured as an income portfolio with a growth portion from capital gains to account for inflation. The components all trade at different opportunity times; mutual funds after the closing bell, ETF’s throughout the trading day and individual bonds when they come available. As an example, it would be impossible to know if another investment firm could have obtained Hampton’s \$2.5M bond portfolio or even the same bonds and quality on any given day and time.

Since the Town of Hampton and its Trust Funds do not appear to have been aggrieved, there appears to be no reason to perform a “fact intensive inquiry” to determine if Hampton “missed out on a higher rate of return with another investment advisor by switching to or staying with Mackensen & Company.”

The suitability of funds and the solvency of Mackensen and Company?

All Hampton Trust Funds are only invested in financial products which are readily available on US stock exchanges to both individual and institutional investors. These include no load mutual funds, exchange traded funds and individual municipal and corporate bonds. MCI does not offer or use proprietary products. All Trust products are rated by Morningstar in the case of mutual funds and an appropriate bond rating agency such as Moody’s, Standard & Poor’s or Fitch in the case of individual bonds. Additionally, individual bonds must be of high quality to be included in the Trusts. The actions of any other MCI client would have no impact on Hampton’s Trusts. No securities, funds, cash or any other trust assets are entrusted for safekeeping to MCI.

National Advisors Trust (NATC), of Overland Park, Kansas, an independent trust company whose primary responsibility of ensuring the safekeeping of investment assets acts as custodian of the funds that comprise Hampton’s portfolios. National Advisors Trust is regulated by the office of the Comptroller of

Currency (OCC), a bureau of the US Treasury Department. It is authorized to do business in all 50 states and is a member of the Federal Deposit Insurance Corporation (FDIC).

By law, client's assets are segregated from the capital assets of National Advisors Trust and are not subject to potential creditors' claims against the Trust Company.

NATC's CFO, John Sullivan, was recently named the 2015 CFO of the year by the Kansas City Business Journal in the Small-For-Profit Companies category.

Review their investment relationship with MCI and perhaps meet with Mr. Mayes:

The Trustees met with Mr. Mayes for an hour and fifteen minutes, in public session on October 19, 2015, more than 30 days before receiving the letter from the NH Director of the Charitable Trusts where such action was suggested. This meeting complied with the Right to Know Law under RSA 91-A: 2.

Mr. Mayes was asked about the lack of earlier disclosure concerning the SEC administrative action. We were informed at a later date that Mr. Mayes was advised by legal counsel not to disclose the investigation until the SEC order was finalized. When this occurred, Mr. Mayes immediately sent a letter to all Trustees dated September 3, 2015, the same date as the SEC order, disclosing the action.

At this meeting, the Trustees performed an "Overall Portfolio Performance Review." The Trustees also reaffirmed Mackensen and Company, Inc. as investment advisor to the Trustees of the Trust Funds by a 4-0-0 vote with one Trustee absent.

On the evening of October 19, 2015 the Trustees and their investment advisor, David Mayes of MCI met with the Hampton Board of Selectmen, again in open session and provided a Trust performance update. The minutes reflect compliments on Trustee and Trust performance.

Investment Returns:

The Trustees are constantly reviewing portfolio performance and returns. We take a proactive and timely approach to portfolio management as exemplified by our recent move to individual bonds. The Trustees recognized a potential shift from a Bull Market as early as 2013. As a result, three purchases of high ranked corporate and municipal bonds totaling \$2.4M were made beginning in January 2014 and as recently as July 2015. These purchases have buffered the portfolio from increasing risk while still providing the town with steady dividend and interest income. A recent market call of an individual bond and purchase of a substitute brought the individual bond portion of the Trust to approximately \$2.5M. The Trustees take their fiduciary responsibility very seriously and act only in the best interest of the Trusts. In addition to quarterly reviews, we receive monthly reports on all portfolios (as does the Town of Hampton) and have the capability to monitor all investments daily at stock market closing prices, if desired. The Trustees view themselves as investors, not traders or speculators and view any type of market timing as a losing proposition. We invest as the fund was established for income yet keeping pace with inflation by maintaining an equity position that provides capital gains.

From 2012 thru 2014 the Real Estate Trust Fund increased approximately \$2.9M while distributing nearly \$2.0M in interest and dividends to Hampton taxpayers. Average return, net of fees, for these years was 10.06% with an average yield of 3.93%.

Questions by the Hampton Board of Selectmen (BOS):

The following address the eight questions posed to us in the BOS December 14, 2015 letter. However, we believe that this avenue of questioning goes far beyond the scope of the Trust Funds and has no bearing on present management and fund performance.

- 1) Is Mr. Mackensen in fact still serving on the Mackensen & Company Board of Directors, and, if so, is he being paid anything for doing so?

Currently, Mr. and Mrs. Mackensen are members of the Mackensen & Company Board of Directors. The Company purchased the Mackensen's, interests as owners in June of 2012, at which point Mr. Mackensen became a creditor. MR and Mrs. Mackensen have a contractual right to retain seats on the Board as long as either of them remains a creditor. Mr. David Mayes is the sole shareholder of the corporation and he and Mrs. Mayes are the other directors. Per the company's By-Laws, the number of Directors and their identities are determined annually by the shareholders(er). So, while Mr. and Mrs. Mackensen are entitled to Board seats per the terms of the company sale until the seller note is fully paid, the Shareholder (Mr. Mayes) effectively controls the Board. Board members are not compensated.

- 2) If so, does Mr. Mackensen exercise any say over how the Town's \$20 million in trust funds are invested?

Mr. Mackensen has no involvement with the day-to-day operations of the Company. He has neither managerial responsibilities nor authority to act on behalf of the Company. **No one but the Trustees of the Trust Funds has any say over how the assets entrusted to us are invested.**

- 3) Does Mr. Mackensen still own any percentage interest in National Advisors Trust Company, FSB with whom all \$20 million of Hampton's Trust Funds are invested?

Mr. Mackensen is not a shareholder of National Advisors Trust Company, the custodian of Mackensen & Company's municipal client accounts. Mackensen & Company is a shareholder in National Advisors Holdings, the parent company of National Advisors Trust Company, FSB.

Mackensen & Company receives no compensation from National Advisors Holdings or National Advisors Trust, FSB as a consequence of being a shareholder.

- 4) Is Mr. Mackensen himself receiving an income stream as part of the buyout by Mr. Mayes of Mr. Mackensen's ownership of Mackensen & Company?

Mr. Mackensen is not receiving an "income stream" from any of the revenues of Mackensen & Company. He is receiving repayment of the principal of the note that financed the business sale and interest on that note. The Company is obligated to make payments to him as a result of the purchase of his interest. Those payments continue whether or not the Company makes a profit as they are contractual obligations.

- 5) What are the exact terms of the ongoing buyout by Mr. Mayes of Mr. Mackensen's interest?

The agreement between the Company and Mr. Mackensen is private and confidential and is unrelated to the management of Hampton's Trust Funds.

- 6) Who is paying the \$100,000 in fines under the SEC's September 3, 2015 Order as between Mackensen & Company and Warren Mackensen, who are jointly responsible to pay it?

The SEC fine was imposed jointly and severally, meaning both the Company and Mr. Mackensen are obligated to pay the fine. As of this date the fine has been paid in full. Mr. Mackensen has assumed the entire obligation.

- 7) When is the buyout of the Mackensen's by David Mayes to be completed under the terms of the buyout?

The agreement between the Company and Mr. Mackensen is private and confidential and is unrelated to the management of Hampton's Trust Funds.

- 8) Does Mackensen & Company has a separate compliance officer who is independent of its principals?

Like most similarly-sized registered investment advisors, Mackensen & Company does not have a separate compliance officer. This function is part of the responsibility of the Company's owner (David Mayes) who has taken training regarding compliance issues and will continue to do so. Further, the Company has engaged an attorney who specializes in compliance matters for both registered investment advisers and broker dealers. The Company's compliance counsel has previously served in senior level positions with the SEC and has extensive experience as a Chief Compliance Officer and holds various FINRA licenses. It is not unusual, and there is no regulatory requirement otherwise, for the compliance officer to serve in multiple roles. Generally, only fairly large firms have an individual or individuals serve solely as a compliance officer. Further, having a separate compliance officer does not necessarily correlate to better compliance outcomes.

Finally, I find it necessary to remind you that the Trustees are duly elected Town officials with their duties established in RSA 31:25. The custody and management by State statute rests with us alone.

The BOS often cites its authority to meddle in the funds management under RSA 41:9 Financial Duties. Para VI reads "The selectmen shall be responsible for establishing and maintaining **internal control procedures** (Emphasis added) to ensure the safeguarding of all town assets and properties." Reasonable internal procedures would be audits and the like. Trying to usurp control of Trustee responsibilities is not.

NH statutes make holding positions as a Selectman and Trustee at the same time incompatible offices for a good reason.

The Trustees have served the citizens well. We wish to continue to do so unencumbered by harassment and town politics.

Sincerely,



Norman Silberdick
Chairman, Trustee of the Trust Funds

Cc: Thomas J. Donovan
Director of Charitable Trusts
Fred Welch, Hampton Town Manager
Mark Gearreald, Hampton Town Attorney
Max Sullivan, Seacoast Media

