Office of Thrift Supervision
Department of the Treasury

John E. Bowman
Deputy Director and Chief Counsel

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6372

June 17, 2008

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Dear [ ]:

This is in response to your letters of April 11, and 21, 2008, in which you request that the Office of Thrift Supervision (OTS) confirm that: (i) certain private equity investment funds and investment vehicles managed by [ ] (Investors) will not be required to file with OTS under the Change in Bank Control Act (Control Act), section 10 of the Home Owners' Loan Act (HOLA), or the OTS Acquisition of Control Regulations (Control Regulations) in connection with a proposed acquisition of a combination of common stock (Common Stock) and non-voting convertible preferred stock (Preferred Stock) of [ ] (Holding Company); (ii) for purposes of 12 C.F.R. § 574.4(a)(2)(vi), OTS would not conclude that the Investors have acquired control of the Holding Company if the Investors' total investment is not greater than 25 percent of the Holding Company's March 31, 2008, shareholders' equity, as adjusted for any later significant changes or events occurring prior to the completion of the investment; and (iii) if the Federal Deposit Insurance Corporation (FDIC) determines that it would not deem the Investors to control the Holding Company or [ ] (Savings Bank) within the meaning of section 3(w)(5) of the Federal Deposit Insurance Act (FDIA), OTS would not deem the Investors to control or be a controlling stockholder of the Holding Company or the Savings Bank for purposes of sections 3(u) and 38 of the FDIA and 12 C.F.R. Part 565. The transaction is described in more detail in your letters and in related materials you have submitted to OTS.

You have stated that the Investors initially acquired shares of Preferred Stock in December 2007, and in December 2007 converted all of such Preferred Stock, resulting in ownership of approximately 5.4 percent of the Common Stock. The Investors propose to acquire additional shares of Preferred Stock that, upon conversion, would represent approximately an additional 12 percent of the Common Stock. You have represented that after consummation of the investment, the Investors would hold Common Stock and Preferred Stock that would represent, in the aggregate, approximately 17 percent of the Common Stock on an as-converted basis.

You have represented that any conversion of the Preferred Stock that would enable the Investors to hold more than 9.9 percent of the Common Stock would not be permitted. In

addition, you have represented that the investment agreement pertaining to the Investors' investment in the Common Stock and the Preferred Stock provides that if the Investors were to convert or sell Preferred Stock that is convertible into more than 9.9 percent of the Common Stock, shares in excess of the 9.9 percent limit would be sold in one of the following situations: (i) a widely dispersed public offering; (ii) private sales in which no purchaser or group of purchasers would acquire more than two percent of the Common Stock; (iii) sales to the Holding Company (or a subsidiary thereof); or (iv) sales to an unaffiliated third party acquiring majority control of the Holding Company (without regard to securities held by the Investor in excess of 9.9 percent of the Common Stock being acquired from the Investors).[1] The investment agreement provides that the Investors generally may not transfer Common Stock or Preferred Stock prior to June 20, 2009, subject to the qualification that after the first anniversary of the investment agreement, the Investors may engage in certain transfers.

The investment agreement provides that the Investors are entitled to have one director on the Holding Company's board of directors once they own shares of Common Stock representing at least 4.5 percent of the outstanding Common Stock. In addition, the investment agreement provides that after a representative of the Investors has been appointed to the Holding Company's board, the Investors will be entitled to have a representative on the board as long as they own at least 100 shares of Common Stock, along with other securities issued by the Holding Company, any of its subsidiaries, or any securitization trust sponsored, structured or administered by the Holding Company or any subsidiary thereof, that have an aggregate face value or purchase price of at least $25 million.

In your April 21st letter you represented that the Preferred Stock does not have any voting rights that would make the Preferred Stock voting securities within the meaning of the Bank Holding Company Act (BHCA) and that the Investor's right to have their single representative nominated to the Holding Company's ten-member board of directors arises only from the investment agreement. You further informed OTS that the investment agreement is the only agreement to which the Investors are a party that could potentially be deemed to give the Investors the ability to have a significant influence over the general management or overall operations of the Holding Company. You also stated that the Investors do not have any controlling shareholders and that, to the best of the Investors' knowledge, no management official(s) of the Investors own voting securities of the Holding Company that would, when aggregated with the securities to be held by the Investors, represent more than ten percent of the voting securities of the Holding Company.[2] In addition, you represented that another

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[1] You have represented that the Investors will not avoid these restrictions through sales of Common Stock designed to cause the Investors to remain under the 9.9 percent limit.

[2] You have represented that outside directors of [ ], do not currently hold any shares of Common Stock. In order to ensure that any future purchases of Common Stock by these outside directors do not cause the Investors to be deemed to hold more than ten percent of the Common Stock within the scope of the Control Regulations, you have submitted a rebuttal of concerted action between [ ] outside directors and the Investors. OTS will act on this rebuttal filing in a separate document.

shareholder of the Holding Company controls approximately 19.5 percent of the Common Stock, and that none of the Investors' personnel will serve as officers or otherwise manage the business affairs of the Holding Company or any of its subsidiaries.

The Control Regulations provide, in relevant part, that voting stock:

> shall be deemed to include stock and other securities that, upon transfer or otherwise, are convertible into voting stock or exercisable to acquire voting stock where the holder of the stock, convertible security or right to acquire voting stock has the preponderant economic interest in the underlying voting stock. Securities immediately convertible into voting stock at the option of the holder without additional consideration shall be deemed to constitute the voting stock into which they are convertible . . . ."[3]

The preamble to the final regulation adopting the Control Regulation provides that "voting stock includes securities that, upon transfer or any event within the control of the holder, would become 'voting stock' unless the securities also require that they can only be transferred in a widely dispersed sale or public offering."[4] The preamble indicates that the purpose of the limitation on convertibility upon transfer is to ensure that the acquiror does not have the ability to give another party substantial control over a large block of stock, including the ability to transfer control to a third party.[5]

The payment of additional consideration is not required in order for the Investors to convert the Preferred Stock to Common Stock. However, according to the terms of the Preferred Stock, conversion of Preferred Stock to Common Stock is not permissible to the extent the Investors would hold more than 9.9 percent of the Common Stock upon conversion. Also, conversions and sales of the Preferred Stock above 9.9 percent are restricted as provided above.

Based on the foregoing facts, we consider the portion of the Preferred Stock that would, if converted and added to the Common Stock that the Investors already hold, cause the Investors to hold up to 9.9 percent of the Common Stock, to be Common Stock. Such Preferred Stock is immediately convertible without the payment of additional consideration, and is therefore treated as Common Stock under 12 C.F.R. § 574.2(u)(3).[6] However, we consider the applicable restrictions on convertibility of the Preferred Stock to be consistent with the conclusion that the remainder of the Preferred Stock to be held by the Investors (Remaining Preferred) is not

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[3] 12 C.F.R. § 574.2(u)(3)(2008).

[4] 50 FR 48686 at 48692 (Nov. 26, 1985).

[5] Id.

[6] In addition, such Preferred Stock becomes Common Stock upon transfer, and is transferable without restriction. Therefore such Preferred Stock also would be treated as Common Stock based upon its convertibility to Common Stock and the ability of the Investors to transfer the stock without restriction.

immediately convertible to common stock because: (i) the provisions regarding sales of the stock in a private or public offering (as described above) are consistent with the purpose of the language in the preamble to the final regulation, that is, ensuring that an acquiror is not able to transfer control to a third party; (ii) sales to the Holding Company do not raise the concerns regarding transfer of control that the regulation is designed to prevent; and (iii) the sale to an unaffiliated third party acquiring majority control of the Holding Company (without regard to securities held by the Investors in excess of 9.9 percent of the Common Stock being acquired from the Investors) would not provide the Investors with material influence with respect to the Holding Company. Accordingly, we would not consider the Remaining Preferred to be Common Stock at the time of the acquisition.

Accordingly, based on your representations, we conclude that the Investors will not hold more than ten percent of any class of the Holding Company's voting securities within the scope of the Control Regulations. Although the Investors will hold more than 25 percent of a class of the Holding Company's equity securities, you have represented that the Investors will not acquire any control factor, as described in 12 C.F.R. § 574.4(c), regarding the Holding Company.

You have represented that the Investors will structure the transaction to avoid acquiring more than 25 percent of the Holding Company's equity, and therefore will not acquire control of the Holding Company pursuant to 12 C.F.R. § 574.4(a)(2)(vi). We have no objection to the Investors basing the amount of the Holding Company's equity for purposes of this regulatory provision on the most recent financial information filed with the Securities and Exchange Commission (which present the Holding Company's condition as of March 31, 2008), provided that the amount of the Holding Company's equity in such financial statements is adjusted to take into account any material events that occur after March 31, 2008, and before the consummation of the acquisition. We are not aware of any facts that otherwise lead us to conclude that the Investors would control the Holding Company or its savings association subsidiary within the definitions of control in the Control Act, section 10 of the HOLA, or the Control Regulations. Accordingly, based on your representations, we confirm that the Investors would not be required to file with OTS under the Control Act, section 10 of the HOLA, or the Control Regulations in connection with the proposed acquisition.

Under section 3(u)(1) of the FDIA, a controlling stockholder (other than a bank holding company) is an institution-affiliated party. Similarly, under section 38 of the FDIA and Part 565 of OTS's regulations, a company that controls a savings association can be subjected to certain requirements, if the savings association becomes undercapitalized.

Section 3(w), the definitional provision of the FDIA, refers to section 2 of the BHCA for the definition of control.[7] Similarly, the definitional provision in 12 C.F.R. Part 565 also refers to section 2 of the BHCA for the definition of control. Generally, section 2(a) of the BHCA

[7] See 12 U.S.C. § 1813(w)(5) and 12 C.F.R. § 565.2(a)(1) (2008).

provides that: (i) a company has control of another entity if the company owns, controls or has power to vote 25 percent or more of any class of voting securities of the entity; (ii) a company controls another entity if the company controls the election of a majority of the entity's board of directors; or (iii) the agency determines that the company exercises a controlling influence over the management or policies of the entity.

You have represented that the Investors will not own, control, or have power to vote 25 percent or more of any class of the Holding Company's voting securities and that the Investors will only have one representative on the Holding Company's ten-member board of directors. Based on your representations, we confirm that, if the FDIC concludes that the Investors do not control the Holding Company or the Savings Bank within the meaning of subsections 2(a)(2)(A) and 2(a)(2)(B) of the BHCA, OTS will concur in that conclusion. In addition, you have asserted that OTS should conclude that the Investors will not directly or indirectly exercise a controlling influence over the management or policies of the Holding Company or the Savings Bank within the meaning of subsection 2(a)(2)(C) of the BHCA. Based solely on the facts set forth in your April 21st letter and related correspondence, if the FDIC concludes that the Investors will not control the Holding Company or the Savings Bank within the meaning of subsection 2(a)(2)(C) of the BHCA, OTS will concur in that conclusion.

Finally, provided that, on the basis of the facts you have provided, the FDIC concludes that the Investors will not control the Holding Company or the Savings Bank, we can confirm that OTS would not consider the Investors to be a controlling stockholder for purposes of section 3(u)(1) of the FDIA or in control of the Savings Bank for purposes of section 38 of the FDIA and Part 565 of OTS's regulations.

The foregoing conclusions are based on your representations. Any material change in the relevant facts could lead to different conclusions.

If you have any questions regarding the foregoing, please call Kevin A. Corcoran, Deputy Chief Counsel for Business Transactions, at (202) 906-6962.

Sincerely,

John E. Bowman
Deputy Director and Chief Counsel