Office of Thrift Supervision
Department of the Treasury
1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6000

94/CC-01

January 7, 1994

[redacted]

Re: Composition of a Class of Voting Stock under 12 C.F.R. Part 574; Status of a Living Trust under 12 U.S.C. § 1467a

Dear [redacted]er:

This is in response to your letters, dated October 7, 1993, and October 28, 1993, to Michael W. Buting, Assistant Regional Director of the West Region of the Office of Thrift Supervision ("OTS"), in which you requested confirmation that (1) the to-be-issued class of preferred stock ("Preferred Stock") of [redacted], F.S.B., [redacted]a (the "Savings Bank"), would be treated as a single class of "voting stock" together with the Savings Bank's existing common stock ("Common Stock"), for purposes of the OTS's Acquisition of Control Regulations ("Control Regulations");[1] and (2) a "living" or "family" trust ("Living Trust") to be created by a shareholder would not be required to register as a savings and loan holding company under section 10(e) of the Home Owners' Loan Act ("HOLA").[2]

On the basis of the facts presented, we confirm that the Savings Bank's Common and Preferred Stock should be treated as one class of voting stock for purposes of the Control Regulations. For the reasons discussed below, however, we decline to confirm your views that the Living Trust would not be required to register as a savings and loan holding company under the HOLA.

DISCUSSION

Background

In connection with a proposed recapitalization ("Recapitalization"), the Savings Bank plans to sell Preferred Stock that would be convertible into shares of the Savings Bank's Common Stock at any time at the option of the holder. Although a conversion ratio has not yet been determined, the Savings Bank

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[1] 12 C.F.R. Part 574 (1993).

[2] 12 U.S.C. § 1467a (Supp. IV 1992).

anticipates that each share of Preferred Stock will be convertible into more than one share of Common Stock. The Preferred Stock has one vote per share and has voting power identical to the Common Stock. The Savings Bank expects, if all the Preferred Stock is sold, then upon completion of the Recapitalization, that holders of the Preferred Stock would have approximately 40% of the total voting power of all voting securities of the Savings Bank.

You also advise us that a Director of the Savings Bank has proposed acquiring more than 25% of the Savings Bank's Common Stock. Although the Director will file a notice of Change in Control for this acquisition, he is considering transferring the shares to a revocable Living Trust, provided that the Living Trust would not be treated as a savings and holding company. You have not provided any other details about the Living Trust, except that no independent trustee would be interposed between the Director/grantor and the Living Trust and that beneficial ownership of the Common Stock would remain with the Director.

You have asked us for our views as to whether (1) the Preferred Stock and Common Stock would be treated as a single class of voting stock under the Control Regulations, and if so, whether only aggregate purchases of Preferred and Common stock in excess of the applicable voting stock thresholds would trigger the Control Regulations, and (2) whether the Living Trust is exempt from the requirements of section 10(e) of the HOLA.

ANALYSIS

1. **Composition of a Class of Stock under the Control Regulations**

Under the Control Regulations, an acquiror is generally deemed to acquire control of a savings association, and thus is subject to the applicable filing requirements, if the acquiror directly or indirectly acquires more than 10 percent of "any class of voting stock" of the savings association and is subject to any control factor, as defined in 12 C.F.R. § 574.4(c).[3] Thus, any securities that are deemed to constitute a single class of voting stock under the Control Regulations will be aggregated for purposes of defining whether the threshold acquisition of control requirements have been met.[4]

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[3] See 12 C.F.R. § 574.4(b)(1)(i) and (c)(1), (5), and (6) (1993).

[4] An acquiror would be required to file either a notice under the Change in Bank Control Act (individuals), 12 U.S.C. § 1817(j)(1) (Supp. IV 1992), an application under the Savings and Loan Holding Company Act (companies), 12 U.S.C. § 1467a(e)

(continued...)

Prior OTS legal opinions providing guidance in this area have concluded that the issue of whether or not a security constitutes a separate "class of voting stock" under the Control Regulations "turn[s] on the extent to which the holders of the stock in question are authorized to vote as a separate 'class,' rather than characterization of the stock under general principles of corporate law."[5] You represent that the Preferred Stock holders and the Common Stock holders will have equal voting rights and will vote on all matters together.[6] Thus, the holder of a substantial block of Preferred Stock "would not have an ability to control the institution that is disproportionately greater than its percentage ownership of the aggregate number of outstanding voting shares, and there would be no regulatory objective served by deeming the [Preferred Stock] to be a separate class."[7] Accordingly, we would consider the Preferred Stock and the Common Stock to be a single class of stock for purposes of the Control Regulations.

2. Status of a Living Trust as a Holding Company

Pursuant to section 10(e) of the HOLA, a company generally is prohibited from acquiring, directly or indirectly, control of a savings association or a savings and loan holding company without prior OTS approval, and thereafter registering with the OTS as a savings and loan holding company.[8] While the term "company" is broadly defined under the HOLA and Control Regulations to include "any corporation, partnership, trust, joint-stock company, or similar organization,"[9] the HOLA and Control Regulations

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[4](...continued)
(Supp. IV 1992), or a rebuttal of control under the Control Regulations (individuals or companies), 12 C.F.R. § 574.6 (1993).

[5] Op. Chief Counsel, July 26, 1991 at 4 quoting Op. G.C. (FHLBB) Aug. 29, 1988.

[6] Letter from Linda C. Sayler to Larry Kaplan (OTS) (Dec. 30, 1993).

[7] Op. G.C. (FHLBB) Aug. 29, 1988 at 7.

[8] See 12 U.S.C. § 1467a(e)(1)(B) (Supp. IV 1992) and 12 C.F.R. § 574.3(a) (1993).

[9] 12 U.S.C. § 1467a(a)(1)(C) (Supp. IV 1992) (emphasis added). See also 12 C.F.R. § 574.2(f) (1993).

specifically exclude from the definition of "savings and loan holding company" --

> any trust (other than a pension, profit-sharing, shareholders', voting or business trust) which controls a savings association or a savings and loan holding company if such trust by its terms must terminate within 25 years or not later than 21 years and 10 months after the death of the individuals living on the effective date of the trust, and is (i) in existence on June 26, 1967, or (ii) a testamentary trust created on or after June 26, 1967.[10]

A trust is excluded from the definition of the term "savings and loan holding company" only if it was in existence and in control of a savings association on June 26, 1967, or it is a testamentary trust created on or after that date.[11] Because the Living Trust (1) was not in control of the Savings Bank on June 26, 1967, and (2) is not a testamentary trust, it does not qualify for the trust exclusion in the HOLA. Therefore, the Living Trust would be required to obtain prior OTS approval to acquire control of the Savings Bank and register with the OTS as a savings and loan holding company.

In reaching the conclusions presented in this letter, we have relied on the factual representations contained in the materials presented to us. Our conclusions depend upon the accuracy and completeness of those representations. Any material change in circumstances from those set forth in your submissions could result in conclusions different from those expressed herein.

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[10] 12 U.S.C. § 1467a(a)(3)(B) (Supp. IV 1992). The same exception is provided under the Control Regulations. See 12 C.F.R. § 574.2(q)(2) (1993).

[11] See Op. Dep. G.C. (FHLBB), May 1, 1985, at 7. ("[A]ny trust, not disqualified by purpose or duration, that was in existence on June 26, 1967, would be eligible for exclusion from the definition of 'savings and loan holding company' only to the extent that it controlled an insured institution or savings and loan holding company on that date. Subsequent acquisitions would not qualify for the exclusion.") Prior to 1989, the trust exclusions in question were in the Savings and Loan Holding Company Amendments of 1967, a part of Title IV of the National Housing Act that was essentially recodified in section 10 of the HOLA upon enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, § 301, 103 Stat. 183, 318 (1989). The scope of the exclusions, however, has remained identical. Compare 12 U.S.C. § 1730a(a)(3)(B) (1988) with 12 U.S.C. § 1467a(a)(3)(B) (Supp. IV 1992).

If you have any questions regarding the foregoing, please do not hesitate to contact Lawrence D. Kaplan, Senior Attorney at (202) 906-7508, or Richard L. Little, Senior Counsel at (202) 906-6447.

Very truly yours,

Carolyn B. Lieberman
Acting Chief Counsel

cc: Regional Director
Regional Counsel
OTS West Regional Office