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

94/CC-07

May 11, 1994

[redacted]

Re: Continued Effectiveness of Section 408(m) Waiver of Management Interlocks Act Prohibition

Dear [redacted]:

This is in response to your letter of January 25, 1994, on behalf of [redacted] (the "Savings Bank"), and [redacted] (the "Management Official"), an officer and director of the Savings Bank and its parent savings and loan holding companies (collectively the "Companies"). In 1988, the Federal Home Loan Bank Board ("FHLBB"), OTS's predecessor, waived the "major assets" prohibition of the Depository Institutions Management Interlocks Act (the "DIMIA")[1] and implementing regulations (the "Interlocks Regulations"),[2] under the emergency thrift acquisition powers in former section 408(m) ("§ 408(m)") of the National Housing Act (the "NHA")[3] in an assisted acquisition with respect to the Management Official's dual service as a management official of the Companies and an unaffiliated bank holding company (the "Acquired BHC"). You seek confirmation that the 1988 waiver would continue to apply to his service as a management official of [redacted] (the "Acquiring BHC"), an unaffiliated bank holding company that recently acquired the Acquired BHC. As discussed below, on the basis of the facts presented, we are of the opinion that the Management Official may continue to rely upon the subject waiver for his dual service with the unaffiliated depository organizations involved.

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[1] The DIMIA is now codified at 12 U.S.C. §§ 3201-3208 (Supp. IV 1992).

[2] The current Interlocks Regulations are codified at 12 C.F.R. Part 563f (1993).

[3] 12 U.S.C. § 1730a(m) (1988) repealed, along with the remainder of Title IV of the NHA, by Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Sec. 407, 103 Stat. 183, 363 (1989).

Background

The Savings Bank is the successor to the operations of five failed [redacted] savings associations acquired by the Companies through an assisted merger of the associations into a predecessor of the Savings Bank (the "Assuming Association") in 1988 (collectively the "1988 acquisition").[4] The FHLBB, as the operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC"), approved the transaction under § 408(m).

In connection with the 1988 acquisition, the Assuming Association named the Management Official chief executive officer and a director. At that time, he was also serving as an officer or director with two bank holding companies that were not affiliated with the Assuming Association. To facilitate the acquisition, the FHLBB order approving the acquisition invoked § 408(m), inter alia, to override the DIMIA and the Interlocks Regulations to allow specific individuals, including the Management Official, to serve as management officials of the Assuming Association and the Companies and other unaffiliated depository organizations.

The FHLBB approval order stated in pertinent part: "[N]otwithstanding the provisions of the [DIMIA] and the provisions of § 563f.3 of the . . . [Interlocks] Regulations . . . , the following individuals may serve as directors or officers of the Assuming Association or its affiliates notwithstanding such individuals' designated capacities as directors or officers of other depository organizations."[5] The order specifically named the Management Official as one of the officials covered by the waiver, together with his then current positions. The order placed no limit on the duration of the waivers granted to the Management Official.

Pursuant to the 1988 waiver, the Management Official has most recently been serving as a "management official," as that term is defined in the DIMIA and Interlocks Regulations,[6] of the Savings

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[4] See FHLBB Res. No. 88-1411P (Dec. 27, 1988). According to your letter, [redacted], the Assuming Association into which the five failed associations were merged, was later renamed [redacted]. Upon a 1993 sale of the bulk of the assets of the latter to a bank holding company not otherwise involved with your inquiry, the Savings Bank assumed its current corporate title.

[5] FHLBB Res. No. 88-1411P at 17.

[6] See 12 U.S.C. § 3201(4) (Supp. IV 1992) and 12 C.F.R § 563f.2(f) (1993). The term "management official" generally covers any officer or employee with management functions or any director of a depository organization.

Bank, as well as at least one of the Companies. In 1993, the two unaffiliated bank holding companies listed in the 1988 approval order were consolidated into a new company, the Acquired BHC. The Acquired BHC recently merged into the Acquiring BHC, which has appointed the Management Official to its board of directors. As a director, he would serve as a "management official" of the Acquiring BHC for purposes of the DIMIA and Interlocks Regulations.

**Discussion**

Absent the relief provided by the § 408(m) waiver granted in connection with the 1988 acquisition, the Management Official's dual service with the Savings Bank and the Acquiring BHC would be subject to the major assets prohibition of the DIMIA and Interlocks Regulations.[7] You seek our concurrence that the 1988 waiver would remain effective with respect to the Management Official's dual service with the Savings Bank (including the Companies) and the Acquiring BHC.

You maintain (at p. 6 of your letter) that the waiver "is broad enough to permit [the Management Official] to serve at those depository organizations which he was serving on the date of the resolution, their successors, and any depository organization at which [the Management Official] could serve if he had no involvement with [the Savings Bank] (i.e., within the scope of the section 408(m) 'but for' test ." (emphasis added). You appear to argue that the waiver applies to both interlocks that existed at the time of the 1988 acquisition and any subsequent prohibited interlocks. We do not agree. While, as discussed below, the Management Official's service with the Acquiring BHC is within the scope of the original waiver, we do not concur with your broader interpretation of the waiver.

At the time of the 1988 acquisition, § 408(m) provided in pertinent part:

> Notwithstanding any provision of the laws or constitution of any State or any provision of Federal law . . . the [FSLIC] upon its determination that severe financial conditions exist which threaten the stability of a significant number of

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[7] 12 U.S.C. § 3203 (Supp. IV 1992) and 12 C.F.R. § 563f.3(c) (1993). The major assets prohibition generally bars management officials of a depository organization with total assets exceeding $1 billion, such as the Acquiring BHC, from serving at the same time as management officials of nonaffiliated depository organizations with total assets exceeding $500 million, such as the Savings Bank (or a management official of any affiliate of such a depository organization, such as any of the Companies).

> insured institutions . . . may authorize any company to acquire control of said insured institution or to acquire the assets or assume the liabilities thereof.[8]

"This language amply demonstrates Congress' intent to preempt all other legislation that might inhibit the purchase of a failing thrift by a FSLIC approved buyer."[9]

The legislative history of a 1987 amendment to § 408(m) explains its preemptive effect as follows:

> [S]ection 408(m)(A)(i) preempts other provisions of Federal and State law that would have the effect of preventing a company from acquiring a failing thrift institution. Thus, for example, if a life insurance company invested in or acquired a thrift institution under Section 408(m), that section would preempt any State law that would prevent the company from continuing to engage in the life insurance business because of that investment or acquisition.[10]

In the opinion analyzing the legal aspects of the 1988 acquisition the General Counsel's staff cited this legislative history to support the FHLBB's employment of a "but for" test for application of § 408(m).

> The life insurance company situation provides an example of a law that would act as an effective impediment, although not an outright bar, to the ability of a company to make a supervisory acquisition. The example supports the use of Section 408(m) to enable an acquiror to continue to engage in the business(es) it had been conducting as the business could have been conducted, but for the acquiror having made the supervisory acquisition.[11]

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[8] 12 U.S.C. § 1730a(m)(1)(A)(i) (1988).

[9] Ford Motor Co. v. Insurance Comm'r of Com. of Pa., 874 F.2d 926, 937 (3d Cir. 1989), cert. denied, 493 U.S. 969 (1989) (emphasis in original).

[10] H.R. Rep. No. 261, 100th Cong., 1st Sess. at 140 (1987), reprinted in 1987 U.S.C.C.A.N. 609.

[11] Op. General Counsel (FHLBB/Corporate and Securities Division), Dec. 27, 1988, at 36 (emphasis in original). The FHLBB's view of the scope of § 408(m) was generally endorsed in Ford Motor Co. v. Insurance Comm'r of Com. of Pa., 874 F.2d 926, 936-40 (3d Cir. 1989), cert. denied, 493 U.S. 969 (1989). ("We

(continued...)

The opinion concluded that the FHLBB had "the legal authority to invoke Section 408(m) to waive the management interlock provisions as they appl[ied] to the . . . individuals [listed in the 1988 approval resolution]. Clearly, 'but for' the subject supervisory acquisition, these individuals would not be subject to the management interlocks [prohibitions]."[12]

In our view, under the "but for" test waivers of the interlocks prohibitions negate substantial future impediments to affected parties' activities at least to the extent the parties engaged in such activities when the waiver was granted. Post-FIRREA OTS Office of Chief Counsel opinions confirm that the "but for" test extends to impediments that could not have been foreseen when the waivers were granted, so long as there is a discernible connection between the original waiver and the subsequent developments.

Thus, for example, the Chief Counsel's Office has concluded that a § 408(m) waiver of certain transaction-with-affiliate prohibitions in former § 408(d)(4)(B) of the NHA[13] also continued in effect despite a prohibition in a successor statutory prohibition, § 11(a)(1)(A) of the Home Owners' Loan Act ("HOLA"),[14] subject only to limits imposed by §§ 23A and 23B of the Federal Reserve Act[15] that applied to every savings association as if the savings association were a member bank[16] through § 11 of the HOLA[17] after FIRREA.[18] Also, a § 408(m) waiver of the prohibition against formations of multi-state, multiple savings and

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[11](...continued)
hold that Congress's intent to preclude any impediment to the acquisition of failing thrifts is clear.") Id. at 938.

[12] Op. General Counsel (FHLBB/Corporate and Securities Division), Dec. 27, 1988, at 44.

[13] 12 U.S.C. § 1730a(d)(4)(B) (1988).

[14] 12 U.S.C. § 1468(a)(1)(A) (Supp. IV 1992).

[15] 12 U.S.C. §§ 371c and 371c-1 (Supp. IV 1992).

[16] "The term 'member bank' shall be held to mean any national bank, State bank, or bank or trust company which has become a member of one of the Federal reserve banks." Id. § 221.

[17] Id. § 1468(a)(1).

[18] Op. Dep. Chief Counsel (OTS/Williams) (Sept. 26, 1990).

loan holding companies in former § 408(e)(3) of the NHA[19] was held to authorize a unitary holding company to acquire separate thrift subsidiaries and thereby resume multi-state multiple savings and loan holding company status, even though the subsidiary for which the § 408(m) override was invoked had since been closed.[20] The rationale for this conclusion was that the original approval pursuant to § 408(m) was granted in connection with the type of supervisory acquisition excepted by § 10(e)(3)(A) of the HOLA,[21] a successor statutory provision to § 408(e)(3) of the NHA.[22]

In this case, the major assets prohibition in the DIMIA and Interlocks Regulations would constitute a substantial impediment to the corporate successor to a company directly subject to the 1988 waiver because the Acquiring BHC acquired by merger the Acquired BHC, a successor of a company that was covered by the subject § 408(m) waiver. Therefore, consistent with agency precedents, the 1988 waiver extends to the Management Official's service with the Acquiring BHC.

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.

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

Very truly yours,

Carolyn B. Lieberman
Acting Chief Counsel

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[19] 12 U.S.C. § 1730a(e)(3) (1988) (generally prohibiting agency approval of an acquisition resulting "in the formation . . . of a multiple savings and loan holding company controlling savings associations in more than one State . . . .").

[20] Op. Chief Counsel (OTS/Weinstein), Mar. 12, 1991. See also Op. Chief Counsel (OTS/Weinstein), Nov. 21, 1990.

[21] 12 U.S.C. § 1467a(e)(3)(A) (Supp. IV 1992).

[22] 12 U.S.C. § 1730a(e)(3) (1988) (see note 19 supra and accompanying text).