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May 9, 2002

VIA EMAIL AND HAND DELIVERY

Regulations Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552

Attention: Docket No. 2002-11

Re: April 9, 2002 Notice of Proposed Rulemaking: Mutual Savings Associations, Mutual Holding Company Reorganizations, and Conversions from Mutual to Stock Form

Ladies and Gentlemen:

This letter contains our law firm's comments on the subject Notice of Proposed Rulemaking, dated April 9, 2002 (the "Re-Proposal"), that was issued by the Office of Thrift Supervision (the "OTS") in response to the extensive comments receive by the OTS on its July 12, 2000 Notice of Proposed Rulemaking regarding the same subject (the "First Proposal").

Our law firm represents numerous federal and state mutual holding companies, as well as fully-converted federal stock savings associations and holding companies. As a result, we are very familiar with the OTS regulations and policies regarding mutual-to-stock conversions and mutual holding companies (the "Regulations"), including those aspects of the Regulations that have worked well and those that could be improved.

As a general matter, we believe that the Re-Proposal is a significant improvement over the First Proposal, particularly as it relates to business plans. Moreover, we again applaud the efforts of the OTS in adopting the July 12, 2000 Interim Final Rule which has substantially improved the federal mutual holding company structure and the ability of fully-converted associations and mutual holding companies to manage excess capital. Our comments to the Re-Proposal are as follows:

A. Proposed Regulations Affecting Mutual-to-Stock Conversion and MHC Stock Offerings

1. Plan of Conversion

The First Proposal required the filing of a business plan and receiving OTS non-objection to the business plan before a conversion application could be filed with the OTS. The Re-Proposal does not require that the OTS issue its non-objection to a business plan *before* a conversion application can be filed, but requires that an association meet with the OTS at least 10 days *prior to adopting a plan of conversion.*

Comment. We do not believe that a converting association should be required to meet with the OTS prior to adopting a plan of conversion or plan of mutual holding company reorganization. In our view, the only purpose of such a meeting would be to "second-guess" a board's decision to pursue a conversion transaction or form a mutual holding company. At best, such a meeting would simply review with the board the requirements of a conversion, including adoption of a business plan, that are already specified in the Regulations. The Re-Proposal suggests that management and a board are not capable of making an informed decision regarding a conversion transaction without input from the OTS. As noted above, the OTS should be neutral regarding mutual-to-stock conversions. While the Regulations should provide alternatives to a full conversion, there *should not* be a presumption that mutuality is preferable. In our experience, mutual holding companies and standard conversion transactions have had a very positive effect on management and boards of directors. Capital raised in conversion transactions has helped associations to grow and provide new financial services to customers. Moreover, the discipline of the stock markets and public disclosure also enhance the focus and performance of management and boards of directors, which ultimately results in better and more competitive services for customers.

In addition, the Re-Proposal does not specify whether a converting association's board of directors, a committee thereof, or simply management must meet with the OTS. As a practical matter, the OTS should give associations the option of having management or a committee of the board of directors meet with the OTS, particularly if the *converting association* prefers to have the meeting at the offices of the OTS.

Lastly, we do not believe that the Regulations should require a meeting with the OTS before adopting a plan of mutual holding company reorganization *that does not involve a stock offering.* No capital would be raised, and there would be no real purpose for such a meeting.

2. Business Plan

The Re-Proposal is a significant improvement over the business plan standards enunciated in the First Proposal. The elements of an acceptable business plan vary from association to association, and management should have broad discretion to develop a business plan that best meets the needs of its association. We believe that the OTS, as primary federal regulator for savings associations, should establish guidelines for converting associations to assist them in formulating workable business plans. However, the business plan guidelines or standards should not be used as a vehicle to prevent or "second-guess" management's decision to implement a standard conversion or mutual holding company stock offering.

(a) Pre-filing Meeting Regarding Business Plans. The Re-Proposal drops the requirement for a pre-filing meeting and OTS non-objection to a converting association's business plan. It requires that the business plan be filed concurrently with a conversion application, but strongly encourages associations to file such business plans before filing a conversion application.

Comment. The Re-Proposal is a substantial improvement over the First Proposal, particularly with respect to eliminating the requirement of receiving OTS non-objection to a business plan before a conversion application can be filed. We believe most associations will file business plans in advance of filing conversion applications, and will meet with the OTS concurrently with the filing of a business plan. This procedure has worked well in recent years. As noted above, neither management nor a board of directors should be required to meet with the OTS prior to adopting a plan of conversion or mutual holding company reorganization.

(b) Business Plan Standards. The Re-Proposal modifies and eases the business plan standards outlined in the First Proposal, and emphasizes that no single factor will determine whether a business plan is acceptable. For example, a business plan would not necessarily be unacceptable because the projected return on equity is low. Moreover, the Re-Proposal would allow an association to include stock repurchases in the business plan.

Comment. We believe that the business plan standards of the Re-Proposal are a significant improvement over the First Proposal. They should be a useful guide for managements and boards of directors in projecting the deployment of new capital raised in a conversion or minority stock offering. It is important that the OTS work with management to implement feasible business plans, and the suggestion that business plans be filed *before* conversion applications will help both the OTS and management in implementing workable business plans. The ability to include stock

repurchases in a business plan also is important because it is a very useful capital management tool that, in practice, is nearly always used by converted associations.

Finally, since no capital is raised in a mutual holding company reorganization that does not involve a minority stock offering, the regulations should explicitly exempt such transactions from any business plan requirements.

3. Stock Repurchases

We concur with the Interim Final Rule's elimination of all restrictions on stock repurchases for converted savings associations after the first year following a conversion transaction.

4. Charitable Organizations

The current mutual-to-stock conversion regulations do not address charitable foundations established as a part of a "full" conversion or mutual holding company reorganization. Currently, the OTS imposes conditions on the establishment of charitable foundations on a case-by-case basis, and the converting association must request waivers of a number of conversion rules as part of the process. This case-by-case approach adds time and considerable expense to a conversion transaction, and we support the standards for forming a charitable foundation in the Re-Proposal.

5. Stock Benefit Plans

The Re-Proposal confirms the First Proposal by permitting accelerated vesting of stock benefits in the event of a change of control, but not for normal retirement. It also requires stockholder ratification of any material amendments to management stock benefit plans that are made more than one year after a conversion transaction.

Comment. The Re-Proposal is an improvement over existing Regulations that prohibit accelerated vesting in the event of retirement or a change of control. We believe that there is no significant reason why accelerated vesting of stock benefit plans should not occur in the event of retirement.

6. Conversion Proceeds Retained by Holding Companies

We concur with the Re-Proposal which specifically requires a converting association to retain only 50% of the net conversion proceeds.

7. Anti-Takeover Protection

The Regulations currently provide that no person may acquire more than 10% of any class of voting securities of a converted association for three years following a conversion, without prior OTS approval. The OTS has amended the duration of this prohibition from time to time, and OTS approval has been obtained fairly routinely for acquisitions of control more than one year after a conversion transaction. We believe that it would be helpful generally for converting associations to have greater assurance that the OTS will not permit acquisitions of control for three years following a conversion transaction. In practice, we note that the rule loses much of its effect if the OTS is inclined to grant exceptions to the three-year prohibition at management's request. In other words, if pressure is placed on management to "maximize shareholder value" or seek a merger partner, many acquirors or "interested" stockholders would argue that a board has a fiduciary *obligation* to request a waiver of the rule (even if the board and management are otherwise inclined to remain independent) if such waivers are readily available.

B. Proposed Regulations Affecting Mutual Holding Companies Only

We generally applaud the OTS's efforts to make mutual holding companies a viable alternative to standard conversion transactions, and we believe that the Interim Final Rule was a significant step toward this objective. Our comments regarding the Re-Proposal are as follows:

1. Dividend Waivers

The ability of mutual holding companies to waive dividends avoids unnecessary taxes, preserves capital in the association and permits mutual holding companies to operate indefinitely since dividends paid to minority stockholders will not result in dilution of minority stockholders' interests in a second-step conversion. Moreover, the Interim Final Rule regarding dividend waivers makes mutual holding companies more attractive investments for stockholders. Dividend waivers do not adversely affect depositors and the mutual interest in a mutual holding company structure. In fact, it can be argued that they help the mutual interest since capital is retained in the association.

We continue to believe that the FDIC and the Federal Reserve Board policy against mutual holding company dividend waivers is misguided, and we would encourage these regulatory bodies to defer to the far greater expertise of the OTS in regulating and overseeing mutual savings institutions and mutual holding companies. In particular, the mutual holding company structure needs to be easy to understand and favorable to investors in order to remain viable and useful to management. The Federal Reserve Board and the FDIC policies unnecessarily complicate the mutual holding company structure, and have emphasized the inchoate ownership interests of depositors at the expense of stockholders.

2. Stock Benefit Plans

(a) Greater Stock Options and Awards. Under current rules, mutual holding company stock benefit plans are based on the percentage of outstanding shares issued to minority stockholders. For example, if an institution has 35% of its shares held by minority stockholders, then 10% and 4% of the 35% minority shares could be awarded pursuant to stock option and stock award plans. The First Proposal provided that a savings association subsidiary of a mutual holding company may offer stock benefit plans *as if minority stockholders held 49% of the stock*, provided the mutual holding company retains majority control following implementation and exercise of the plans.

The Re-Proposal confirms the First Proposal, with the following exception: management benefit plans (excluding the employee stock ownership plan), may not award more than 25% of the number of shares issued in the minority stock offering.

Comment. The First Proposal was intended to enable mutual holding companies to raise less capital without penalizing management by limiting the size of stock option and stock award plans that are tied to the number of shares sold in an offering. The First Proposal, however, did not address the potential abuse in situations where a mutual holding company sells a very small minority ownership to depositors but attempts to adopt stock benefit plans based on a 49% minority stock offering. The Re-Proposal offers a reasonable way to address the concern that management stock benefit plans may be disproportionate to the total shares sold in a minority stock offering, and represents a significant improvement over existing rules.

(b) Timing of Stockholder Approval of Plans. The First Proposal would have enabled mutual holding companies to adopt stock benefit plans at the time of the mutual holding company formation, so long as awards were not made until six months after the completion of the mutual holding company formation. This would have given mutual holding companies an advantage over full conversion transactions. The Re-Proposal withdraws the First Proposal in this regard.

Comment. We believe that there should not be a preference for mutual holding companies regarding stock benefit plans. Moreover, there is not a significant advantage to having the stock benefit plans adopted as part of the conversion or mutual holding company transaction if awards cannot be made under the plans until at least six months after the conversion transaction is completed.

(c) Additional Stock Benefit Plans. The Re-Proposal provides that a mutual holding company may adopt additional stock benefit plans without requiring an additional stock issuance to depositors and the public. The additional stock benefit plans would require 30 days notice to the OTS. When reviewing the notice, the OTS will consider the purpose of the additional plans, management ratings and supervisory problems. Stockholder approval of the additional plans would be required.

Comment. Specifically authorizing mutual holding companies to offer management and directors additional stock benefits after awards under their original stock benefit plans have been made is essential to (i) enabling associations to remain in the mutual holding company structure indefinitely, and (ii) making the mutual holding company structure more competitive with stock holding companies. There is simply no reason why mutual holding companies, like fully converted stock holding companies, should not be permitted to adopt additional stock benefit plans, subject to stockholder approval. Many stock holding companies, for example, have implemented several generations of stock benefit plans. We believe that the authorization of additional plans should be routine particularly if (i) the original plans have been exhausted and all awards have been made, (ii) the association is well capitalized, and (iii) the total options and stock awards under the original plans combined with new plans is less than the total awards that could have been granted had the association undertaken a standard conversion.

3. **Anti-takeover Protections**

The federal banking regulators have allowed mutual institutions to acquire the minority public shares of a mutual holding company, followed by a merger of the mutual holding company into the mutual institution in a so-called "remutualization" transaction. While most of the remutualization transactions have been "friendly," they raise the possibility of a sale of control to a mutual institution. The Re-Proposal offers additional protection to mutual holding companies by: (i) permitting mid-tier holding companies and their subsidiaries to include a charter provision that prohibits the direct or indirect acquisition of more than 10% of any class of equity security for five years after a stock offering; and (ii) prohibiting any person from acquiring 10% or more of the mid-tier holding company's stock within three years of a minority stock offering without prior OTS approval.

Comment. One of the most important elements of the mutual holding company structure is its relative insulation from unfriendly takeovers and proxy fights when compared to a fully converted association. This protection is necessary because

mutual associations, unlike other corporations, *must* offer all of their stock to customers and the public as part of a conversion transaction. There is no vehicle that enables management to become accustomed to public stock ownership, other than the mutual holding company structure. We believe that any efforts by the OTS to protect the mutual holding company structure from outside interference by other institutions or minority stockholders is helpful and critical to the attractiveness of the structure. Minority stockholders should not complain about this protection because it is fully disclosed in every offering prospectus. Accordingly, we recommend that the OTS adopt the Re-Proposal in final form. Moreover, it is important that the final regulation make it clear that adopting the foregoing anti-takeover protections would not preclude the adoption of similar anti-takeover protections in the event the mutual holding company later converts to stock form.

In addition, although we believe that a mutual holding company has absolute discretion under Delaware and other applicable law to reject any sale of control proposal made by minority stockholders, we believe that because of "remutualization" transactions, additional measures will be helpful or necessary to protect the mutual holding company structure from minority shareholders that desire to interfere with management's long-term goals for the mutual holding company.

4. **Other MHC Improvements**

(a) Charter Enhancement. OTS chartering and regulation of mid-tier stock holding companies has worked very well. However, one significant advantage that Delaware and other state-chartered mid-tier holding companies have over federal mid-tier holding companies is the ability to include certain charter provisions that: (i) limit directors' personal liability for breach of their fiduciary duty of care; (ii) contain broader indemnification than that available under OTS regulations; and (iii) require additional notice procedures for new business matters and shareholder nominations of directors. We encourage the OTS to amend its corporate governance regulations regarding mutual holding companies to provide provisions comparable to those under Delaware law.

(b) Additional Stock Issuances. The OTS should amend the current mutual holding company regulations to specifically provide that mutual holding companies may issue common stock to acquire other financial institutions so long as the mutual holding company retains a majority of the voting shares after the common stock issuance.

(c) Remutualization Transactions. Remutualization transactions present a number of novel issues for mutual holding companies and management. We believe that these issues, including pricing, accounting and control, should be reviewed by the OTS.

(d) Depositor Vote. We believe that the Regulations should be amended to permit the formation of a mutual holding company without public stockholders without a vote of the members at the option of management. If a member vote is obtained, no further vote would be necessary to sell stock. We recognize that the OTS may believe legislation would be necessary for such an amendment.

(e) Minority Vote to Approve Conversion Transactions. We do not believe that a vote of the majority of the minority stockholders should be necessary to approve a "second-step" conversion by a mutual holding company. Such a vote, in effect, disenfranchises the mutual holding company because it permits the minority stockholders to block action taken by the majority stockholder.

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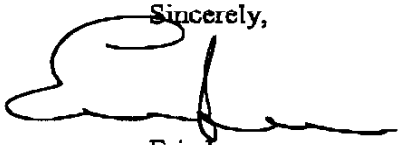
We hope that this comment letter is helpful in evaluating the proposed regulations, and we appreciate having the opportunity to offer our input on these important matters. Please do not hesitate to contact the undersigned at 202-274-2002 or John Gorman at 202-274-2001 of this office should you have any questions regarding this letter.

Sincerely,



Eric Luse

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