3


# MULDOON MURPHY & FAUCETTE LLP

ATTORNEYS AT LAW

5101 Wisconsin Avenue, N.W.
Washington, D. C. 20016

TELEPHONE (202) 362-0840
TELECOPIER (202) 966-9409

www.mmf-law.com


May 8, 2002

Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20552

Attention: Regulation Comments, Chief Counsel's Office
Docket No. 2002-11

Dear Sirs and Madams:

We appreciate the opportunity to comment on the re-proposed revision of the regulations governing mutual to stock conversions and mutual holding company reorganizations (the "Re-proposal"). As we indicated in our comments on the proposal to amend the conversion regulation published on July 12, 2000 (the "First Proposal"), our firm specializes in financial institutions law and has counseled hundreds of savings institutions concerning whether to preserve their mutuality or whether to change their corporate form through a mutual to stock conversion or a mutual holding company reorganization. As many of our senior partners served in senior staff positions at the Federal Home Loan Bank Board and were intimately involved in the promulgation of the original conversion regulations, we have a unique knowledge of the nuances and application of the conversion regulations and the policies underlying those regulations. In addition, our many years of experience in the thrift industry have given us a unique understanding of the mutual form of organization and its corporate governance and operation.

At the outset, we wish to compliment the OTS on its effort to address the concerns that we and other commenters expressed with respect to the First Proposal. In particular, we support the proposed amendments to the mutual holding company regulations. The policy towards dividend waivers and the expansion of stock benefit plans are important steps in making the MHC structure more appealing. We believe that the OTS should extend to MHCs the prohibition on acquisition offers during the first three years following reorganization, as this would give MHCs the same opportunity that fully converted associations have to implement their business plans without threat of a change in control.

Notwithstanding the progress made in the Re-proposal, we continue to have reservations about the business plan requirements, which we discuss below. The second section of this letter consists of additional comments on specific sections of the revised regulations.

**Business Plan Requirements**

As we and many others have argued, the business plan requirements contained in the First Proposal would have constituted a fundamental change in the regulation of conversions. Under the First Proposal, a mutual association wishing to convert to stock form would have been required to "demonstrate" a reasonable need for new capital and that the association will achieve a reasonable return on equity, among other things. The implication of these requirements was that an association that could not satisfactorily demonstrate these things would have its application for conversion denied.

With the Re-proposal, the OTS has softened its stance. Under the Re-Proposal, a converting association need not "demonstrate" anything in its business plan. It must simply "address" a list of specified items. According to the preamble, "the OTS will weigh all of the factors together, and no single factor will determine whether a business plan is acceptable." Even though the OTS has abandoned the checklist approach of the First Proposal in favor of a more holistic concept, the implication remains that if an association's business plan is unacceptable, its application for conversion would be denied. Furthermore, the lack of clarity in the Re-proposal as to how each factor should be considered and weighed leaves too much room for negative staff interpretations. As a result, we remain concerned that the proposed regulations will impede the creation of capital for the thrift industry.

We believe that the imposition of the business plan requirements in the Re-Proposal is inappropriate and detrimental to the industry. In general, we believe that (1) factors to be addressed in the business plan suggest that a need for capital will be a threshold for converting to stock form, and (2) the requirement to show an acceptable return on equity is not the appropriate measure for an acceptable business plan. Furthermore, we believe that the business plan requirement is an overly paternalistic and discriminatory measure that unnecessarily distinguishes a mutual-to-stock conversion from other capital raising transactions. Instead of restricting the ability of savings association's to raise capital, the OTS should be encouraging all forms of capital raising transactions. The addition of capital to the thrift industry will only serve to make it stronger and more competitive. This is especially true now that the landscape for merger and acquisition activity has changed with the elimination of pooling-of-interests accounting, which makes thrifts with cash and capital resources well positioned to be among the survivors in the continuing consolidation of the financial services industry.

1. The Re-proposal Continues to Emphasize Need for Capital

As we demonstrated in detail in our comments on the First Proposal, mutual savings associations have the statutory right to convert to stock form if they choose to do so, and any requirement that effectively restricts the exercise of this choice would be contrary to and in violation of Section 5(i) of the HOLA. We discussed how the statutory and regulatory goal of the OTS and its predecessor had always been to ensure that conversions be done on an equitable basis and that any requirement that an association justify its decision or somehow show that it needed to convert would be without precedent and without authority.

Although the Re-proposal no longer requires a converting association to demonstrate a reasonable need for new capital, we believe that the factors required to be addressed in business plans under the Re-proposal suggest that the need for capital will still be a threshold requirement for converting.

Section 563b.105(a)(3) of the Re-proposal requires the business plan of the converting association to address "what opportunities are available to reasonably achieve [the association's] planned deployment of conversion proceeds." This is just another way of saying the converting association must show a need for additional capital. If the OTS concludes that opportunities to deploy the conversion proceeds are not reasonably available, will the OTS deny the conversion application? If the answer to this question is "yes," then despite the OTS's protestations to the contrary in the preamble, the business plan requirement would in effect create a needs test for conversions. If the answer to this question is "no," then there is no reason for the OTS to require the business plan to address this factor.

If the argument is that a converting association must have a specific use of the additional capital in mind prior to converting, we disagree. First, as the OTS acknowledges in Section H of the preamble, the addition of capital is beneficial, as it "[enhances] the safety and soundness of the savings association." Thus, raising additional capital is itself a justification for conversion. Moreover, it is difficult to reconcile the numerous legislative and regulatory initiatives over the last decade that have made capital levels the fulcrum of the regulatory process with the continued implication in the Re-proposal that substantial capital is adverse. We can only regard any policy that discourages insured financial institutions from raising capital as suspect. The capital that the thrift industry has accumulated over the last decade can easily be lost in poor economic conditions.

Second, the approach of the Re-proposal ignores the fact that reasons other than the desire to create additional capital may provide a valid justification for converting to stock form. For example, many mutual institutions convert to stock form so that they can attract and retain talented officers and employees with stock-based benefits. Others convert to stock form so that they can operate in a more modern and familiar corporate structure. And others convert to the stock form so that they can acquire other financial institutions or businesses in the financial services industry. With the recent elimination of pooling-of-interests accounting, cash has become a more popular form of merger consideration, making thrifts more competitive acquirors. Since the success of any acquisition strategy depends on the ability to locate appropriate and willing targets and to negotiate a mutually acceptable price, and therefore is inherently speculative, it would be difficult, or even inappropriate, to factor acquisitions into an association's business plan projections, due to the many assumptions that would have to be made. Because of the fast pace at which acquisition transactions usually move and the competition for many target companies, in most cases it is impractical for an institution to first find an acquisition target and then convert to stock form. Too many other institutions would be able to complete the transaction more quickly and with fewer contingencies. Accordingly, for an institution that intends to grow by acquisition, it makes more sense to convert first, and in doing so create a "war chest" for acquisitions, and then go out and try to find companies to buy. We are concerned that the proposed business plan requirements do not adequately recognize situations where growth by acquisition will play an important part in a converting institution's business strategy and its long-term competitive viability.

2. Return on Equity is Not An Appropriate Measure for a Business Plan

The Re-proposal contains the requirement that a converting association's business plan address "how [the association] will achieve a reasonable return on equity, commensurate with investment risk, investor expectations, and industry norms, by the final year of the business plan." Nowhere does the OTS explain why this is an appropriate subject for the business plan. We can only surmise that the perception that most converted institutions face pressure from shareholders to improve their returns on equity has caused the OTS to include this requirement.

It is unclear how the OTS will apply this provision. Will the OTS reject an otherwise sound business plan because the association's ROE at the end of the plan period will be lower than industry norms? If the answer to this question is "yes", then, again, despite the OTS's protestations to the contrary in the preamble, the business plan requirement would in effect create a qualification requirement for conversions. If the answer to this question is "no", then there is no reason for the OTS to require the business plan to address this factor. Another possibility is that the OTS would encourage the association to be more aggressive in its planning in order to achieve a higher ROE. We assume that the OTS would not favor investor interests over the safety and soundness of the association.

A. ROE Requirements Would Have a Disparate Impact on Profitable and Smaller Thrifts.

The proposed ROE requirement would penalize mutual institutions that have had strong profits and have accumulated significant equity. A $500 million asset thrift with $50 million of equity that has a 1% return on assets will have a 10% ROE. If that same thrift has $75 million of equity, it will have a 6.7% ROE. This simple example illustrates that profitable institutions that have built up significant equity would be less able to satisfy the proposed return on equity requirement. We see no reason to disadvantage profitable institutions in this manner. Furthermore, since mutual institutions typically do not distribute excess capital the way stock institutions can through dividends or share repurchases, the proposed ROE requirement would encourage profitable institutions to convert to stock form sooner than they might desire in order to avoid building up so much equity that it would be impossible for them to satisfy the ROE requirement.

The proposed ROE requirements also would have the greatest impact on small mutual thrifts, which are the OTS' core constituency. Smaller thrifts (those with less than $100 million in assets) generally have a higher percentage of equity to assets, lower profitability and slower growth relative to larger thrifts. These smaller thrifts, which represent approximately 54% of OTS regulated mutual thrifts, would be least capable of satisfying the proposed return on equity requirement.

B. <u>Protection from Hostile Shareholders Does Not Justify ROE Requirements</u>.

The apparent rationale for the proposed ROE requirement hinges on the OTS's perception that many converted institutions have been pressured by hostile shareholders. In our experience, only a small percentage of converted institutions have faced proxy contests, shareholder proposals to sell the institution, or hostile attempts to acquire control of the institution. Accordingly, we disagree with the statement in the First Proposal that institutions that fail to produce adequate returns on equity "will likely face pressure from dissatisfied shareholders." Furthermore, we question whether having a business plan that projects a certain ROE will eliminate shareholder activists. Shareholders who pressure management typically do so in order to promote their own short-term interests. They may seek to maximize their returns through larger dividends, aggressive stock repurchases or the sale of the institution. These actions may be at odds with management's long-term business strategy and may not be in the best interests of shareholders who are taking a long-term view of their investment. In these circumstances, projections of an industry-average ROE are not likely to prevent the shareholder pressure perceived by the OTS. Being cash-rich is an unavoidable by-product of the conversion process. Instead of restricting an institution's ability to convert, the OTS should focus on providing converted institutions with the ability to deploy the conversion proceeds without being subject to immediate pressure to utilize the cash raised in the conversion. This is done currently through Section 563b.3(i)(3).

It has always been an element of the conversion process, as with de novo institutions, that improvement in ROE comes over time. To make sure investors understand this, converting institutions routinely disclose as an investment consideration in their stock offering materials that the additional capital raised in the conversion will reduce the institution's ROE and that it will take several years to achieve a ROE comparable to that of more seasoned companies. As a result, investors should not have unreasonable expectations of what can be achieved.

As we stated in our comments on the First Proposal, rather than restricting conversions, we believe that the OTS can do a great deal more to protect converted institutions from dissident shareholders without favoring the institution over the dissident shareholder or placing the dissident shareholder at a disadvantage. We also suggested that the OTS should consider ways in which it can make the thrift charter more attractive and more conducive to producing greater shareholder returns, such as working with Congress to change the non-mortgage lending limits applicable to federal thrifts, especially the commercial lending limit.

C. Emphasis on ROE Runs Counter to Market Forces.

The amount of stock sold by a converting thrift is based on a valuation of the institution by an independent appraiser. This valuation considers, among other things, the market for stocks of comparable companies. As a result of this valuation process, the market has a significant impact on how much capital a converting thrift raises. Valuations go up when thrift stocks are popular and, as a result, more capital is raised. Conversely, valuations go down when thrift stocks are unpopular and, as a result, less capital is raised. A significant impact of the changing valuations in bull and bear markets is that when more capital is raised, the resulting ROE is lower. And when less capital is raised, the resulting ROE is higher. The OTS's proposed focus on ROE runs counter to the market in that it would restrict access to the market when the market is most receptive. During bull markets for conversions, when valuations are higher and resulting ROEs are lower, the proposed ROE requirement would impede the ability to complete a conversion. During bear markets for conversions, when valuations are lower and resulting ROEs are higher, more institutions may be able to meet the ROE requirement, but weak market demand makes it more difficult to complete a stock offering. We believe that the OTS should not interfere with market forces and should continue to let the market play its role in determining how much capital a converting thrift should raise.

D. Return on Equity is Not a Measure of Shareholder Satisfaction.

We believe that a reasonable return on equity is not the correct measure for the business plan. While investors often focus on return on equity as a measure of a company's success relative to other companies, investors are ultimately more concerned with the return on their investment. The proposal's approach ignores the fact that investors may achieve adequate returns through a combination of regular cash dividends, share repurchases and growth in earnings per share and/or book value, despite a below average return on equity. The fact that an association has achieved a "reasonable ROE" by the end of the plan period means nothing by itself. An association may have a 10% ROE, but if it is expected to show no improvement in earnings per share for the next year, its stock may not be attractive to many investors. On the other hand, an association may have a 5% ROE because of its high capital levels, but if it is expected to increase its earnings per share by 20% per year over the next few years, its stock may be very attractive to investors. Also, many thrift investors focus on book value rather than earnings. If the average thrift is trading at 90% of its per share book value, a thrift trading at 65% of book value may be very attractive to some investors, regardless of its ROE.

While ROE may be a useful measure of how efficiently an institution is utilizing its capital, it is not a measure of the success of a business plan nor is it the measure of investor satisfaction. And while it may be appropriate for management to utilize ROE measurements when deciding how to allocate capital, achievement of a specified ROE is not an appropriate criteria for regulatory evaluation of a business plan. From the perspective of the OTS, all that should matter is that the conversion proceeds be deployed in a safe and sound manner that is permissible under applicable regulations.

3. Conversions Should Be Treated Like Other Capital Raising Transactions, Which Do Not Require Business Plans

A mutual-to-stock conversion involves two primary elements: (1) the conversion of the association to stock form; and (2) the sale of the capital stock of the association or its holding company. Based on footnote 6 of the preamble to the Re-proposal, which says that "there is no requirement to submit a business plan for an MHC reorganization without a stock issuance," we believe that it is fair to conclude that it is not the conversion to stock form itself that leads the OTS to require a business plan. Instead, it is the raising of additional capital that causes the OTS to require the business plan. This is confirmed in Section D of the preamble, where the OTS says that it:

> "believes that the specific requirements [of the business plan] are appropriate to ensure that an association contemplating such a significant transaction, with considerable ramifications regarding capital, management, and business operations, has considered the consequences of the transaction in its business plan."

We believe that this rationale is overly paternalistic and discriminatory against mutual institutions. Having advised hundreds of mutual associations with respect to their chartering options, we are confident that the significance of a mutual-to-stock conversion is not lost on the board of directors. And if it is truly OTS's normal practice to discuss an association's conversion plans with the board of directors, as is claimed in the preamble, then the board's understanding of the consequences of the transaction should be well known to the OTS.

Furthermore, as we noted in our comments on the First Proposal, savings associations in stock form that raise additional capital through stock or debt offerings (whether through public or private offerings) are not required to file a business plan with the OTS. Instead, the institution's capital levels and its business activities are reviewed through the regular examination process. We do not see any need or reason to treat converting mutual institutions differently. The institution should decide whether it wants to undertake a conversion and raise additional capital. The OTS should not interfere with or second-guess that decision.

In defense of the business plan requirement, OTS staff members have likened the conversion application to an application for permission to organize a savings association and have cited the significant cultural change that occurs when an institution converts from mutual to stock form as reason for the need for a business plan. However, this rationale does not justify the disparate treatment from other capital raising transactions. The cultural change is not really any different than when a closely held stock savings association conducts an initial public offering, yet approval of a business plan is not required in that circumstance. Furthermore, there is no real link between the business plan and the change in corporate culture. The best business plan in the world will not assure that management and employees successfully adapt to operating as a public company. We also do not believe that the comparison to de novo institutions is appropriate. In a PTO application, the OTS needs to determine if the organizers have the expertise and the capital necessary to successfully operate the institution. A business plan is important for a PTO application because the amount of capital required to open and operate the institution is tied to the business plan. The more aggressive the organizers' strategy, the more capital will be required. In a conversion, on the other hand, the amount of capital to be raised is determined by an appraisal of the institution and not by what the OTS believes the business plan requires. Nor is the business plan necessary to evaluate management's expertise. In most cases the OTS has been examining the converting institution for years and is very familiar with management.

**Comments regarding specific sections**

1. Section 563b.100(a). This section requires that the board of directors meet with the OTS "at least ten days" prior to adopting a plan of conversion. Nothing in the preamble for the Re-proposal or the First Proposal provides any justification for having the required meeting with the OTS any particular number of days prior to adoption of the plan of conversion. It is easily conceivable that a well-prepared board of directors would be ready to adopt a plan of conversion promptly after meeting with the OTS. Since there is no reason for having to wait ten days after meeting with the OTS to adopt a plan of conversion, the words "at least ten days" should be deleted from the first sentence of this section.

2. Section 563b.105(a)(3). This section requires the business plan to address "how the new capital will support projected operations and activities." It is difficult to see how this differs from the requirements of Section 563b.105(a)(1) to address "projected operations and activities

for three years following the conversion" and to "describe how [the association] will deploy the conversion proceeds." The discussion of projected operations and activities and of the deployment of the conversion proceeds would necessarily include whatever is contemplated by the first clause of 105(a)(3). Accordingly, this clause should be deleted. For the reasons discussed above, the second clause of this section should also be deleted.

3. Section 563b.105(a)(6). For the reasons discussed above, this section should be deleted.

4. Section 563b.110(b). This section requires the chief executive officer and two-thirds of the directors to certify that the business plan submitted with the conversion application accurately reflects the intended plans for deployment of conversion proceeds and that any new initiatives reflected in the business plan are reasonably achievable. As we see no purpose for this certification, this section should be deleted. The requirement in Section 110(a) that at least two-thirds of the directors approve the business plan will adequately ensure that it is widely supported by the board. A certification that new initiatives are reasonably achievable in no way makes those initiatives more achievable. To the extent that this certification constitutes some sort of guarantee by the directors that the objectives of the business plan will be achieved, such a guarantee is inappropriate. If the OTS has concerns about the achievability of any new initiatives, those concerns can be expressed through the process of reviewing the business plan. If the OTS is concerned about being able to initiate proceedings against directors who have approved an association's business plan, the directors' signatures on the Form AC, in which the business plan must be included, should be sufficient.

5. Section 563b.240(g). This section requires the converting association to submit, following completion of the conversion, an opinion of counsel that the association "complied with all laws applicable to the conversion." We believe that the proposed opinion requirement (i) represents an inappropriate opinion request, (ii) would require counsel to opine as to factual matters of which it would have no knowledge, and (iii) would be a significant expense to the converting association. The proposed regulation represents a significant departure from current regulations, which require an opinion of counsel that the converting institution complied with all state laws applicable to the conversion. See 563b.8(c)(2)(ii). Where a conversion is also governed by state law, we understand why the OTS would want an opinion from counsel regarding the converting institution's compliance with state law. In that circumstance, the OTS is not administering or enforcing state law and is not charged with knowing its requirements. However, since the OTS is obviously familiar with its own conversion regulations and through the application process will have reviewed many elements of the conversion for compliance with its regulations (such as the terms of the plan of conversion and the contents of the proxy statement and the stock offering materials), there is no similar need to have counsel opine as to compliance with federal law.

Revising the regulation to refer to "all applicable laws" significantly changes the nature of this opinion. The effect of this broadly phrased regulation is that the proposal asks legal counsel to be the guarantor of the conversion, which is widely considered to be an inappropriate use of a legal opinion. According to the 1991 Legal Opinion Accord of the American Bar Association:

> "A third-party legal opinion is an expression of professional judgment on the legal issues explicitly addressed. By rendering a professional opinion, the opinion giver does not become an insurer or guarantor of the expression of professional judgment, of the transaction or of the future performance of the client. Nor does the rendering of an opinion guarantee the outcome of any legal dispute that may arise out of the transaction."

In addition, an opinion of this sort would require counsel to opine as to factual matters of which it would have no knowledge. As the OTS is aware, several different parties other than legal counsel assist a mutual institution with a conversion, the most significant of which is the marketing agent. Legal counsel has no control over how these parties fulfill their responsibilities. Furthermore, legal counsel is not closely involved in every aspect of the conversion. For example, once the stock offering commences, legal counsel's role is generally limited to responding to requests to assist the institution and the marketing agent in understanding the requirements of the plan of conversion, the conversion regulations and applicable securities laws. Counsel generally has no knowledge of the communications between the marketing agent and prospective investors or the actions of the marketing agent in promoting the offering. Accordingly, to the extent that the required legal opinion covers the conduct of the stock offering (which we think it would), we believe that the opinion requirement is unreasonably overbroad. This opinion would also result in significant additional expense for the converting association, as counsel would have to review many aspects of the proxy solicitation, stock order processing and allocation of shares that it otherwise would not review.

We suggest that this section be revised to refer to "all state laws applicable to the conversion," as is consistent with the current regulations.

6. Section 563b.380(c). This section begin as follows: "If your tax-qualified employee stock ownership plan is not able to or chooses not to purchase stock in the offering." The Re-Proposal has substituted the words "chooses not to" for "is not able to." We believe that because either situation may arise, this provision should be revised to include both phrases.

7. Section 563b.500(c). This section says that if a stock benefit plan is "<u>adopted</u> more than one year following" conversion, any material deviations from OTS requirements must be approved by shareholders (emphasis added). It appears that the incorrect word was used in the first part of this section. According to section L of the preamble, "an association must present to shareholders any material <u>amendments</u> to previously approved" stock benefit plans (emphasis

added). In order to reflect this intent, the regulation should say "[i]f your plan is amended more than one year following" and not "if your plan is adopted" (emphasis added).

8. Sections 563b.565 and 563b.575(a). These provisions require that the charitable organization's charter, bylaws and gift instrument (and operating plan with respect to certain of the conditions) include the OTS conditions imposed on charitable foundations established in connection with conversions and reorganizations. We believe that it is unnecessary to include each of the conditions in all of the foundation's governing documents. It would be legally sufficient if the OTS conditions, or a reference to the OTS approval letter containing such conditions, were included as a condition to the gift instrument since the foundation is legally obligated to operate in accordance with the conditions placed on the gift of stock. Nevertheless, we do agree that the purpose of the foundation and the pro rata voting restriction should be included in the foundation's certificate of incorporation and the pro rata voting restriction should be included on the stock certificate representing the shares of stock contributed to the foundation in connection with the conversion or organization. With respect to the conditions governing the composition of the board of directors, these provisions are appropriately included in the foundation's bylaws. The remaining conditions have no place in a certificate of incorporation or bylaws. Additionally, there is no reason to include any of the conditions in the foundation's operating plan. For example, the OTS does not require federal thrifts to include in their charters or bylaws provisions which state that they are required to file certain reports with the OTS or that there are subject to examination by the OTS. The OTS does not require subsidiaries of thrifts to include these types of provisions in their corporate governance documents. Further, we would also note that the OTS does not require other persons or entities that receive approvals with conditions to place those conditions in their corporate governance documents. In this regard, the OTS has the authority under the Federal Deposit Insurance Act to enforce the conditions imposed on the foundation.

9. Section 563b.575(c). This provision provides that the OTS may review the compensation paid to charitable organization directors who are not employees, officers or affiliates of the institution. As a private foundation, the foundation is governed by the rules and regulations of the Internal Revenue Service. Those rules make clear that compensation paid to foundation directors or officers must be reasonable. In practice, many private foundations do not pay directors' fees or if they do pay such fees they tend to be nominal. As the foundation's compensation practices are already regulated by another federal government agency, there appears to be no legitimate regulatory interest served by adding another layer of regulatory oversight on the foundation. We recommend that this provision be removed. We note that the OTS has the authority to examine the foundation and if it finds as part of such examination that compensation paid is excessive, it has the authority to issue a supervisory directive to the foundation with regard to such compensation practices.

8. Form AC, Exhibit 8. Delete "stock repurchases" from the third sentence of section (a) to make this section consistent with the regulations.

9. Form AC, Exhibit 9. Among the exhibits required for a charitable foundation is a three year operating plan that includes, among other things, a discussion of the charitable causes to be supported by the foundation, including their location and a description of how the activities will aid the local community, the foundation's policies for soliciting and accepting grant applications, the decision standards for approval of grants and the anticipated number and dollar amount of grants. We believe this requirement is onerous, serves no valid OTS purpose and could have the effect of discouraging institutions from forming charitable foundations in connection with conversion transactions. A charitable foundation, as a private foundation, is subject to stringent federal regulations governing its activities and the use of its funds. The OTS imposes a condition on the foundation that its grants serve the institution's local community. That condition is sufficient to satisfy the OTS' concern that grants from the foundation benefit the local community. There is no legitimate regulatory interest served in requiring the institution to prepare a detailed operating plan that includes the type of information the OTS itemizes. As the OTS is aware, the Internal Revenue Service does not require a charitable foundation to prepare and file an operating plan. Management of the institution is usually focused on the conversion or reorganization and it is not until after the conversion transaction is closed that the foundation's directors and officers begin to focus on the foundation's plan for grants and donations. The OTS does not require institutions that form foundations outside of conversion to receive OTS approval to form such foundation nor does it review the operating plan, if any, for such a foundation. The OTS also does not request federal associations to present business plans to the OTS of their targeted charitable contributions for a three-year period. We recommend that the OTS eliminate this requirement from the conversion exhibits or, if it continues to believe there is a legitimate regulatory reason for receiving such a detailed operating plan, require submission of such a plan within six (6) months of the conversion. This would give the board of directors of the foundation and its management time to develop the foundation's strategies, operations and grant guidelines.

The OTS also requests as an exhibit to the Form AC a legal opinion discussing whether the charitable organization's proposed charter and bylaws, including the pro rata voting requirement, comply with state law. In our view, this opinion serves no valid interest of the OTS and causes an association that desires to form a foundation to incur the additional cost of obtaining a legal opinion that is not necessary. We note that the OTS does not require an opinion of counsel as to whether a service corporation or operating subsidiary's charter and bylaws comply with state law. OTS also does not require such an opinion for a state chartered savings and loan holding company. We believe this requirement should be eliminated.

* * *

We thank you for your consideration of these comments.

Sincerely,

Muldoon Murphy & Faucette LLP

MULDOON MURPHY & FAUCETTE LLP

00208402.WPD