

Authority of Directors to Act on Board Resolutions by E-Mail

Summary Conclusion: A federal savings association may permit its directors to approve or deny board resolutions via e-mail if the thrift establishes procedures for verifying the identity of the directors and complies with applicable laws and regulations. 12 C.F.R. part 555.

Date: May 10, 2001

Subjects: Home Owners' Loan Act/Savings Association Powers

P-2001-3



Office of Thrift Supervision

Department of the Treasury

Chief Counsel

1700 G Street, N.W., Washington, DC 20552 • (202) 906-625

May 10, 2001

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Re: Authority of Directors to Act on Board Resolutions by E-mail

Dear []:

This responds to your inquiry regarding whether [] (Association), a federal savings association, may permit its Board of Directors to use electronic signatures, such as in e-mails, to act on board resolutions. In brief, we conclude that the Association may permit its directors to approve or deny board resolutions via e-mail as long as the thrift establishes procedures for verifying the identity of the directors and otherwise complies with applicable laws and regulations.

I. BACKGROUND

The Association inquires whether its Board of Directors may act on board resolutions via e-mail. The Association would provide an electronic message to each director with a copy of the resolution in question. Each director would have the ability to respond to the e-mail by stating, "I approve" or "I reject" with an express reference to the resolution. The Association would use its own internal security measures to verify the identity of the directors. The proposed activity is not intended to replace board meetings, but rather is intended to facilitate board communications and to aid in adopting board resolutions between meetings.¹ The Association intends to maintain all of the directors' e-mail responses electronically, with the capability of printing a paper copy, or in paper format so that examiners can review the e-mails.

¹ The Association has represented that the proposed e-mail process would not replace board meetings, but instead it is meant to assist in obtaining consent for specific matters between meetings. OTS agrees that an e-mail voting process does not eliminate the need for full and open discussion of matters before the board. Boards should continue to meet regularly in person to permit all members to jointly interact, ask questions, hear answers, and share opinions about all significant issues before them.

II. DISCUSSION

OTS regulations at 12 C.F.R. Part 555 permit federal savings associations to conduct electronic operations. Specifically, a federal savings association “may use . . . electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity.”² Electronic means or facilities include “personal computers, the Internet, the World Wide Web, telephones, and other similar electronic devices.”³ If a federal savings association uses electronic means to perform a function, it also must identify and mitigate potential risks, establish prudent internal controls, and implement security measures designed to ensure secure operations.⁴

The electronic operations regulations are broad. OTS drafted the electronic operations regulations to address advances in technology and to facilitate the use of emerging technology by federal savings associations.⁵ In promulgating the regulations, OTS’s intent was to advance, and not to impede, thrifts’ ability to adopt emerging technology. In conducting the proposed activity, the Association would be taking advantage of emerging technology by permitting the directors to approve or reject board resolutions electronically via e-mail. Accordingly, the activity in question here is consistent with the purpose of the electronic operation regulations.

The concept of allowing directors to take action from a remote location is not novel. Several OTS regulations permit federal savings association directors to participate in board meetings without being physically present. The regulations governing federal mutual savings association bylaws allow the board of directors to permit participation in board meetings by telephone.⁶ Similarly, directors of stock associations “may participate in a meeting by means of a conference telephone or similar communications device through which all persons participating can hear each other at the same time.”⁷ The regulations

² 12 C.F.R. § 555.200(a) (2001) (emphasis added).

³ *Id.*

⁴ 12 C.F.R. § 555.210 (2001). In addition, section 555.210(b)(3) requires a thrift to comply with the security measures referenced in Part 568, “Security Procedures.”

⁵ 63 Fed. Reg. 43327 (Supplemental notice of proposed rulemaking) (August 13, 1998).

⁶ 12 C.F.R. § 544.5(b)(9) (2001).

⁷ Former Appendix to Part 552 - current OTS Model Bylaws for Stock Associations, Article III, sections 3 & 5. OTS Form 1518 (Rev. 12/96). Such participation constitutes presence in person for all purposes.

also recognize that directors may take action without a board meeting if they provide written consent signed by all of the directors specifying the proposed action.⁸ Acting on board resolutions via e-mail is merely a logical extension of the authorized activities of participating by telephone in meetings or acting through written consent.⁹

Moreover, OTS regulations permit federal savings association shareholders to provide electronic proxies as long as the holder uses a procedure for verifying the identity of the shareholder.¹⁰ Although no regulation explicitly authorizes federal savings association directors to act on board resolutions by e-mail, OTS regulations do not prohibit such activity. Indeed, the rules encourage such activity by permitting directors to act without being physically present at a meeting and by authorizing the use of electronic means. The electronic operation regulations contemplate thrifts using electronic means to conduct a broad range of activities. If procedures exist for identity verification (as is required in the context of shareholder proxies given electronically), OTS regulations do not preclude, and in fact they support, the notion of directors approving or denying board resolutions via e-mail. Accordingly, as long as a thrift has appropriate procedures for verifying the identity of the directors, and otherwise complies with the required record keeping and security measures, a thrift may permit its directors to approve or deny board resolutions via e-mail.¹¹

Finally, recent legislation, the Electronic Signatures In Global And National Commerce Act (E-Sign Act),¹² alleviates any concern about the legality of electronic signatures and electronic records such as e-mail. The E-Sign Act, which covers transactions in or affecting interstate or foreign commerce, states

⁸ 12 C.F.R. §§ 544.5(b)(9) (bylaws of federal mutual associations may provide for action by unanimous written consent of the directors), and 552.6-1(i) (2001) (federal stock associations).

⁹ Directors may act on board resolutions without a meeting via e-mail if all the directors agree to participate in this manner. A board also may be able to conduct a meeting electronically, in which case no separate agreement to do so should be necessary.

¹⁰ 12 C.F.R. §§ 544.5(b)(6) (federal mutual savings associations), and 552.6(f) (federal stock associations).

¹¹ While OTS finds the Association's proposed activity permissible, the Association should ensure that its own corporate governance laws do not preclude the proposed activity. Federal stock associations may elect in certain circumstances to follow corporate governance procedures of the laws of the state where the main office of the association is located, the laws of the state where the association's holding company is incorporated or chartered, Delaware General Corporation Law, or The Model Business Corporation Act. 12 C.F.R. § 552.5(b)(3) (2001).

¹² Pub. L. No. 106-229, 114 Stat. 464 (2000), 15 U.S.C. §§ 7001-7031.

that an electronic signature or an electronic record cannot be denied legal effect, validity, or enforceability solely because it is in electronic form.¹³ Therefore, providing the E-Sign Act covers the proposed activity, the e-mail responses and electronic signatures have the same legal validity as the directors' written board resolutions and signatures.

The E-Sign Act defines "transaction" as an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons.¹⁴ The legislative history of the E-Sign Act reveals that Congress intended to cover financial activities and activities incidental to financial activities.¹⁵ The act of managing the affairs of a federal savings association is certainly an activity incidental to a financial activity. Therefore, the E-Sign Act covers directors' approving or denying board resolutions.

In reaching these conclusions, we have relied on the factual information and representations made in the material you submitted to us and in subsequent conversations. Our conclusions depend upon the accuracy and completeness of such information and representations. Any material differences in the facts or circumstances from those described herein could result in different conclusions.

If you have further questions, please contact Koko Ives, Counsel (Banking and Finance) at (202) 906-6661 or Vicki Hawkins-Jones, Assistant Chief Counsel, at (202) 906-7034.

Very truly yours,



Carolyn J. Buck
Chief Counsel

cc: Regional Directors
Regional Counsel

¹³ *Id.* at § 7001(a)(1). The E-Sign Act does not substantively address a variety of issues, including issues of authentication and verification.

¹⁴ *Id.* at § 7006(13).

¹⁵ During a Senate vote, Senator Gramm discussed the relevance of the E-Sign Act to financial activities and stated, "It is my understanding that this act, for example, covers any activity that would qualify as a financial activity, an activity incidental to a financial activity, or a complementary activity under section 4(k) of the Bank Holding Company Act of 1956, as amended, whether or not such activity is conducted by, or subject to any limitations or requirements applicable to, a financial holding company." 146 Cong. Rec. S5281, S5283 (June 16, 2000) (Mr. Gramm). Under the Bank Holding Company Act, some activities that are financial in nature include lending, exchanging, transferring, investing for others, or safeguarding money or securities. Bank Holding Company Act, 12 U.S.C. § 1843 (4)(k) (2000).