Status of a Savings and Loan Holding Company under Section 10(c)(9) of the Home Owners' Loan Act

Summary Conclusion: Section 10(c)(9)(D) of the Home Owners' Loan Act permits internal corporate reorganizations and does not prevent transactions involving "solely a company under common control with a savings and loan holding company from acquiring, directly or indirectly, control of the savings and loan holding company or any savings association that is already a subsidiary of the savings and loan holding company." The resulting holding company is therefore not subjected to the activities restrictions of §§ 10(c)(9)(A) or (B).

Date: May 18, 2001

Subjects: Savings and Loan Holding Companies/Change in Control

P-2001-5

P-2001-5

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

May 18, 2001

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Re: Status of a Savings and Loan Holding Company under Section 10(c)(9) of the Home Owners' Loan Act

Dear [ ]:

This letter responds to your letter of March 23, 2001, on behalf of [ ] (Holding Company), the unitary savings and loan holding company of [ ] (Savings Bank). You seek confirmation of your view that the demutualization and implementation of a Plan of Reorganization (Plan) by the Holding Company is within the scope of section 10(c)(9)(D) of the Home Owners' Loan Act (HOLA), 12 U.S.C. § 1467a(c)(9)(D), and will not cause the resulting savings and loan holding company to be subject to the activities restrictions of section 10(c)(9)(A) or (B). Based on the steps of the demutualization and Plan described in your March 23, 2001, letter, in our view, the demutualization and Plan are within the scope of section 10(c)(9)(D)(i) and the resulting holding company will not be subject to section 10(c)(9)(A) or (B).

Background

The Holding Company has been the Savings Bank's holding company since [ ] The Holding Company is a mutual company, and accordingly, is owned by its policyholders. On March 14, 2001, the Holding Company filed an application for demutualization with the State of [ ], Department of Banking and Insurance. The Plan contemplates that a current wholly owned subsidiary of the Holding Company, [ ] (New Holding Company), would become the parent holding company for the Holding Company, the Savings Bank and affiliates. The Holding Company apparently would no longer hold any equity interests in the Savings Bank, and therefore, could de-register as a savings and loan holding company. In contemplation of the demutualization and the Plan, the New Holding Company's board of directors was reconstituted to be identical to the Holding Company's board. Upon demutualization and the reorganization, the common stock of the New Holding Company would be owned principally by the current policyholders of the Holding

Company and certain of its insurance subsidiaries. As a part of the Plan, many of the financial subsidiaries of the Holding Company, including the Savings Bank, will become direct subsidiaries of the New Holding Company.

The Plan proposes that the New Holding Company will engage in an initial public offering (IPO) of its common stock. The IPO presently is estimated to represent approximately [ ] percent of the New Holding Company's common stock. No single shareholder or group would acquire more than 5 percent of the New Holding Company's common stock.

The Plan further proposes (but does not require) that the New Holding Company enter into commitments to sell shares of a different class of voting common stock, Class B Stock, and related debt to institutional investors in a private placement. The private placement would close concurrently with the completion of the demutualization of the Holding Company. The Class B Stock would represent a financial interest in a specified portion of the Holding Company's business and would vote with the common shareholders on all matters, except as required by law. The Holding Company anticipates that the total voting power of the Class B Stock would be less than [ ] percent of the outstanding shares.

Discussion

Section 10(c)(9)(A) prohibits a company, or its subsidiaries, from engaging in, directly or indirectly, in any merger, consolidation, or other type of business combination, to acquire control of a savings association, unless the company is engaging in only those activities permitted by section 10(c)(1)(C), section 10(c)(2), or the activities permitted for financial holding companies by section 4(k) of the Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. § 1843(k).

Section 10(c)(9)(B) prohibits a savings and loan holding company, and its subsidiaries other than a savings association, from engaging, directly or indirectly, in activities other than the activities permitted by section 10(c)(1)(C), section 10(c)(2), or section 4(k), notwithstanding section 10(c)(3). This section is intended to prevent new commercial affiliations by existing savings and loan holding companies.

Section 10(c)(9)(C) exempts from the restrictions of paragraphs (A) and (B) those companies that were savings and loan holding companies on May 4, 1999, or had an application pending with the OTS on or before May 4, 1999, subject to certain requirements (subparagraphs (C)(i) and (ii)). This section grandfathers commercial powers for existing savings and loan holding companies, permitting them to continue or expand their commercial activities.

Section 10(c)(9)(D) states (by its caption) that paragraph (9) permits certain corporate reorganizations, and specifically, clause (i) does not prevent a transaction that involves "solely a company under common control with a savings and loan holding company from acquiring, directly or indirectly, control of the savings and loan holding company or any savings association that is already a subsidiary of the savings and loan holding company." This section intends to permit essentially internal corporate reorganizations without subsequently subjecting holding companies to the activities restrictions of subparagraphs (c)(9)(A) or (B).

Section 10(c)(9) was added to HOLA by section 401 of the Gramm-Leach-Bliley Act of 1999.[1] The section originated in the U.S. Senate as the "Johnson Amendment" and as section 601 of the Senate's Financial Services Modernization Act, S. 900. The principal purpose of the section is:

> . . . to prohibit (except for corporate reorganizations) new unitary savings and loan holding companies from engaging in nonfinancial activities or affiliating with nonfinancial entities. The prohibition applies to a company that becomes a unitary savings and loan holding company pursuant to an application filed with the OTS after May 4, 1999. A grandfathered unitary thrift holding company (one in existence or applied for on or before May 4, 1999) retains its authority to engage in nonfinancial activities.[2]

The Senate discussion of the Johnson Amendment focused almost entirely on the separation of banking and commerce,[3] with lesser discussions regarding the acquisition of grandfathered unitary thrift holding companies by commercial companies, the powers and authorities of grandfathered unitary thrift holding companies acquired by financial holding companies, and the ability of OTS to prevent circumvention of the prohibition.[4] Only passing reference, as quoted above, or inference is made to the ability of unitary thrift holding companies to engage in corporate reorganizations and transactions that are the subject of section 10(c)(9)(D).[5] Such scant, and almost nonexistent, legislative history offers minimal guidance to OTS on interpreting this section as it relates to the multi-step, complex transaction contemplated by the Holding Company.

While section 10(c)(9)(D) addresses which companies would be, and which kinds of transactions would result in, grandfathered holding companies after the transaction, or merger, consolidation, or other type of business combination, it does not address other aspects of these transactions. Many issues that arise in corporate reorganization transactions are not addressed by paragraph (D), such as the existence of minority shareholders or other control persons or entities not affiliated with the organization engaging in a transaction; issuance of additional minority equity and debt interests; changes in corporate structures that move existing holding companies outside the direct or indirect chain of ownership of an OTS regulated savings association or savings and loan holding company; or the status under section 10(c)(9)(C) of the thrift holding companies that come into or move out of the direct or indirect chain of ownership.

In our view, the phrase "solely a company under common control with a savings and loan holding company" in clause (i) should be read as a single descriptive phrase that defines what entity may engage in a corporate reorganization transaction that is not prevented by

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1 Public Law No. 106-102 (November 12, 1999) 113 Stat. 1338.

2 H.Rep. 106-434, Cong.Rec. H11299, November 2, 1999.

3 See, for example, the Senate's original consideration of the Johnson Amendment at Cong. Rec. S4830-4839, 4848-4850, May 6, 1999.

4 Cong. Rec. S13902, 13904-13906, November 4, 1999.

5 *Id.*, at 13902.

paragraph (9). The company to be used in such a transaction must be under the common control of the persons or entities that presently control the savings association or savings and loan holding company. The presence of minority, noncontrolling shareholders would not preclude the safe harbor granted by subparagraph (c)(9)(A)(i).

The Plan proposes that an existing wholly owned subsidiary of the Holding Company, New Holding Company, will be moved within the corporate structure to become the holding company for the Holding Company, the Savings Bank and other Holding Company subsidiaries. This aspect of the Plan complies with our view of clause (i) because the New Holding Company is under the control of the Holding Company at the inception of the transaction.

You represent that the proposed IPO and the sale of Class B Stock together would represent less than approximately 18 percent of the outstanding voting interests in the New Holding Company with no person controlling more than 5 percent of the outstanding shares. No person(s) or entity(ies) (acting individually or acting in concert) would acquire a level of ownership greater than 5 percent, therefore, no level of rebuttable or conclusive control is achieved through the proposed demutualization, the IPO and the Class B Stock (and related debt) issuance. Thus, in our view, no new controlling persons are introduced into the corporate structure. Therefore, we conclude that the proposed transaction, as described, is within the spirit of section 10(c)(9)(D)(i). We further conclude that the New Holding Company would accede to the grandfathered status of the Holding Company under section 10(c)(9)(C) because the Holding Company was a savings and loan holding company before May 4, 1999. Of course, the New Holding Company must comply with the restrictions in clauses (i) and (ii) of section 10(c)(9)(C).

In reaching the foregoing conclusions, we have relied on the factual representations contained in the materials submitted to us by you on behalf of the Holding Company. Our positions depend on the accuracy and completeness of those representations. Any material change in facts or circumstances could result in different conclusions from those expressed herein. Moreover, our conclusions represent our position on the interpretation of the regulations implicated in this particular case. Accordingly, this letter may not be used as precedent by any other parties.

If you have any questions regarding the above matter, please contact Gary Jeffers, Senior Attorney, Business Transactions Division, at (202) 906-6457.

Sincerely,

Carolyn J. Buck
Chief Counsel

cc: Regional Director
Regional Counsel