

OFFICE OF THRIFT SUPERVISION

Approval of Holding Company Application and Operating Subsidiary Application

Order No.: 2006-45
Date: November 28, 2006
Re: OTS Nos. 5848, 18000
H-4353, H-3483, H-3896, H-
3897, H-3898 and H-2265

ETFC Holdings, Inc., Arlington, Virginia (Holding Company) has applied for approval of the Office of Thrift Supervision (OTS), pursuant to 12 U.S.C. § 1467a(e), and 12 C.F.R. § 574.3, to acquire E*TRADE Bank, Arlington, Virginia (Association), and E*TRADE Savings Bank, Arlington, Virginia (Savings Bank). In addition, the Association has applied for OTS approval, pursuant to 12 C.F.R. Part 559, to establish its clearing broker affiliate, E*TRADE Clearing LLC, New York, New York (Clearing) as a wholly owned operating subsidiary.¹ Collectively, the foregoing filings are referred to herein as the Applications.

The Parties

The Association is a federally chartered, Deposit Insurance Fund (DIF)-insured, stock savings bank headquartered in Arlington, Virginia. The Savings Bank is a federally chartered, DIF-insured, stock savings bank located in Arlington, Virginia, and a wholly owned subsidiary of the Association. Both the Association and the Savings Bank are indirect, wholly owned subsidiaries of E*TRADE Financial Corporation, New York, New York (Parent). The Holding Company is a newly created Delaware corporation that was incorporated for the purpose of facilitating the proposed transaction. Clearing is a subsidiary of the Parent and is registered with the Securities and Exchange Commission as a broker-dealer.

The Proposed Transaction

In the proposed transaction, the Holding Company will become a direct wholly owned subsidiary of Parent, and acquire the Association and the Savings Bank. In order to establish Clearing as a wholly owned subsidiary of the Association, the Parent will transfer all of Clearing's ownership interests to the Association.

¹ This Order does not address issues regarding compliance with 12 C.F.R. § 563.43, which applies the restrictions in 12 C.F.R. part 215 of the Federal Reserve Board's Regulation O to savings associations and their subsidiaries.

Holding Company Application

Section 10(e)(2) of the Home Owners' Loan Act (HOLA) and the OTS Acquisition of Control Regulations provide, that in reviewing the proposed acquisition of more than one savings association by a company other than a savings and loan holding company, OTS must consider the financial and managerial resources and future prospects of the company and associations involved, the effect of the acquisition on the associations, the insurance risk to the DIF, and the convenience and needs of the community to be served.² Consideration of the managerial resources of a company or savings association must include consideration of the competence, experience, and integrity of the officers, directors, and principal shareholders of the company or savings association.³ In addition, OTS must consider the impact of any acquisition on competition.⁴ Also, 12 C.F.R. § 563e.29 requires that OTS take into account assessments under the Community Reinvestment Act (CRA) when approving holding company acquisitions.

As to managerial resources, there will be no changes to the existing management of the Association or the Savings Bank. The Holding Company's proposed executive management and directors already serve in similar positions with Parent, its subsidiary holding companies, the Association or the Savings Bank. OTS, as a federal regulator of the Parent, its subsidiary holding companies, the Association and the Savings Bank, is familiar with the Holding Company's proposed executive management and directors. Accordingly, OTS concludes that the managerial resources of the Holding Company, the Association, and the Savings Bank are consistent with approval.

With regard to financial resources, OTS reviewed the Holding Company's, the Association's and the Savings Bank's financial positions. The Holding Company will be a shell holding company that will not directly engage in any activities. The Association and the Savings Bank are "well-capitalized." Accordingly, OTS concludes that the financial resources of the Holding Company, the Association and the Savings Bank are consistent with approval.

With regard to the future prospects, the reorganization would have financial and operational benefits for the Association, and the Association's and the Savings Bank's managerial resources are consistent with approval. Accordingly, OTS concludes that the future prospects of the Holding Company, the Association and the Savings Bank are consistent with approval of the holding company application.

The transaction will not result in any currently operating, unaffiliated depository institutions becoming affiliated. The Department of Justice was notified of the transaction and raised no objections. In addition, no comments objecting to the

² 12 U.S.C. § 1467a(e)(2). See also 12 C.F.R. § 574.7(c) (2006).

³ Id.

⁴ Id.

transaction were received from the public. Based on the foregoing, OTS concludes that the competitive considerations are consistent with approval.

With respect to convenience and needs of the community, the Association and the Savings Bank plan to continue operations in the same manner and offer the same products and services as they did prior to the transaction. Accordingly, OTS concludes that the convenience and needs of the community are consistent with approval.

With respect to performance under the CRA, the Holding Company, as a newly chartered corporation with no operating history, provides no basis upon which to evaluate CRA performance.⁵ No adverse comments have been filed regarding the holding company application on CRA grounds. Accordingly, OTS concludes that there is not any basis for objection to the holding company application based on CRA grounds.

Operating Subsidiary Notice

As a result of the proposed transactions, Clearing will become a wholly owned operating subsidiary of the Association. An operating subsidiary must engage only in activities permissible for a federal savings association to engage in directly, the federal savings association must own, directly or indirectly, more than 50 percent of the voting shares of the operating subsidiary, and no person or entity other than the federal savings association may exercise operating control over the operating subsidiary. In addition, OTS may, at any time, limit or refuse to permit any activities of an operating subsidiary, for supervisory, legal, or safety or soundness reasons.

The Association will hold all of Clearing's voting securities, and no party other than the Association will have operating control of Clearing. With respect to the regulatory criterion that the operating subsidiary engages only in activities permissible for federal associations, OTS has determined that federal savings associations and their operating subsidiaries have the legal authority under HOLA to engage in activities of a securities clearing broker.⁶ The Association plans to organize the operating subsidiary as a limited liability company. OTS has concluded that an operating subsidiary may be organized as a non-corporate operating subsidiary.⁷

OTS is imposing Conditions 5, 6 and 7 set forth below to ensure that: (i) Clearing complies with applicable transactions with affiliates restrictions, (ii) Clearing's operations remain within the scope of the application, and (iii) Clearing's membership in various exchanges and clearinghouses does not result in potential liabilities that would raise supervisory concerns.

Conclusion

⁵ The Association has a "Satisfactory" CRA rating.

⁶ See Op. C.C. (November 28, 2006).

⁷ See OTS Order No.: 2003-54 (October 21, 2003).

OTS concludes that the Applications satisfy the applicable approval standards, provided the following conditions are complied with in a manner satisfactory to the Southeast Regional Director, or his designee (Regional Director). Accordingly, the Applications are hereby approved, subject to the following conditions:

1. The Association and Holding Company must receive all required regulatory approvals, and submit copies of all such approvals to the Regional Director, prior to consummation of the proposed transaction;
2. The proposed transaction must be consummated within 120 calendar days from the date of this Order;
3. On the business day prior to the consummation of the proposed transaction, the chief financial officers of Parent, the Holding Company, the Association, the Savings Bank and Clearing must certify in writing to the Regional Director that no material adverse changes have occurred with respect to the financial condition or operation of Parent, the Holding Company, the Association, the Savings Bank and Clearing as disclosed in the Applications. If additional information having a material adverse bearing on any feature of the Applications is brought to the attention of Parent, the Holding Company, the Association, the Savings Bank, Clearing or OTS since the date of the financial statements submitted with the Applications, the transaction must not be consummated unless the information is presented to the Regional Director, and the Regional Director provides written non-objection to consummation of the transaction;
4. The Holding Company and the Association must advise the Regional Director in writing within 5 calendar days after the effective date of the proposed transactions: (a) of the effective date of the proposed transactions; and (b) that the transactions were consummated in accordance with all applicable laws and regulations, the Applications, and this Order;
5. Parent, its subsidiary holding companies, the Holding Company, the Association, the Savings Bank and Clearing must comply with all commitments and representations made to the Board of Governors of the Federal Reserve System (FRB) and conditions imposed by the FRB in connection with the Association's requests for certain exemptions from the FRB as set forth in the FRB's letter, dated October 24, 2006 (FRB Letter);
6. The Association and Clearing must submit for the prior, written non-objection of OTS: (i) any proposed major deviations or material changes from those activities set forth in the operating subsidiary application; and (ii) any proposed material deviations or material changes from the commitments and representations made to the FRB, in connection with the FRB Letter; and

7. The Association must develop a risk management program to monitor and assess the risk exposure to the Association and Clearing related to Clearing's membership on various exchanges and clearinghouses. This program must address the potential contingent liability to the Association and Clearing related to liability to Clearing for the obligations of all other members of each exchange or clearinghouse for which Clearing is also a member.

The Regional Director may, for good cause, extend any time period specified herein for up to 120 calendar days.

By order of the Director of the Office of Thrift Supervision, or his designee, effective November 28, 2006.



Scott M. Albinson
Managing Director
Office of Examinations, Supervision,
and Consumer Protection