

July 9, 2007

By Messenger

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Attention: OTS-2007-0008

Ladies and Gentlemen:

This comment letter is filed on behalf of our client Archer-Daniels-Midland Company (“ADM”) in response to the interim final rule with request for comments that appeared at pages 25948-25957 of the Federal Register on May 8, 2007 (“Interim Rule”), which adds a new Part 585 to the Office of Thrift Supervision (“OTS”) regulations relating to certain services prohibited for certain persons at savings and loan holding companies (“SLHCs”).

ADM became an SLHC in 1998 upon the conversion of its wholly-owned subsidiary state-chartered commercial bank to a federal savings bank known as Hickory Point Bank and Trust, fsb (“Hickory Point Bank”), which has its home office in Decatur, Illinois.

Summary Positions

ADM recommends amendments to address two significant aspects of the Interim Rule.

First, the exemption from the prohibition in Section 585.30 established in Section 585.100 of the Interim Rule should be expanded to include all SLHC employees who meet the criteria of Sections 585.100(a)(2), (a)(3) and (a)(4) as modified, or alternatively, as a less comprehensive improvement, should be expanded to exempt all SLHC employees whose responsibilities and activities are limited solely to the agriculture and manufacturing activities of ADM as described below.

Second, the Interim Rule should be clarified to limit the criminal offenses for which convictions can prohibit persons from serving SLHCs to criminal offenses under United States law and not to include criminal offenses under foreign law, and also to clarify that the

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offenses for which persons agreeing to enter into pretrial diversion or similar programs can be prohibited from serving SLHCs should include only criminal offenses under United States law and not include criminal offenses under foreign law.

Discussion

1. ADM's Business

ADM is a leading agricultural processing company conducting its operations in over 50 countries around the world. Headquartered in Decatur, Illinois, ADM and its various subsidiaries have over 26,800 employees, more than 240 processing plants, and had net sales for the fiscal year ended June 30, 2006 of approximately \$37 billion. Approximately 11,250 of the ADM employees work outside the United States. Approximately 10,500 of the over 26,800 employees, or approximately 39.1 percent of these employees, are employed directly by ADM, while the remaining approximately 16,300 employees, or approximately 60.9 percent of the employees, work directly for ADM subsidiaries. As of the date of this submission, ADM's common stock had an aggregate market capitalization of approximately \$23.6 billion.

Agricultural processing constitutes a very high percentage of ADM's business. The principal products produced by ADM, the principal markets for those products, and the methods of distribution of these products are the following:

a. Oilseeds Processing. ADM processes oilseeds, such as soybeans, cottonseed, sunflower seeds, canola, peanuts and flaxseed, into vegetable oils and meals principally for the food and feed industries. Crude vegetable oil is sold "as is" or is further processed into salad oils. Salad oils can be further processed into margarine, shortening and other food products. Partially refined oil is sold for use in chemicals, paints and other industrial products. Refined oil can be further processed for use in the production of biodiesel. Cotton cellulose pulp is manufactured and sold to the chemical, paper and filter markets.

b. Corn Processing. ADM is engaged in wet milling and dry milling corn operations. Corn derived products produced by ADM for use in the food and beverage industry include syrup, starch, glucose, dextrose and sweeteners. Dextrose is also produced for use by ADM as a feedstock for its bioproducts operations. By fermentation of dextrose, ADM produces alcohol and other specialty food and feed ingredients. Ethyl alcohol is produced to beverage grade or for industrial use as ethanol. ADM also produces citric and lactic acids, lactates, sorbitol and xanthan gum, which are used in various food and industrial products.

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c. Agricultural Services. ADM's extensive grain elevator and transportation network is used to buy, store, clean and transport agricultural commodities, such as oilseeds, corn, wheat, milo, oats and barley, and to resell these commodities primarily as feed ingredients and as raw materials for the agricultural processing industry.

d. Other. ADM mills wheat, corn and milo into flour. ADM produces bakery products and mixes, which are sold to the baking industry. ADM also processes cocoa beans and produces cocoa liquor, cocoa butter, cocoa powder, chocolate and various compounds for the food processing industry. Lecithin, an emulsifier produced in the vegetable oil refining process, is marketed as a food and feed ingredient. ADM also produces a wide range of edible soy protein products, including soy flour, soy grits, soy protein concentrates and soy isolates. ADM produces lettuce, produces other fresh vegetables and herbs in its hydroponic greenhouse and raises fish for distribution to consumer food customers.

Hickory Point Bank furnishes public banking and trust services, as well as cash management, transfer agency and securities safekeeping services for ADM. ADM Investor Services, Inc. is a registered futures commission merchant and a clearing member of all principal commodities exchanges. ADM Investor Services International, Ltd. specializes in futures, options and foreign exchange in the European marketplace. ADM Derivatives, Inc. offers foreign exchange services to institutional and retail clients. Agrinational Insurance Company, a wholly-owned subsidiary of ADM, provides insurance coverage for certain property, casualty, marine, and other miscellaneous risks of ADM and participates in certain third-party reinsurance arrangements. ADM also is a limited partner in various private equity funds which invest primarily in emerging markets.

2. Interim Rule

The Interim Rule implements Section 19(e) of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1829(e), which was enacted as Section 710(a) of the Financial Services Regulatory Act of 2006. Section 19(e) prohibits certain persons who have been convicted of certain criminal offenses involving dishonesty, a breach of trust, or money laundering, or persons who have agreed to a pretrial diversion or similar program in connection with a prosecution for such offenses from holding certain positions directly with an SLHC. Section 19(e)(2) of the FDIA specifically authorizes the OTS Director to provide exemptions by regulation or order from the prohibitions of this statute if the exemptions are consistent with the purposes of the statute.

These prohibitions of service apply directly only to employees of SLHCs and do not apply directly to employees or other institution-affiliated parties of non-depository institution subsidiaries of SLHCs. But the OTS noted in the preamble to the Interim Rule that direct

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employees of SLHC subsidiaries still could be subject to the prohibitions established under the Interim Rule if the employees of the subsidiaries participate in the conduct of the affairs of parent SLHCs.

This comment letter will review only two elements of the Interim Rule with respect to which we would like to comment. The first of these elements is the scope of the business activities which, if employees' responsibilities and activities are limited solely to these activities, make employees engaging in those activities exempt from the prohibitions otherwise established by the Interim Rule. The second of these elements is that the Interim Rule does not indicate whether the criminal offenses that can result in prohibitions are only offenses under United States law or whether criminal offenses that can result in prohibitions also include offenses under foreign laws.

3. Exempt Employees Whose Responsibilities And Activities Are Limited Solely To Certain Specified Activities

Section 585.100 of the Interim Rule exempts SLHC employees from otherwise prohibited relationships with their SLHCs if certain specified conditions are met. One of these specified conditions is that the "employee's responsibilities are limited solely to agriculture, forestry, retail merchandising, manufacturing, or public utilities operations." 12 C.F.R. § 585.100(a)(1). For the exemption to apply, *inter alia*, the employee's position must not appear on the SLHC's list of policymaking positions, which the SLHC must maintain and review annually; the employee, in fact, must not exercise any policymaking functions with the SLHC; and the employee does not have certain other specified relationships with the SLHC. 12 C.F.R. §§ 585.100(a)(2), (a)(3) and (a)(4).

The preamble to the Interim Rule indicates that in the months following the enactment of Section 19(e) in 2006, OTS received requests from SLHCs for exemptions from the prohibitions in Section 19(e) for employees in their forestry, manufacturing, and retail merchandising operations. 72 Fed. Reg. 25948, 25951 (May 8, 2007). The preamble indicates that OTS "finds that an exemption for SLHC employees whose responsibilities and activities are limited solely to forestry, manufacturing and retail merchandising operations is consistent with the purposes of Section 19(e) of the FDIA." 72 Fed. Reg. 25948, 25951.

OTS apparently based this finding on a belief that it is unlikely that employees whose responsibilities and activities are limited solely to one of these three activities "would constitute a threat to safety and soundness of a subsidiary insured depository institution, would threaten the interests of the institution's depositors, or would threaten to impair the public confidence in the institution." 72 Fed. Reg. 25948, 25951. The preamble also states

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that “the exemption granted in the interim final rule imposes certain conditions designed to ensure that the SLHC would not be materially impacted”

The preamble to the Interim Rule indicates that, in response to the foregoing SLHC requests for exemptions, OTS reviewed existing SLHC operations to determine whether a broader exemption might be appropriate and necessary. Based on this additional review, OTS determined to extend the exemption also to SLHC employees whose activities and responsibilities are limited solely to agricultural operations or provide public utilities. 72 Fed. Reg. 25948, 25951. The preamble also indicates that “[t]he exemption would apply to employees who are directly engaged in these [five different] activities and to employees who provide administrative services in support of these activities. Because the employee’s responsibilities and activities must be limited solely to the listed operations, however, the exemption may not exempt all support personnel.” 72 Fed. Reg. 25948, 25951.

The preamble also noted several arguments made by the SLHCs in support of exemptions, which included that the vast majority of their employees engaging solely in the listed activities “have no policymaking functions, do not otherwise participate in the conduct of the affairs of the SLHC or the subsidiary depository institution, and have no working relationship with the subsidiary insured depository institution.” The preamble also noted the SLHC arguments that “applying section 19(e) of the FDIA to these employees would require the SLHCs to implement unnecessary and costly background checks and undertake unnecessary personal actions . . . [and also] would place them at a competitive disadvantage with respect to others in their industry that do not own an insured depository institution.” 72 Fed. Reg. 25948, 25951.

However, neither the Interim Rule nor the preamble to the Interim Rule provides any justification why only SLHC employees engaged in these five types of activities could be exempt, but employees engaged in other types of activities could not be exempt. Nor does the Interim Rule or the preamble to the Interim Rule provide any details or other additional information to help to define the precise scope of the activities which, if conducted by SLHC employees, can exempt these employees from the prohibitions listed in Section 585.30.

Therefore, it is unclear, for example, whether “agriculture” as that term is found in Section 585.100(a)(1) includes only the conduct of actual farming activities or the growing of agricultural goods or whether “agriculture” also would include working in aspects of manufacturing, converting, processing and transporting agricultural goods, such as soybeans, corn, wheat, cocoa and renewable fuels, as many ADM employees do. It is also unclear the extent to which the exemption for employees with responsibilities and activities limited to “manufacturing” also would apply to ADM employees engaged in the activities described above.

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4. Whether Criminal Offenses Triggering Prohibitions Only Must Be United States Criminal Offenses

Section 585.40 states that, except for two types of excluded adjudications and offenses listed in Section 585.50, Part 585 covers: (1) "Any conviction of a criminal offense involving dishonesty, breach of trust or money laundering"; and (2) "Any agreement to enter into a pretrial diversion or similar program in connection with a prosecution for a criminal offense involving dishonesty, breach of trust or money laundering." Section 585.50 excludes from coverage adjudications by a court against persons as youthful offenders or juvenile delinquents and certain defined de minimis criminal offenses.

However, neither Section 585.40 nor any other section of Part 585 indicates whether the criminal offenses mentioned in Section 585.40 are limited to offenses prosecuted only under United States law or whether they also include criminal offenses prosecuted in foreign jurisdictions outside the United States. For the purposes of this question, we would define the "United States" to include the 50 states, the District of Columbia, and commonwealths, possessions and territories subject to United States jurisdiction, such as Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, Wake Island, Midway Islands and certain other limited geographic areas. Nor does the Federal Deposit Insurance Corporation Statement of Policy With Respect To Section 19, which was issued in 1998, and upon which the Interim Rule is significantly based, specifically address whether the criminal offenses that could prohibit service with insured depository institutions could be offenses under foreign law or are limited to offenses under United States law.

5. Section 585.100 Should Specifically Exempt All ADM Employees Who Meet The Revised Conditions In Sections 585.100(a)(2), (a)(3), and (a)(4)

Neither the Interim Rule nor the preamble to the Interim Rule provides any justification why SLHC employees engaged only in the five listed types of activities could be exempt, but employees engaged in other types of activities could not be exempt. We strongly urge the OTS to amend the Interim Rule to provide an exemption for all SLHC employees without regard to the nature of their job responsibilities and activities as long as these employees meet the amended conditions set out in Sections 585.100(a)(2), (a)(3), and (a)(4) with respect to their policymaking functions, their ownership of SLHCs and certain other specified relationships with the SLHCs. If the OTS does not eliminate the restricted list of five types of responsibilities and activities that can trigger exemptions, employees engaged in other types of activities will not be exempt even though such other employees: (i) would not constitute a threat to the safety and soundness of their subsidiary insured depository institutions; (ii) would not threaten the interests of the depositors of such institutions; (iii) would not threaten to impair the public confidence in such institutions; and (iv) would have

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absolutely no ability to impact the SLHC, particularly with respect to major policymaking. See 72 Fed. Reg. 25948, 25951.

However, if the OTS does not implement this type of amendment described in the preceding paragraph, then significant changes still should be made to the list of five categories of activities in the current form of Section 585.100(a)(1) that presently can exempt employees in order to exempt additional groups of ADM employees.

As indicated above, neither Section 585.100(a)(1) nor any other section of Part 585 provides any specific guidance on the scope of "agriculture" or "manufacturing" activities covered by the exemption in Section 585.100(a)(1). However, as indicated on page 5 above, the preamble to the Interim Rule states that "[t]he exemption would apply to employees who are directly engaged in these [five different] activities and to employees who provide administrative services in support of these activities." Therefore, the preamble clearly suggests that with respect to "agriculture" the exemption applies to various agricultural activities and also to employees who "provide administrative services in support of these activities." But without further clarification it is not clear whether the exemption is also broad enough to include employees working in all aspects of the ADM activities of converting, processing, manufacturing and transporting agricultural goods to facilitate their availability and use by various types of consumers. Nor is the term "manufacturing" defined or explained in Part 585 so as to make clear the extent to which it also covers ADM activities described on pages 2 – 3 above.

In our view, the exemption in Section 585.100 clearly should cover employees whose responsibilities and activities are limited solely to the various aspects of the broad range of agricultural processing activities and agricultural manufacturing conducted by ADM employees that are listed above. It is clear that employees engaged in the broad range of agricultural processing activities conducted by ADM and agricultural manufacturing activities conducted by ADM, unless the employees would be included in the ADM list of policymaking positions, will have no ADM policymaking functions, and will have no working relationship with Hickory Point Bank, ADM's subsidiary depository institution. Similar to the SLHCs' arguments set forth on page 5 above, potentially subjecting such ADM employees engaged solely in agricultural processing and agricultural manufacturing activities as defined in the beginning of this paragraph and in the following paragraph to the Part 585 prohibitions would result in unnecessary and costly background checks, would require ADM to undertake unnecessary personnel actions, and would place ADM at a disadvantage to its competitors who do not own depository institution subsidiaries.

As set forth on pages 2 – 3 of this letter, ADM engages in a broad range of activities relating to a broad range of agricultural products. We believe that all of the ADM employees

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engaged in the various business lines listed on pages 2 – 3 of this letter above should be treated by the OTS as engaged in “agriculture” or “manufacturing” and, therefore, all ADM employees working on matters related to these business lines should be eligible for the exemption in Section 585.100(a) of the Interim Rule provided that these employees meet each of the conditions listed in Section 585.100(a)(1) – Section 585.100(a)(4) of the Interim Rule, as these provisions are modified as set forth below.

If the OTS retains a list of exempt types of responsibilities and activities, we would suggest that the OTS could address the specific concerns of ADM either by: (1) adding new terms, such as “agricultural processing” or “agricultural manufacturing” to the current list of five exempt activity areas and defining these new terms to include the various ADM business areas described above; or (2) by including in the preamble to the final rule descriptions of “agriculture” and “manufacturing” to make clear that all of the various ADM activities described above will qualify for the exemption. One specific possibility would be to amend “agriculture” to be “agriculture and agricultural processing” and then include a definition of “agricultural processing” in Section 585.20 that would incorporate the various activities listed on pages 2 – 3 of this letter. Another specific alternative would be to make the same change to the term “agriculture” mentioned in the preceding sentence and then include in the preamble to the final rule a detailed discussion of the meaning of “agricultural processing” that would include the various activities listed on pages 2 – 3 of this comment letter.

As indicated above, ADM, the top-tier holding company, has approximately 10,500 employees, a substantial number of whom have responsibilities and activities limited solely to agricultural processing matters and who are not otherwise subject to the Section 585.30 prohibition because these employees of ADM meet all of the conditions listed in Section 585.100(a). Therefore, clarification that ADM employees with responsibilities and activities limited solely to agriculture and/or manufacturing matters would be exempt from the prohibition in Section 585.30 would have a very significant positive impact for ADM.

6. Amendments To Section 585.100(a)(3) And 585.100(a)(4)

In addition to the change recommended above with respect to the deletion of the list of exempt responsibilities and activities and the potential exemption of SLHC employees with responsibilities and activities in all business areas, we also would recommend that the OTS make two limited changes to the conditions in Section 585.100(a)(3) and (a)(4) that would have to be met in order for the exemption to be applicable.

First, we would recommend that the term “policymaking function” in Section 585.100(a)(3) be specifically defined. The Interim Rule does not specifically define “policymaking function.” However, the preamble to the Interim Rule indicates in footnote

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15 on page 25951 that OTS examiners will review SLHC policies, procedures and practices in complying with the prohibition on employees exercising any policymaking functions. This would appear to give examiners very significant discretion in interpreting this restriction. However, we believe it would be much more practical for the regulations to include a specific definition of "policymaking function." One definition that we would suggest could be used is the definition of "officer" in Securities and Exchange Commission Rule 16a-1.

Rule 16a-1 provides that an "officer" is "an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Officers of the issuer's parent(s) or subsidiaries shall be deemed officers of the issuer if they perform such policy-making functions for the issuer. In addition, when the issuer is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. ... *'Policy-making function' is not intended to include policy-making functions that are not significant.*" 17 C.F.R. § 240.16a-1(f) (emphasis added).

Second, Section 585.100(a)(4)(iii) prohibits employees eligible for the exemption from participating, "directly or indirectly, in the conduct of the affairs of the savings and loan holding company." We believe that the OTS's primary concern is with respect to those persons with major policymaking authority at an SLHC. Yet, this provision could inadvertently disqualify lower-level employees. The "conduct of the affairs" standard is not defined in the Interim Rule or in the federal banking statutes. Therefore, if read literally, this limitation could nullify the exemption as a practical matter because many employees in low-level and mid-level positions arguably participate in the conduct of the affairs of the SLHC. Therefore, we would urge the OTS to delete subsection (a)(4)(iii). The substance of the provision is already addressed by subsection (a)(4)(i), which applies to institution-affiliated parties, including any person who participates in the conduct of the affairs of an SLHC.

7. Convictions And Agreements Should Be Covered Only If They Involve Criminal Offenses Under United States Law

Since ADM has active operations in over 50 different countries, it is conceivable that certain present ADM employees have been, or will be, convicted of criminal offenses under laws of these foreign countries that could be determined objectively to involve dishonesty, breach of trust or money laundering. However, some or perhaps, even, many of the criminal statutes in certain of these countries may vary significantly from criminal statutes in the

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United States involving dishonesty, breach of trust or money laundering. Therefore, it might in certain instances be extremely difficult for ADM or involved employees to determine whether certain of these foreign statutes involve "dishonesty, breach of trust or money laundering" as these terms are commonly defined and interpreted in the United States.

Also, there might be some significant uncertainty whether individuals in some of these foreign countries would be provided sufficient procedural rights and safeguards to ensure that if any ADM employees living in these countries are prosecuted for crimes determined to involve "dishonesty, breach of trust or money laundering" that such employees will be the subject of sufficiently fair trials or sufficiently fair other criminal proceedings.

Given the uncertainties with respect to whether certain foreign crimes would constitute offenses to which the Section 585.30 prohibition might apply and given the uncertainties with respect to the adequacy of various foreign criminal procedures, we would urge OTS to limit the application of the Section 585.30 prohibition only to either employees convicted only of United States criminal offenses or to employees agreeing to enter into pretrial diversion or similar programs only in connection with prosecutions of criminal offenses under United States law.

Conclusion

We greatly appreciate your attention to the review of the foregoing comments and recommended changes to the Interim Rule. Please call me at (202) 778-9350 or A. James Shafter, Vice President and Assistant General Counsel of ADM, if you have any questions or if you need any additional information with respect to any of the foregoing materials.

Sincerely,



Ira L. Tannenbaum

cc: A. James Shafter
Vice President and Assistant General Counsel
Archer-Daniels-Midland Company