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*By electronic delivery*

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Regulation Comments  
Chief Counsel's Office  
Office of Thrift Supervision  
1700 G Street, NW  
Washington, DC 20552  
Attention: OTS-2007-0008  
[regs.comments@ots.treas.gov](mailto:regs.comments@ots.treas.gov)

Re: Prohibited Service at Savings and Loan Holding Companies; OTS Docket No. 2007-0008; 72 Federal Register 24948 (May 8, 2007)

Ladies and Gentlemen:

The Office of Thrift Supervision (OTS) promulgated an interim final rule amending its current rules by adding a new regulation prohibiting service at a savings and loan holding company (SLHC) by certain individuals who have been found guilty of committing, or entered a pre-trial diversion program regarding prosecution of, certain criminal offenses (Interim Rule). This Interim Rule implements section 710 of the Financial Services Regulatory Relief Act of 2006 (FSRRA).

The American Bankers Association (ABA) appreciates the opportunity to comment on this Interim Rule on behalf of the more than two million men and women who work in the nation's financial services industry. ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership--which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, savings banks, and bankers banks--makes ABA the largest banking trade association in the country.

### Summary of Comments

ABA believes the Interim Rule is consistent with the overall objective of eliminating unnecessary regulatory burden for the nations' banking and financial services industry. However, ABA believes certain issues should be addressed in the final rule.

- A bright line test is needed regarding the definition of "participation" and "major policymaking" functions of a SLHC. ABA believes that since "agency and court decisions will provide the guide as to what standards will be applied," OTS is in the best position to provide the industry with clear and consistent rules on this matter.

- Further guidance is needed as to the scope of Section 19(e) applicability, especially with regard to agents and *de facto* employees of SLHCs.
- OTS should work to ensure that 12 C.F.R. § 585.100 is broad enough to encompass the entire list of non-financial activities conducted by SLHCs.
- Any ambiguity regarding insurance agents as “agents” of SLHCs should be clarified to indicate what the cut-off threshold is for section 19(e) applicability to insurance agents.
- OTS should allow applications for case-by-case exemptions to be handled in regional or local offices instead of at OTS headquarters in Washington, D.C. Furthermore, it is important that OTS clarify which level of official(s) will conduct appeals hearings, as well as where these application determinations and hearings will occur.
- ABA is concerned about potential international applications of Section 19(e). For instance, will convictions or pre-trial diversion programs from countries lacking judicial system transparency equally apply for purposes of Section 19(e) prohibition?
- Requiring exemption applications for each designated position will potentially result in duplicative applications being filed for one individual.
- OTS should refine the prison sentence timeline and index the \$1,000 fine amount attached to the *de minimis* offense definition to the rate of inflation, thus ensuring continued efficacy of the *de minimis* offense limitations.

## Discussion

As a general proposition, ABA supports OTS in its efforts to ensure that savings institutions and SLHCs are not encumbered by unnecessary regulatory requirements. ABA believes that the Interim Rule is consistent with the overall objective of eliminating regulatory burden while simultaneously protecting the integrity of our country’s banking system. Prohibiting certain individuals with a record of criminal offences from serving in major policy making positions at SLHCs is laudable. ABA believes that certain issues should be addressed in connection with full implementation. For these reasons, ABA recommends the following suggestions.

1. A bright-line test is needed regarding the definitions of “participation” and “major policymaking” functions of the SLHC.

Under interim section 585.120, OTS will determine whether an individual is exempt, or whether an exemption request is approved, after considering, among other factors, the extent to which an individual “[p]articipate(s) in the major policymaking functions of the [SLHC] . . . .”<sup>1</sup> The supplementary information to the Interim Rule references “major policymaking” several times, both in the context of who is exempt from the prohibition, as well as what factors OTS will consider in reviewing an exemption application, yet does not provide an adequate explanation as to factors to be considered in determining what this term means. While the supplementary information states directors and executive officers, as defined under Regulation O, are assumed to be involved in major policymaking functions, there is no indication that this list is exhaustive. Without a bright-line test to determine whether an individual “participates” in “major policymaking functions” of an SLHC, the industry may file numerous unnecessary exemption applications, or could fail to file applications for individuals for whom Section 19(e) is truly designed. Furthermore, how is “participation” to be determined? OTS should provide the industry with threshold standards for determining when an

<sup>1</sup> Prohibited Service at Savings and Loan Holding Companies, 72 *Fed. Reg.* 25948, 25957 (May 8, 2007) (to be codified at 12 C.F.R. § 585).

individual will be deemed to meet the requirements of “participation” in major policymaking functions of a SLHC. For instance, numerical cutoffs of metrics would provide the industry much needed clarity regarding what level of involvement must be met in order for an individual to be engaged in “participation.” Simplicity and consistency in this area will allow compliance and human resource staff at SLHCs to evaluate compliance with Section 19(e) better.

ABA believes that since the Interim Rule specifies that “agency and court decisions will provide the guide as to what standards will be applied,”<sup>2</sup> OTS is in the best position to provide the industry clear and consistent parameters on this matter. Such parameters could be delivered through definitions contained in the final rule, or as an appendix attached thereto. ABA would be happy to work with the OTS in developing such standards.

2. Further guidance is needed as to the scope of Section 19(e) applicability, especially with regard to agents and *de facto* employees of SLHCs.

Supplementary information to the Interim Rule indicates that for purposes of section 585.20’s definition of “institution affiliated party” (IAP), *de facto* employees of a SLHC, as well as independent contractors (including any attorney, appraiser, or accountant), are to be considered IAPs and therefore subject to the Section 19(e) prohibition.<sup>3</sup> Some of our members have expressed concerns over the breadth of individuals this definition encompasses. Requiring SLHCs to conduct background and/or credit checks on every independent contractor or *de facto* employee would result in a glut of paperwork without a concomitant benefit resulting to the SLHC. Given that consultants and those who engage in licensed professions already are overseen by not only their respective professional bodies, but also OTS’s own Part 513 rules regarding Practice Before the Office,<sup>4</sup> subjecting these individuals to additional layer of scrutiny imposes an unnecessary repetitive burden.

OTS states that “Section 19(e) imposes a duty upon the SLHC to make a reasonable inquiry regarding a person’s history,” which includes “at a minimum” that SLHCs “establish a screening process” to verify an individual does not have a disqualifying conviction or pretrial diversion record.<sup>5</sup> As part of this process, many SLHCs are likely to request a “consumer report” to obtain relevant information bearing on the individual’s reputation, character, and personal characteristics. In order to obtain such a “consumer report,” the SLHC must be able to show that it has a “permissible purpose” for requesting such report, presumably for employment purposes.<sup>6</sup> Requesting “consumer reports” for all independent contractors and *de facto* employees, assuming a permissible purpose exists under FCRA for requesting reports on non-employees, represents at least an unreasonable burden on SLHCs, and possibly exposes a statutory conflict faced by SLHCs under the Interim Rule. Given that the avowed purpose of FSRRA is relieving financial institutions of regulatory burden, it does not follow logically that implementation of section 710 should result in an increase in regulatory burden. ABA recommends OTS reexamine the use of “consumer reports” as fulfilling the “reasonable inquiry” duty inherent in the Interim Rule as it pertains to independent contractors and *de facto* employees.

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<sup>2</sup> Id. at 25951.

<sup>3</sup> Id. at 25949.

<sup>4</sup> See 12 C.F.R. § 513.

<sup>5</sup> 72 Fed. Reg. at 25950.

<sup>6</sup> If an individual has a disqualifying conviction or pre-trial diversion record, then the individual may ultimately be removed from his or her position. If this occurs, the credit report could ultimately be used as part of an adverse action, which raises further requirements under the Fair Credit Reporting Act (FCRA). See 15 U.S.C. § 1681b(b)(3).

3. OTS should work to ensure that 12 C.F.R. § 585.100 is broad enough to encompass the entire list of non-financial activities conducted by SLHCs.

Section 19(e)(2) provides the Director with broad authority to exempt classes of individuals from the prohibitions, so long as the exemptions are consistent with the purposes of Section 19.<sup>7</sup> ABA applauds the OTS for providing exemptions for the many employees of SLHCs who work solely in the industries of agriculture, forestry, manufacturing, retail merchandising, or public utilities. Individuals whose job duties relate solely to non-financial activities should not be subject to banking regulatory rules. Additionally, ABA appreciates the clarity of OTS' comments that the Section 19(e) applies to SLHCs and intermediate holding companies, but does not include non-depository institution subsidiaries of SLHCs. Nevertheless, ABA is concerned that not all properly exempt individuals will be covered under the categories listed in the Interim Rule. For example, employees of SLHCs who are engaged solely in the business of hotels or golf courses, while not involved in financial activities and arguably covered under one or more of the exemptions, may find themselves subjected to the Section 19(e) prohibition since there might not be any directly applicable exemption category. ABA therefore recommends that OTS periodically review the list of exempted industries to ensure that all non-financial activities are covered under the exemption.

Additionally, it is arguable that the authority vested in the Director by Section 19(e)(2) to provide exemptions permits OTS to grant specific exemptions by order for particular SLHCs, which may be warranted by unique facts or circumstances. As such, some of our members would urge that the final rule be clarified to indicate OTS retains this authority and will exercise it where appropriate. ABA supports consideration of this point.

4. Any ambiguity regarding insurance agents as "agents" of SLHCs should be clarified to indicate what the cut-off threshold is for Section 19(e) applicability to insurance agents.

OTS-regulated SLHCs include insurance companies, and the application of Section 19(e) to insurance agents presents unique questions for OTS. OTS has previously issued an opinion holding that insurance agents employed by a SLHC, who perform activities related to marketing, solicitation, and customer service for the SLHC's deposit and loan products and services, are not subject to state licensing and registration requirements to the extent that the savings institution itself is not subject to those requirements.<sup>8</sup> This letter indicates that such insurance agents are viewed as agents of the SLHC and therefore subject to OTS, not state, regulations.

The Interim Rule specifically identifies "agents" as IAPs,<sup>9</sup> seemingly bringing insurance agents under the Section 19(e) prohibition. Given the large number of insurance agents employed by various SLHCs, the Interim Rule as currently written has the potential to cause an exponential increase in the number of exemption applications filed. Such hardship on SLHCs would be in addition to the prohibitively large burden of attempting to conduct background checks and obtain information on all such insurance agents. ABA therefore encourages OTS to exclude insurance agents from Section 19(e), or in the alternative provide a clear cut-off regarding the level at which Section 19(e) applies to insurance agents.

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<sup>7</sup> See S. 2856, 109th Cong. § 710 (2006).

<sup>8</sup> See Authority of a Federal Savings Association to Perform Banking Activities through Agents Without Regard to State Licensing Requirements, OTS Letter P-2004-7 (Oct. 25, 2004).

<sup>9</sup> 72 Fed. Reg. at 25949.

5. OTS should allow applications for case-by-case exemptions to be handled in regional or local offices instead of at OTS headquarters in Washington, D.C. Furthermore, it is important that OTS clarify which level of official(s) will conduct appeals hearings.

Clarity and transparency are inherently important to our country's judicial tradition, as well as to an effective appeals system. Identifying which individuals and forums will have authority for exemption approval and hearing requests is crucial for instilling industry confidence in the process. At present, the Interim Rule does not identify which level of official(s) will be responsible for these processes, nor does it specify where these request determinations and hearings will occur. While 12 C.F.R. § 509.301(a) permits hearings to be held in Washington D.C. or other locales by a "presiding officer" as designated by the OTS Director, it is silent on the issue of where and by whom exemption requests will be reviewed. We request that OTS provide greater specificity regarding the exemption approval and hearing processes in the final rule. Specifically, ABA requests that OTS offer guidelines as to which positions will have responsibility for carrying out the hearing and appeals processes, as well as provide for local or regional hearings to minimize burden.

6. ABA is concerned about potential international applications of Section 19(e).

The Interim Rule does not specify whether or not "persons who have been convicted of certain criminal offenses . . ." includes individuals convicted of offenses in foreign jurisdictions. ABA recognizes that convictions from certain foreign jurisdictions should be accorded recognition on par with those rendered in the United States. However, if convictions from *any* jurisdiction function to disqualify an individual from SLHC major policy-making positions, there exists the chance for potentially worrisome results. For instance, are convictions from countries without judicial transparency or any appellate oversight to be recognized? Additionally, if all qualifying foreign convictions function to disqualify an individual from SLHC service, the burden to ensure foreign convictions are reported will encumber SLHCs in an unreasonable manner, not to mention the burden already incumbent upon them to obtain information related to domestic convictions, pretrial diversions, and expungements.

7. Requiring exemption applications for each designated position will potentially result in duplicative applications being filed for one individual.

The Interim Rule specifies that "an applicant may seek an exemption only with respect to a designated position" within a named SLHC.<sup>10</sup> Given that exemption applications must be applied for on a case-by-case basis, some members expressed concern over multiple filings for one individual, should that individual change jobs, be promoted, or be subjected to a reorganization within the SLHC. Requiring such duplicative filings for the same individual could possibly interfere in the ability of the SLHC to conduct its normal business processes, especially if OTS processing of applications is delayed for any reason. If OTS maintains this "designated position" requirement, ABA recommends OTS consider some form of "fast track" processing or "approved database" for individuals who have already received an exemption approval.

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<sup>10</sup> 72 Fed. Reg. at 25952.

8. OTS should refine the prison sentence timeline and index the \$1,000 fine amount attached to the *de minimis* offense definition to the rate of inflation, thereby ensuring continued efficacy of the *de minimis* offense limitations.

OTS has specifically sought comment on alternative definitions of *de minimis* for purposes of Section 19(e). ABA agrees with OTS' election to follow the model used by the Federal Deposit Insurance Corporation (FDIC) in allowing an exemption where an individual has only one conviction or pretrial diversion, such conviction or pretrial diversion occurred at least five years prior, and the offense did not involve an insured depository institutions, credit union, or other banking organization.<sup>11</sup> Requiring exempted persons to be covered by a fidelity bond to the same degree as similarly situated persons within the SLHC and disclose the conviction or pretrial diversion to all banking organizations in whose affairs he or she participates are also reasonable requirements.

However, ABA believes that a standard more narrowly tailored to the traditional dichotomy of offenses in the American legal system may be helpful. As currently written, the Interim Rule would define a *de minimis* offense as one punishable by imprisonment for a term of *less than one year*, a fine of less than \$1,000, or both.<sup>12</sup> It is reasonable that OTS chose these cutoffs to reflect the way in which misdemeanors and felonies are distinguished. However, federal guidelines define the lowest class of felony as that punishable by “less than five years but *more than one year*,” and the most severe misdemeanor as punishable by “*one year or less* but more than six months.”<sup>13</sup> If the Interim Rule is adopted as currently written, any individual convicted of a crime punishable by a term of one year would be guilty of only a misdemeanor, yet still not qualify under the Section 19(e) *de minimis* exemption. ABA therefore recommends that the final rule be harmonized with existing federal classifications to indicate that for purposes of the *de minimis* exception, an offense must have been punishable by imprisonment for a term of *one year or less*. As an alternative, OTS may wish to consider adopting a simpler standard for determining *de minimis* offenses, whereby offenses classified as a misdemeanor at the time they were committed qualify for the *de minimis* exemption.

Additionally, it is important to recognize that a strict cutoff of \$1,000 as the monetary component of any *de minimis* exception will lose practicality as time passes. Thus, ABA recommends that OTS provide that the \$1,000 amount will be indexed to inflation, thereby preserving the original amount in terms of purchasing power.

## Conclusion

As a general proposition, ABA supports regulatory relief measures for the financial services industry. For instance, the changes outlined in the Interim Rule, while closely tracking those adopted by the FDIC, improve upon them in significant areas, such as allowing institutions and individuals to submit exemption applications. However, while ABA supports the Interim Rule's underlying purpose, ABA believes that it is necessary for OTS to refine definitions and clarify certain ambiguities. A bright-line test regarding the definitions of “participation” in and “major policymaking functions” of SLHCs is imperative to effective application of Section 19(e). Likewise, a statement that FCRA allows SLHCs to obtain “consumer reports” on agents and *de facto* employees as part of their “reasonable inquiry” process would alleviate ambiguity over whether or not a permissible purpose exists. Furthermore, ABA believes that the definition of a *de minimis* offense

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<sup>11</sup> See Statement of Policy Pursuant to Section 19, 63 Fed. Reg. 66177 (Dec. 1, 1998).

<sup>12</sup> 72 Fed. Reg. at 25950, 25956.

<sup>13</sup> 18 U.S.C. § 3359; see id. at § 3381.

should be harmonized with the federal (and many states') classification system, and that the \$1,000 amount be indexed for inflation.

Ensuring that Section 19(e) provides adequate exemptions to cover SLHC employees engaged solely in non-financial activities is an important goal as well, and one the ABA encourages OTS to review on a regular basis. Additionally, ABA believes that it is important for OTS to provide greater specificity about the exemption application and hearing processes. OTS should monitor implementation of the Section 19(e) processes to ensure all applications and appeals are disposed of in a fair and proper manner. If there are any questions about these comments, please do not hesitate to contact the undersigned at (202) 663-5056.

Sincerely,



Christopher M. Paridon  
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