



July 9, 2007

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

Attention: OTS-2007-0008

Re: Prohibited Service at Savings and Loan Holding Companies, 72 FR 25948 (May 8, 2007)

Dear Sir or Madam:

America's Community Bankers ("ACB")¹ welcomes the opportunity to comment on the interim final rule issued by the Office of Thrift Supervision ("OTS") to implement the provisions of Section 19(e) of the Federal Deposit Insurance Act ("FDIA").² Section 19(e) of the FDIA prohibits any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering or has agreed to enter a pretrial diversion or similar program in connection with a prosecution for such an offense from holding certain positions with a savings and loan holding company without the prior written consent of the Director of the OTS.

ACB Position

ACB generally supports the interim final rule to implement Section 19(e) of the FDIA that will be codified in a new part, Part 585, of the OTS regulations. We believe the clarification and guidance that a final rule would provide regarding the implementation and enforcement of Section 19(e) will be useful in helping savings and loan holding companies to comply with the statutory requirement that has serious consequences for noncompliance. We appreciate that the OTS, in developing the interim final rule, considered the unique issues and the diverse industries that may be, or affiliated with, a savings and loan holding company. We strongly urge the OTS to adopt a final rule that responds to the challenges of compliance with Section 19(e) of these diversified holding companies.

ACB strongly urges the OTS to consider amending the interim final rule to provide that anyone who works as an employee of a savings and loan holding company and who can meet the criteria established in 12 CFR 585.100(a)(2), 12 CFR 585.100(a)(3), and 12 CFR 585.100(a)(4) be exempt from the prohibition. ACB generally is concerned that the burden of compliance with the interim final rule as written will result in inadvertent lapses by savings and loan holding

¹ America's Community Bankers is the national trade association committed to shaping the future of banking by being the innovative industry leader strengthening the competitive position of community banks. To learn more about ACB, visit www.acb.us.

² 72 Fed Reg 25948 (May 8, 2007)

companies that are making efforts to identify and seek waivers for all employees who may be prohibited from working at the holding company.

Given the possible significant harm to the holding company for noncompliance,³ we urge the OTS to develop a process that does not result in a burdensome method for the holding company to implement the rule. To the extent that the savings association subsidiary is not a major part of the business of the holding company in terms of assets, revenue, operations or numbers of employees, we believe that it is important that any final requirements be viewed in the context of the potential burden imposed on the holding company. If the business of the holding company includes diverse businesses that are not involved in providing financial services, we are concerned that the recordkeeping and monitoring of employees who move from a non-policymaking position to a policymaking position will be a significant burden.

ACB urges the OTS to consider adopting a final rule that provides for a broader and more flexible exemption for employees of savings and loan holding companies. To that end, we strongly recommend that the OTS adopt a rule that exempts all employees of the holding company who do not have policymaking functions, own or control the holding company or participate in the affairs of the holding company. Such a rule could provide a bright-line test that would identify which employees are in policymaking or control positions. The recordkeeping and monitoring for this universe of employees would be less burdensome for the holding company and for the OTS. Further, many employees of savings and loan holding companies work and reside in foreign countries, a situation that raises a number of questions for compliance.

A less beneficial alternative to providing a general exemption would be to expand the list of categories contained in the interim final rule to include additional industries, departments, job functions or positions in which employees work. The specific categories that the OTS has determined in the interim final rule to be exempt include employees whose responsibilities and activities are limited to agriculture, forestry, retail merchandising, manufacturing or public utilities operations. The broad categories include a number of the employees, but we are concerned that ancillary employees who work in the processing and distribution areas and employees who provide the infrastructure for these employees might not be considered to be exempt. If this approach is retained in the final rule, we urge the OTS to clarify that every person who works at a company that is generally engaged in the activities listed in the interim final rule be exempt.

ACB urges the OTS to promulgate a final regulation that results in the least burden possible for savings and loan holding companies. In addition to including broader categories of employees who are exempt, we urge the OTS to make the application process for an exemption as efficient as possible. For example, we urge the OTS to permit savings and loan holding companies to file the exemption requests with the appropriate regional office and to permit such applications to be reviewed using an expedited process. We also urge the OTS to establish an appeals process that

³ Section 19(b) of the FDIA provides that the penalty for whoever knowingly violates subsection (a) of this section shall be fined not more than \$1,000,000 for each day such prohibition is violated or imprisoned not more than 5 years, or both. Section 19(e) specifically makes Section 19(b) applicable to savings and loan holding companies as if they were insured depository institutions.

can be used by the individuals seeking an exemption or by the savings and loan holding companies.

Finally, ACB urges the OTS to work with the state insurance authorities to ensure that the laws, rules and guidance that govern the employment practices of insurance companies and the use of agents are consistent with the final rule issued by the OTS. We request that the OTS clarify the application of the statute and any final rule to agents of insurance companies.

Background

As part of the Financial Services Regulatory Relief Act of 2006,⁴ Section 19 of the FDIA was amended by adding a new Section 19(e) that expands the application of provisions of Section 19 to savings and loan holding companies as if they were insured depository institutions. Generally, Section 19 prohibits any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering or who has entered into a pretrial diversion or similar program in connection with a prosecution for such an offense from holding certain positions with respect to an insured depository institution and now a savings and loan holding company, without the prior written consent of the relevant regulator, the Federal Deposit Insurance Corporation ("FDIC") or the Director of the OTS. With regard to any insured depository institution or savings and loan holding company, such a person may not:

- become or continue as an institution affiliated party;
- own or control, directly or indirectly; or
- otherwise participate, directly or indirectly in the conduct of affairs.

The statute also specifies that for a minimum period of ten years a person who has been convicted of a number of enumerated crimes may not serve in the listed capacities at an insured depository institution. The statute does provide that the FDIC may grant an exception from the prohibition by regulation or order. Section 19(e) makes the prohibitions of the statute applicable to savings and loan holding companies and provides that the Director of the OTS may grant exceptions from the prohibition by rule or order to the same extent that may be granted by the FDIC.

Because of the history of savings and loan holding companies, there are a number of diversified holding companies engaged in commercial and other businesses at the holding company level. Further, there are a number of savings and loan holding companies that are and have been engaged in a wide range of activities that have not been permitted to bank holding companies. In addition, a number of insurance companies are savings and loan holding companies. Many of the categories of employees of these holding companies are not working in capacities in which employees of insured institutions are working. The OTS must address these issues that are unique to savings and loan holding companies.

⁴ Pub.L. 109-351

General Exemption

Section 19(e) provides that the Director of the OTS may grant exemptions from the prohibitions in the statute by regulation or order. The interim final rule provides for a more general exemption for persons who are involved in certain specific operations and also meet certain specified requirements. In addition, the interim final rule provides for individuals to seek exemptions from the prohibitions. The areas listed for which there is a general exemption are: agriculture, forestry, retail merchandising, manufacturing or public utility operations. ACB does not believe that the list is broad enough or flexible enough to include the tens of thousands of employees of savings and loan holding companies whose activities do not intersect with the business of the savings association subsidiary.

We strongly urge the OTS to consider a broad exemption that would permit an employee of a savings and loan holding company to work at the company if that person does not have a policymaking function, does not have control of the holding company, and does not influence the affairs of the holding company or the savings association. Such an exemption would make it easier for holding companies to ensure that appropriate background checks are undertaken and inquiries made of employees who are not in policymaking or control positions. The OTS could include a narrow list of factors that the savings and loan holding company could use to determine which positions have policymaking responsibilities within the holding company. The employees who apply for those positions or who are promoted to those positions would need to undergo the scrutiny required to assure compliance with the prohibitions.

The persons who own or control the holding company would be determined based on the definitions found in the final rule and commonly used in the context of the federal banking laws. Finally, the OTS could establish narrow criteria for the savings and loan holding company to consider in determining whether an employee participates directly or indirectly in the conduct of the affairs of the holding company. Such a list could be easily updated on an annual basis and would be much less burdensome than a list that enumerates all employee positions that are intended to be exempt from the rule.

ACB believes that the statute permits the OTS to grant such a broad exemption. The language of Section 19(e)(2) provides that the Director of the OTS may provide exemptions, by regulation or order, from the application of paragraph (1) if the exemption is consistent with the purposes of this subsection.⁵ The purposes of the subsection are that without prior written consent of the FDIC or the Director of the OTS, whichever is appropriate, persons who have been convicted of a criminal offense involving dishonesty, or a breach of trust or money laundering, or who have agreed to enter a pretrial diversion or similar program in connection with the prosecution of such offense may not become or continue as an institution-affiliated party of, may not own or control, directly or indirectly, or otherwise participate, directly or indirectly, in the conduct of affairs of an insured depository institution or savings and loan holding company.⁶ We believe that the vast majority of employees of holding companies that are more than shell holding companies for the insured institution are not involved in the policymaking or ownership of the holding company.

⁵ 12 USC 1829(e)(2). Paragraph 1 is the application of the general prohibition in Section 19 to savings and loan holding companies.

⁶ 12 USC 1829

The holding companies that are in the financial services business have processes in place to comply with the requirements of the insurance and securities industries.

The FDIC issued a Statement of Policy in 1998 to provide guidance to all insured institutions regarding the implementation of the prohibitions of Section 19.⁷ Section D of the Statement of Policy addresses the criteria that will be considered by the agency in reviewing applications for exemption from the prohibition. The Statement of Policy states that “The essential criteria in assessing an application are whether the person has demonstrated his or her fitness to participate in the affairs of an insured institution, and whether the affiliation, ownership, control or participation by the person in the conduct of the affairs of the insured institution may constitute a threat to the safety and soundness of the insured institution or the interests of its depositors or threaten to impair public confidence in the insured institution.”⁸ We believe that the OTS should consider a broad exemption for employees of holding companies who are not a threat to the safety and soundness of the holding company, much less the insured savings association.⁹

The FDIC’s Statement of Policy further provides that applications for exemption from the prohibition will be considered. The criteria are the same as that used by the OTS in the interim final rule. We note that the FDIC states that “some applications can be approved without extensive review because the person will not be in a position to constitute any substantial risk to the safety and soundness of the insured institution. Persons who occupy clerical, maintenance, service or purely administrative positions generally fall into this category.”¹⁰ We urge the OTS to consider granting a general exemption to the persons who would be in those categories for savings and loan holding companies as they also would not be policymakers, control or participate in the business of the holding company.

The majority of employees of a number of savings and loan holding companies do not meet the criteria established for ownership, participation or influence. We understand that several savings and loan holding companies have tens of thousand of employees who work in a number of capacities that have no policymaking function, no opportunity to control the holding company and no ability to influence the operations. These companies have processes in place to conduct background checks for employees that satisfy the requirements of the appropriate industry. However, in some instances, in the past, the background checks might not have been as detailed as necessary for employees who are or were below specified levels. Doing retroactive background checks on these employees would be burdensome and disruptive.

⁷ Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act Concerning Participation in the Conduct of the Affairs of an Insured Institution by Persons Who Have Been Convicted of Crimes Involving Dishonesty, Breach of Trust or Money Laundering or Who Have Entered Pretrial Diversion Programs For Such Offenses, 63 Fed Reg 66177 (Dec. 1, 1998)

⁸ Id at 66185.

⁹ An analogy to the inclusion of only persons with policymaking responsibilities in the requirements of any final rule is the recently issued regulation requiring amendments to the rule requiring executive compensation disclosures issued by the Securities and Exchange Commission. The rule provides that only the compensation of executive officers who have policymaking responsibilities for the company or an subsidiary must be disclosed, even if the compensation of any other person is in excess of the executive officers 71 Fed Reg 53158 (Sept. 8, 2006) and 71 Fed Reg 53267 (Sept 8, 2006).

¹⁰ 63 Fed Reg 66185.

Other considerations that arise in connection with such a retroactive review include privacy concerns with regard to these employees. Obtaining and maintaining the data that would result from a review would necessitate security precautions as well as concerns that the information might be used in an inappropriate way in an employment context. In addition, we understand that there are state laws that prohibit prospective employers from asking certain questions about past convictions. To the extent that these laws interfere with a savings and loan holding company's ability to obtain the information required, we urge the OTS to confirm that such laws are preempted.

Finally, given the number of employees at savings and loan holding companies, once each holding company reviews each of its employees, the OTS may be inundated with applications for exemption for employees who have been with the companies for some years and do not have any policymaking function but who would be prohibited from employment with the holding company.

Alternative to a Broad Exemption

ACB strongly urges the OTS to adopt a broad exemption in any final rule. However, if the agency provides a list of industries and positions that are exempt, we urge that additional categories be included and clarifications made. Even within the broad categories listed in the interim final rule, there are a number of positions to which it is unclear whether the exemption applies. For example, would everyone who works at a company that fits into the general category be exempt or only those persons whose functions are specifically involved in agriculture, forestry or the other the areas enumerated.

ACB questions granting an exemption to a truck driver who works for a utility company but not one that works for a company that is not one of the types listed. For example, if all drivers and maintenance persons who work for utility companies or manufacturing companies are exempt, may the drivers and maintenance persons who work for other companies also be exempt? Several of the companies that might be included in the manufacturing and agricultural categories generally include factory or assembly workers as well as sales and office staff. There are other savings and loan holding companies that also have these types of workers and the OTS might consider that these employees should also be exempt, although they are not with companies in the listed industries.

Further, there are savings and loan holding companies that own or manage properties, including hotels and recreational properties, that require maintenance workers for general upkeep, housekeeping and kitchen staff, landscape and mechanical workers to keep the properties running. The employees of these savings and loan holding companies are not able to avail themselves of the exemption in the interim final rule, although they do not have policymaking functions or control the holding company.

If the agency does not provide a general exemption for all employees who do not meet the criteria regarding policymaking, control or participation in the business of the company, we urge the OTS to consider adding the types of broad categories of employees to the final rule: janitorial or other cleaning staff, maintenance or mechanical workers who provide upkeep for the physical plant of the company or the machines used in the manufacture of products, employees

who process and sell products that are manufactured, and clerical staff who support those activities, and so on. However, it may not be practical to compile a list that would include every possible position and job description.

Finally, savings and loan holding companies may have operations in foreign countries with a significant percentage of holding company employees living and working outside the United States. Given the differences in the judicial systems of other countries around the world, we are concerned that the application of the prohibitions might lead to negative consequences for some employees of these holding companies, including being prohibited from employment with the holding company. The company would need to have confidence that an employee had been treated in a manner similar to the way he or she would be treated by the United States judicial system if he or she had been convicted of a relevant crime in a foreign country or make a judgment about the nature of the offense and argue for an exemption. The person may not have been adequately represented or other factors may have been present. We urge the OTS to consider a general exemption with regard to foreign operations, if specific criteria are met.

Insurance Companies as Holding Companies

In addition to the diversified companies that are savings and loan holding companies, a number of insurance companies have chartered limited purpose trust and full service savings associations and, as a result, have become savings and loan holding companies. These insurance companies are subject to the laws and regulations of the states in which they are chartered and in which they do business. Generally, insurance companies may not employ “[a]ny individual who has been convicted of any criminal felony involving dishonesty or a breach of trust, or who has been convicted of an offense under this section, and who willfully engages in the business of insurance whose activities affect interstate commerce or participates in such business.”¹¹

There are employees of insurance companies for whom the prohibition does not apply but for whom the prohibition in Section 19(e) is applicable. As is the case with the commercial and other entities that are holding companies, insurance companies have janitors, groundskeepers, maintenance persons, mechanics, clerks and other employees that do not have a policymaking function, do not control the holding company and do not participate in the affairs of the holding company. We urge that these persons be included in the general exemption that we suggest.

Further, the question of whether insurance agents are subject to the prohibitions of Section 19(e) is unclear. We urge the OTS to clarify that insurance agents are not subject to the prohibitions of the statute and any final rule, unless they otherwise participate in the policymaking function at the holding company, own or control the holding company or participate in the affairs of the holding company.

While the FDIC Statement of Policy does not address the status of agents under Section 19, it does address the status of independent contractors. The FDIC determined that persons who exercise influence or control over the affairs of the institution are “de facto” employees of the

¹¹ 18 U.S.C. § 1033 (e)(1)(A). The business of insurance is defined as: (A) the writing of insurance, or (B) the reinsuring of risks, by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons. 18 U.S.C. § 1033(f)(1).

insured institution and are covered by the provisions of Section 19.¹² We do not believe that agents that do not otherwise meet the conditions established in the interim final rule should be considered employees of the insurance company holding company and therefore should be exempt from the Section 19(e) prohibitions.

Process

ACB believes that applications for exemptions from the prohibitions should be filed with and reviewed by the appropriate OTS Regional Office. The Regional Office may send the application to Washington for review if it believes that such scrutiny is warranted. We believe that having a streamlined and efficient process is necessary when the matter of whether a person may be employed with a savings and loan holding company is being addressed. We also urge the OTS to develop and implement an appeals process that can be used by individuals as well as savings and loan holding companies.

Conclusion

ACB appreciates the opportunity to comment on the interim final rule. We urge that the implementation of the statutory requirement created by the adoption of Section 19(e) of the FDIA be accomplished in a manner that is the least burdensome possible for savings and loan holding companies. ACB urges the OTS to consider adopting a general exemption for employees who are not policymakers or meet other criteria. The processes developed to screen and hire the employees of diverse companies should not be disrupted. ACB stands ready to work with the OTS to identify situations that are overly burdensome and to assist in making the rule more efficient. Should you have any questions, please contact the undersigned at (202) 857-3121 or pmilon@acbankers.org or Sharon Haeger at (202) 857-3186 or shaeger@acbankers.org.

Very truly yours,



Patricia A. Milon
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¹² 63 Fed Reg 66178