Office of Thrift Supervision
Department of the Treasury

1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6000

January 13, 1995

[redacted]

Re: Conclusive and Rebuttable Control Determinations

Dear [redacted]

This letter is in response to your November 3, 1994, letter, as supplemented, requesting interpretive advice and inquiring as to the applicability of the Office of Thrift Supervision ("OTS") Acquisition of Control Regulations, 12 C.F.R. Part 574 (the "Control Regulations") to a proposed proxy or written consent solicitation by [redacted], its general partner, [redacted] and the [redacted] (collectively, the "Acquirors") relating to a shareholder meeting of [redacted] (the "Company"), which is registered as the savings and loan holding company of [redacted], A Federal Savings Bank, [redacted] (the "Savings Bank"). You essentially have requested our views as to whether the Company controls the Savings Bank, thus making the Control Regulations applicable to the Acquirors' proposed solicitation of proxies or written consents of the Company's shareholders. If the Control Regulations apply, the Acquirors would be required to file either a holding company application or a rebuttal of control submission, as applicable, prior to the commencement of a proxy or consent solicitation.

On the basis of the facts presented, we would not assert that the Company currently controls the Savings Bank as control is determined under the Home Owners' Loan Act (the "HOLA") and the Control Regulations, and therefore, would not assert that the Company is a "savings and loan holding company" as defined in the HOLA and the Control Regulations. Furthermore, because it does not appear from the facts presented that the proposed proxy or written consent solicitation would cause the Acquirors to acquire, directly or indirectly, control of the Savings Bank, the Office of Chief Counsel will refrain from recommending an action against the Acquirors if they proceed without first having filed a holding

company application or rebuttal of control submission under section 10(e) of the HOLA and the Control Regulations.

Background

In November 1983, the Federal Home Loan Bank Board ("FHLBB"), predecessor to the OTS, approved the Company's holding company application to acquire all of the common stock of the Savings Bank. The FHLBB's approval order provided that the acquisition was to be completed within 60 days of the date of the approval order. The Company completed its acquisition of the Savings Bank within the time period required under the approval order, and then registered as a savings and loan holding company.

Your letter represents that, as part of a recapitalization of the Savings Bank undertaken in August 1994, the Company exchanged all of its shares of the Savings Bank's common stock for all (approximately 4.2 million shares) of the Savings Bank's Class B Common Stock.

The rights of the Class B Common Stock are governed by the terms of: (i) the stock instrument, (ii) the charter of the Savings Bank, and (iii) the terms of a Shareholder Agreement between the Savings Bank and the Company. While the Class B Common Stock is generally nonvoting, the holders of the Class B Common Stock have the right to vote as a class on certain limited matters, such as merger and acquisition transactions, to protect the interests of the Class B shareholders. The Class B Common Stock is convertible into Class A Common Stock only upon transfer of the Class B Common Stock by the Company to a third party. Any proposed transfer of ownership is subject to a right of first refusal by the Savings Bank.

As of November 3, 1994, the Savings Bank had issued 19.86 million shares of Class A Common Stock.[1] The Class A Common Stock is the only issuance of voting common stock. The Class B Common Stock, if converted, would constitute 17.5 percent of the Savings Bank's voting Class A Common Stock.

You further represent that, to the best of your knowledge, two shareholders of the Company each own approximately 21.6 percent of the Class A Common Stock of the Savings Bank.[2] Therefore, the

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[1] The Savings Bank had issued 1.91 million shares of Class C Common Stock as of November 3, 1994. The Class C Common Stock is nonvoting except on certain limited matters to protect the interests of the Class C shareholders.

[2] If the Class B Common Stock were converted, the two largest Class A Common Stock shareholders would each hold approximately 17.8 percent of the outstanding Class A Common Stock.

Company would be the third largest shareholder of the Savings Bank's Class A Common Stock. The Company presently has no representatives on the board of the Savings Bank and no representatives in the management of the Savings Bank.

You state that the purpose of the proposed proxy or written consent solicitation is to permit the Acquirors to attempt to elect a slate of nominees to the board of directors of the Company. The Acquirors wish to nominate five persons for election to the Company's board. You represent that the bylaws of the Company presently provide for five board members.

Discussion

The principal issue presented is whether the proposed proxy or written consent solicitation would cause the Acquirors to acquire control, directly or indirectly, of a savings association under the HOLA and the Control Regulations. You assert that the proxy or written consent solicitation would not cause the Acquirors to control the Savings Bank because the Company does not control the Savings Bank, as "control" is determined under the HOLA and the Control Regulations.

The HOLA states that a person shall be deemed to have control of a savings association if the person, directly or indirectly, or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, or holds with power to vote, or holds proxies representing more than 25 percent of the voting shares of such savings association, or controls in any manner the election of a majority of the directors of such association.[3] In addition, the HOLA states that a person shall be deemed to have control of a savings association or any other company if the Director determines, after reasonable notice and opportunity for hearing, that such person, directly or indirectly, exercises a controlling influence over the management or policies of such savings association or company.[4]

The Control Regulations set forth several conclusive control determinations, and several rebuttable control determinations. The conclusive control determinations parallel the statutory control determinations.[5] The rebuttable control determinations may be rebutted pursuant to procedures set forth in the Control Regulations.[6]

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[3] 12 U.S.C. § 1467a(a)(2)(A).

[4] 12 U.S.C. § 1467a(a)(2)(D).

[5] 12 C.F.R. § 574.4(a) (1994).

[6] 12 C.F.R. § 574.4(e) (1994).

Based on the facts presented, the Company would not be subject to a conclusive control determination under sections 574.4(a)(1) or 574.4(a)(3).[7] The Company does not own or control more than 25 percent of any class of the Savings Bank's voting stock,[8] and the facts presented do not indicate that the Company controls the election of a majority of the Savings Bank's directors.

It might be argued that the Company controls the Savings Bank by virtue of having the power, directly or indirectly, to exercise a controlling influence over the management or policies of the Savings Bank,[9] given that the Company until recently held all of the Savings Bank's common stock, and continues to be registered as a savings and loan holding company. An additional basis for such an argument could exist if the Company were able to acquire, at any time, without further OTS approval, additional shares of the Savings Bank's common stock that would trigger a conclusive or rebuttable control determination. However, based on the facts presented, it does not appear that the Company has the power to exercise a controlling influence over the Savings Bank. Registration as a savings and loan holding company is a procedural action. In addition, as previously noted, the Company presently has no representatives on the board of the Savings Bank, and no representatives in the management of the Savings Bank. Finally, based on the facts presented, the Company would be required to seek OTS approval to acquire a conclusive or rebuttable control determination with respect to the Savings Bank.[10]

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[7] Sections 574.4(a)(2) and 574.4(a)(4) are not relevant with respect to a determination of whether the Company controls the Savings Bank.

[8] Even if the Class B Common Stock constitutes "voting stock" under 12 C.F.R. § 574.2(u)(3) (1994), the Class B Common Stock, if converted, would constitute 17.46 percent of the Savings Bank's voting Class A Common Stock.

[9] 12 U.S.C. § 1467a(a)(2)(D); 12 C.F.R. § 574.4(a)(3) (1994).

[10] 12 C.F.R. § 574.3(c)(1)(v) provides that any additional acquisitions of stock after OTS approval under 12 C.F.R. § 574.7, or any predecessor provision, are permissible without further OTS approval, provided such acquisition is consistent with any conditions of approval and with representations made by the acquiror in its application.

The November 1983 FHLBB approval order specified that the acquisition of the Savings Bank's common stock was to be accomplished within 60 days after the date of the order and in accordance with the Plan of Reorganization and Combination Agreement. Future acquisitions of the Savings Bank's common stock,

(continued...)

There are two distinct rebuttable control determinations that are based on ownership of stock. An acquiror generally shall be determined, subject to rebuttal, to have acquired control of a savings association (or a savings and loan holding company[11]), if the acquiror directly or indirectly, or through one or more subsidiaries or transactions, or acting in concert with one or more persons or companies: (i) acquires more than ten percent of any class of voting stock of the savings association and is subject to any "control factor", or (ii) acquires more than 25 percent of any class of stock of the savings association and is subject to any "control factor."[12]

You have asserted that the Class B Common Stock held by the Company should not be considered to be Class A Common Stock (which is "voting stock")[13] because, among other things, the Class B Common Stock is not convertible while it is held by the Company.[14] You have asserted that the Company, therefore, does not hold more than ten percent of any class of the Savings Bank's voting stock, and that the Company, accordingly, is not subject to a rebuttable control determination with respect to the Savings Bank.

Regardless of your assertions regarding the regulatory treatment of the Class B Common Stock as voting stock as part of the Class A common stock, the Company's ownership of 100 percent of the Class B Common Stock exceeds the 25 percent threshold of section 574.4(b)(1)(ii). In addition, there are significant arguments in favor of treating the Class B Common Stock as the Class A Common Stock into which it is convertible upon sale by the

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[10](...continued)
therefore, would not be consistent with the terms of the FHLBB's approval of the acquisition, and would not be within the scope of section 574.3(c)(1)(v).

[11] The Control Regulations define "savings association" to include a savings and loan holding company. 12 C.F.R. § 574.2(p) (1994).

[12] 12 C.F.R. § 574.4(b)(1) (1994). The control factors are set forth at 12 C.F.R. § 574.4(c) (1994).

[13] 12 C.F.R. § 574.2(u)(3) (1994) provides that voting stock shall be deemed to include stock and other securities that, upon transfer or otherwise, are convertible into voting stock, or exercisable to acquire voting stock where the holder has the preponderant economic risk in the underlying voting stock.

[14] The Class B Common Stock would become Class A Common Stock upon sale by the Company.

Company.[15] Under those circumstances, the Company would be considered to have exceeded the ten percent threshold in section 574.4(b)(1)(i) with respect to the Class A Common Stock.

Nevertheless, it appears that the Company is not subject to a rebuttable control determination with respect to the Savings Bank because the Company has not acquired a control factor. You have represented that the Company is not one of the Savings Bank's two largest holders of a class of voting stock, and that representatives of the Company do not hold any management position with the Savings Bank or serve as members of the Savings Bank's board of directors. In addition, you represent that no other control factor is present. Accordingly, based on your representations, we conclude that the Company is not subject to a rebuttable control determination with respect to the Savings Bank.

Finally, we note that the Company's existing registration as a savings and loan holding company does not cause us to conclude that the Company controls the Savings Bank. Registration as a savings and loan holding company is not included as a factor in the HOLA or in the Control Regulations in determining whether a company controls a savings association. Moreover, the definition of "savings and loan holding company" under the HOLA and the Control Regulations is based on control of a savings association, rather than on registration as a savings and loan holding company.[16]

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[15] 50 Fed. Reg. 48686, 48692 (Nov. 26, 1985), where the FHLBB states:

> [T]he definition of 'voting stock' [now codified at 12 C.F.R. § 574.2(u)(3) (1994)] also includes securities that, upon transfer or any other event within the control of the holder, would become 'voting stock', unless the securities also require that they can only be transferred in a widely dispersed sale or public offering. This provision of the definition is necessary to address arrangements in which an institution issues to an acquiror a security which converts to 'voting stock' upon transfer to a third party.

[16] 12 U.S.C. § 1467a(a)(1)(D); 12 C.F.R. § 574.2(q) (1994). See Vickars-Henry Corp. v. Board of Governors of the Federal Reserve System, 629 F.2d 629 (9th Cir. 1980), which demonstrates that the status as a bank holding company for one regulatory purpose is not dispositive of its status for determination of control purposes.

Conclusion

Based on the facts presented, and the foregoing analysis, the Office of Chief Counsel would refrain from recommending an enforcement action against the Acquirors if they proceed with the proposed proxy or written consent solicitation without having first filed a holding company application or rebuttal of control submission, as applicable, pursuant to the section 10(e) of the HOLA and the Control Regulations.

In reaching the foregoing conclusions, we have relied on the factual representations contained in the materials submitted to us. 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 an enforcement action in this particular case. Accordingly, this letter may not be used as precedent by any other parties.

If you have any questions concerning the foregoing, please contact Gary Jeffers, Counsel (Banking and Finance), Business Transactions Division, at (202) 906-6457.

Sincerely,

Carolyn B. Lieberman
Chief Counsel

cc: Regional Director,
Regional Counsel,
West Regional Office

Ken Slosser,
Kevin Gong, Esq.,
Irvine Area Office

[redacted]