Office of Thrift Supervision
Department of the Treasury
1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6000

February 9, 1995

[redacted]

Re: Treatment of voting stock of non-subsidiary thrift organizations held by companies under common control
12 U.S.C. § 1467a(e)(1)(A)(iii)

Dear [redacted]:

This is in response to your letter of July 6, 1994, to Jearlene Miller of the Midwest Region of the Office of Thrift Supervision ("OTS"), and Kevin Corcoran, of the Business Transactions Division of the OTS, as supplemented by letters dated September 26, 1994, and November 29, 1994.

According to your correspondence, [redacted] ("Holding Company A"), a savings and loan holding company, and [redacted] (the "Partnership") (collectively, the "Commonly Controlled Companies"), both of which are controlled through various means by [redacted] (the "Controlling Shareholder"), together hold in excess of five percent of the voting shares of [redacted] ("Holding Company B"). You seek confirmation of your view that the combined holdings of the Commonly Controlled Companies in Holding Company B need not be attributed to Holding Company A for purposes of applying the prohibition against ownership by a savings and loan holding company of more than five percent of the voting shares of a savings and loan holding company not a subsidiary (the "5% prohibition") contained in section 10(e)(1)(A)(iii) of the Home Owners' Loan Act ("HOLA").[1]

We decline to confirm your opinion. Although the OTS has not previously addressed the subject, in administering provisions of

[1] 12 U.S.C. § 1467a(e)(1)(A)(iii) (Supp. V 1993).

the Bank Holding Company Act (the "BHC Act")[2] analogous to the 5% prohibition, the Federal Reserve Board (the "FRB") has established precedents that we regard as persuasive in assessing the legal consequences of the facts presented. As explained more fully below, in accordance with these precedents, we are of the opinion that companies under the common control of an individual, which act together as a group to acquire voting shares of a savings association or savings and loan holding company, constitute a "company" under the Savings and Loan Holding Company Act (the "SLHC Act").[3] In addition, if any company in such a group is a savings and loan holding company, the commonly controlled companies constitute a "savings and loan holding company" for purposese of the 5% prohibition. Thus, if the combined holdings of such a savings and loan holding company exceeded five percent of the voting shares of a non-subsidiary thrift organization, the 5% prohibition would apply and the holding company could properly be required to divest any interests in excess of five percent of the non-subsidiary thrift organization.

BACKGROUND

According to your correspondence, Holding Company B is a savings and loan holding company that acquired control of [redacted] (the "Association") through a holding company conversion in April, 1993. Holding Company A is a bank holding company and a multiple savings and loan holding company that controls [redacted], a Savings Bank, [redacted], and [redacted] of [redacted] (collectively, the "Thrift Subsidiaries"). The Partnership is a limited partnership that is not a savings and loan holding company.

The Controlling Shareholder is the chairman and chief executive officer of Holding Company A, which he controls through various family trusts. The Controlling Shareholder also controls the Partnership as the president and controlling shareholder of a company that is the general partner of, and, thus, in control of, the Partnership. You have supplied information indicating that the Commonly Controlled Companies, the Controlling Shareholder, and another company under his control, directly or indirectly own in various combinations minority interests in approximately forty (40) banking and thrift depository organizations other than the Association, Holding Company B and its Thrift Subsidiaries.

During 1993, Holding Company A and the Partnership purchased on the open market common stock that totaled 9.997% of the voting shares of Holding Company B, apportioned in the following manner:

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[2] Id. §§ 1841-1850.

[3] See note 13 infra.

Holding Company A -- 4.930%; the Partnership -- 5.067%. In the last quarter of 1993, Holding Company B repurchased some of its own stock, causing the combined holdings of Holding Company A and the Partnership in Holding Company B to rise to 10.294%. Subsequently, sales of Holding Company B's common stock by Holding Company A and the Partnership caused these companies' ownership of Holding Company B's common stock to decline to 5.519% at the end of July 1994, apportioned as follows: Holding Company A -- 4.991%; the Partnership -- 0.528%.

Upon learning of the repurchases that caused the Commonly Controlled Companies' combined ownership to exceed ten percent of Holding Company B's stock, Holding Company A and the Partnership attempted to comply with applicable OTS regulations by filing (1) an application pursuant to 12 C.F.R. § 563b.3(i)(3) for OTS approval to acquire directly or indirectly more than ten percent of the stock of a recently converted savings association and (2) a rebuttal of control submission pursuant 12 C.F.R. § 574.4(e) to rebut the regulatory presumption that the Commonly Controlled Companies had acquired control of Holding Company B. By making these filings, the Commonly Controlled Companies concede that they are acting in concert in acquiring the stock of Holding Company B.

Subsequent to the Commonly Controlled Companies' efforts to reduce their ownership to below ten percent of Holding Company B's voting shares, and in connection with the OTS review of the filings, the OTS Regional Office asked whether the combined stockholdings of the Commonly Controlled Companies in Holding Company B should be aggregated for purposes of applying the 5% prohibition to Holding Company A. As we understand the Regional Office's position, if Holding Company B's stock held by Holding Company A's commonly controlled sister company, the Partnership, is attributed to Holding Company A, Holding Company A would be in violation of the 5% prohibition, even though Holding Company A has reduced its direct holdings to below five percent of Holding Company B's stock.

Your letters have attempted to respond to the aggregation issue, but, since we believe the matter is appropriately resolved on a different basis, we will only summarize your position. You argue that the interests of the Commonly Controlled Companies in the voting shares of Holding Company B should not be aggregated and attributed to Holding Company A because (1) "acting in concert," the only method of acquisition that you maintain would provide a basis for aggregation, is not expressly mentioned in the 5% prohibition and should not be implied from other terms used in the provision and (2) aggregation would be contrary to policies followed by the FRB in administering a provision in the BHC Act

analogous to the 5% prohibition (the "BHC Act 5% restriction")[4] and a directive in the recently enacted Riegle Community Development and Regulatory Improvement Act of 1994 requiring banking agencies to adopt uniform interpretations of common regulatory or supervisory policies.[5]

You also argue that divestiture of Holding Company B's stock by Holding Company A, as recommended by the OTS Regional Office would be at odds with the way the FRB applies the BHC Act 5% restriction in cases where commonly controlled bank holding companies each acquire less than five percent of the stock of an unaffiliated holding company. For the reasons expressed below, we disagree with your arguments and conclusions.

DISCUSSION

In pertinent part, the 5% prohibition in section 10(e)(1)(A)(iii) of the HOLA states:

> (e) Acquisitions
>
> (1) IN GENERAL. It shall be unlawful for --
>
> (A) any savings and loan holding company directly or indirectly, or through one or more subsidiaries or through one or more transactions --
>
> * * * * * *
>
> (iii) to acquire by purchase or otherwise, or to retain more than 5 percent of the voting shares of a savings association not a subsidiary, or a savings and loan holding company not a subsidiary . . . .[6]

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[4] 12 U.S.C. § 1842(a)(3) (Supp. V 1993).

> It shall be unlawful, <u>except with the prior approval of the [FRB]</u> . . . for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank. . . . (emphasis added).

[5] Pub. L. No. 103-325, § 303, 108 Stat. 2160, 2215 (1994).

[6] 12 U.S.C. § 1467a(e)(1)(A)(iii) (Supp. V 1993). There are eight exceptions to the 5% prohibition, none of which are pertinent to the fact pattern you have presented. <u>See</u> 12 U.S.C. § 1467a(e)(1)(A)(iii)(I)-(VIII) (Supp. V 1993).

Essentially the same prohibition, including exceptions that are not here pertinent, is contained in the implementing regulation, Section 584.4(a) of the Regulations for Savings and Loan Holding Companies.[7]

The 5% prohibition was substituted for an absolute prohibition against a savings and loan holding company's acquisition of voting stock of a non-subsidiary thrift organization by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (the "FIRREA").[8] Section 407 of the FIRREA[9] repealed Title IV of the National Housing Act,[10] including the Savings and Loan Holding Company Amendments of 1967,[11] where the absolute prohibition formerly appeared.[12] Section 301 of the FIRREA[13] reenacted in new section 10 of the HOLA[14] an amended version of the SLHC Act, including the new 5% prohibition.[15]

As noted above, we disagree with the analysis that you have submitted because we believe that the policies and practices the FRB has developed to address situations where companies under the control of individuals act together to acquire interests in banks and bank holding companies provide useful guidance in interpreting the SLHC Act.

The BHC Act and the SLHC Act, although not identically worded, treat acquisitions of less-than-controlling interests in

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7 See 12 C.F.R. § 584.4(a) (1994).

8 Pub. L. No. 101-73, 103 Stat. 183 (1989).

9 103 Stat. 363.

10 12 U.S.C. § 1724 et seq. (1988) (repealed).

11 Id. § 1730a (repealed).

12 Id. § 1730a(e)(1)(A)(iii) (repealed).

13 103 Stat. 318-342. For ease of reference, section 10 of the HOLA, as added by the FIRREA, and its predecessor, repealed section 408 of the National Housing Act, will be referred to collectively as the Savings and Loan Holding Company Act (the "SLHC Act").

14 12 U.S.C. § 1467a (Supp. V 1993).

15 Id. § 1467a(e)(1)(A)(iii).

financial institutions similarly. Furthermore, neither statute uses the phrase "acting in concert" in this context.[16]

The main difference between the BHC Act and the SLHC Act concerns the consequences of a holding company's exceeding the applicable 5% limitation. Whereas the BHC Act 5% restriction authorizes the FRB to approve acquisitions of more than five percent of a bank's voting shares by a bank holding company, the 5% prohibition in the SLHC Act bars acquisitions in excess of the five percent ceiling and does not authorize the OTS to approve acquisitions above the ceiling.

In other words, where a savings and loan holding company would be flatly prohibited from acquiring a minority interest in excess of five percent of a non-subsidiary thrift's voting stock, a bank holding company would be required to apply for FRB approval to acquire an equivalent interest in a bank's shares. Otherwise, the two statutes are similar.[17]

Our review of the FRB precedents, however, has not been confined solely to examples of the application of the BHC Act 5% restriction. Because the FRB's approval authority essentially extends from acquisitions of minority interests in non-subsidiary banks (more than five percent) through outright acquisitions of control (25 percent or more), we also considered any FRB precedents where companies under the common control of an individual proposed acquiring a controlling interest in a bank.[18]

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[16] Compare, e.g., 12 U.S.C. § 1842(a)(3) with 12 U.S.C. § 1467a(e)(1)(A)(iii).

[17] The concept of "action in concert" is not explicitly mentioned in the BHC Act. As is the case with the SLHC Act, however, the concept of indirect ownership or control is mentioned. Compare 12 U.S.C. § 1841(a)(3) ("acquire direct or indirect ownership or control of any voting shares of any bank [resulting in ownership or control of] more than 5 per centum of the voting shares of such bank") with 12 U.S.C. § 1467a(e)(1)(A)(iii) ("directly or indirectly. . . acquire . . .more than 5 percent of the voting shares of a savings association not a subsidiary").

[18] The SLHC Act incorporates the concept of "action in concert" in the definition of "control." See 12 U.S.C. § 1467a(a)(2)(A). Thus, "action in concert" is a factor in acquisitions of control (but not necessarily acquisitions of voting shares) under the SLHC Act. On the other hand, the "control" definition in the BHC Act does not contain a reference to "action in concert." Because neither the BHC Act nor the SLHC Act explicitly uses the phrase "acting in concert" in the

(continued...)

While the OTS might lack authority to approve holding company acquisitions of minority interests in non-subsidiary thrifts, the considerations involved in deciding whether commonly controlled companies are required to apply for approval to acquire a controlling or non-controlling interest in a bank are the same. Thus, both types of FRB precedents are, in our view, pertinent.[19]

The FRB treats companies under the common control of an individual and acting together to achieve a common purpose collectively as a "company" as defined in the BHC Act.[20] If such a company consisted of one or more bank holding companies, it would be required to file an appropriate application for FRB approval of any proposed acquisition of more than five percent of the voting shares of a bank.[21] As an example of this policy, an individual, [redacted], made a tender offer to purchase 24% of the voting stock of [redacted] ([redacted]") through six bank holding companies that he controlled. None of the [redacted] holding companies, however, was going to purchase more than five percent of [redacted] shares. As the FRB later described the ensuing events,

> [redacted] filed a lawsuit against [redacted] in Federal district court to block the tender offer. [redacted] alleged, among other things, that consummation of the tender offer would violate the Bank Holding Company Act. In response to an Order from the United States District Court for the District of Wyoming, the [FRB] advised the court that the six companies, acting together as a single enterprise to achieve a common purpose, constituted a bank holding company under the

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[18](...continued)
pertinent section imposing acquisition restrictions, FRB precedents on such acquisitions are relevant to the questions you have presented.

[19] The FRB "has stated that the acquisition of less than a controlling interest in bank 'is not a normal acquisition' for a bank holding company." PAULINE B. HELLER ET AL., FEDERAL BANK HOLDING COMPANY LAW, § 3.03[5][c], at 3-138, n. 490 (1994) [hereinafter HELLER] (citing Sun Banks, Inc./Peoples Bank of Lakeland, 71 Fed. Res. Bull. 243 (1985) and Sun Trust Banks, Inc./Peoples Bank of Lakeland, 76 Fed. Res. Bull. 542 (1990). Nevertheless, in considering such acquisitions, the FRB uses the same statutory factors and legal standards applicable to acquisitions of controlling interests in the voting shares of banks. Id. § 3.03[5][c], at 3-139.

[20] See 12 U.S.C. § 1841(b).

[21] See, generally, HELLER, § 1.01.

> Act with its principal place of business in Nebraska and that section 3(d) of the Act (the prohibition against out-of-state bank acquisitions) precluded approval of the proposed acquisition in Wyoming.[22]

The FRB further described its reasoning in the [redacted] matter in another case where it stated that--

> the group of six [redacted] holding companies would be a bank holding company under the Act because in making the tender offer for [redacted], the [redacted] companies were acting as a group with a single purpose and at the direction and under the control of [redacted], rather than independently of one another as passive investors. The Board found that because of their common ownership and control exercised over them by [redacted], the companies were incapable of independent action, and they would together constitute a "company" under the Act with respect to their proposed acquisition of [redacted].[23]

Where three bank holding companies under the control of an individual each proposed to acquire five percent of the voting shares of a proposed bank holding company, the FRB's staff concluded that the acquiring bank holding companies "were 'acting in concert' to acquire 15 percent of the voting shares of the proposed bank holding company and, therefore, constituted a 'company' under the BHC [Act] and were required to apply to the [FRB] to acquire the 15 percent share."[24] A "company" can also consist entirely of individuals,[25] or a mixture of individuals and companies.[26]

The FRB has also found the existence of a bank holding company in a group in which no corporate component is a bank holding company under circumstances where a controlling individual

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[22] North Platte Corporation, 66 Fed. Res. Bull. 782, 784, n.11 (1980).

[23] Commerce Bank Corporation, 66 Fed. Res. Bull. 506, 507, n. 5. (1980).

[24] I Fed. Res. Reg. Serv. 4-426.2 (1992) (citing FRB Staff Op. of Aug 18, 1985).

[25] Id. 4-425 (group of six individuals owning stock in two banks and other nonbanking businesses under a nominee agreement held to be a "company" under the BHC Act) (citing FRB Staff Op. of Oct. 11, 1979).

[26] See Hudson Financial Associates/HUBCO, 72 Fed. Res. Bull. 150 (1986)

can manipulate the interests held by the controlled companies to evade the restrictions of the BHC Act. Thus, where two petroleum-related companies controlled by an individual, [redacted], were respectively proposing to acquire 24.9 percent and 23.1 percent (collectively 48 percent) of a bank holding company in which the controlling individual was also going to acquire a 23.1 percent interest, the FRB ruled that the controlled companies constituted a single "company" ineligible to make the acquisition under the BHC Act because of its impermissible non-banking activities.[27] In its Order, the FRB also observed:

> If the 48 percent of the shares of Applicant were held by one company controlled by [redacted], that company would be a bank holding company under the [BHC] Act, and the [FRB] could approve its application only if it agreed to divest its impermissible activities. The [FRB] believes that an individual, by arbitrarily dividing such an ownership interest between two organizations that he controls, should not be able automatically to escape supervision or to avoid the nonbanking provisions of the [BHC] Act.[28]

The FRB precedents discussed above are founded on the BHC Act's definition of "company" that refers to, among other things, "any corporation, partnership, business trust, association, or similar organization."[29] In our view, the definition of "company" in the SLHC Act, which covers "any corporation, partnership, trust, joint-stock company, or similar organization"[30] is sufficiently similar to justify using the FRB

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[27] Commerce Bank Corporation, supra note 24, at 506.

[28] Id. at 508, n. 7.

[29] 12 U.S.C. § 1841(b) (Supp. V 1993).

[30] Id. § 1467a(a)(1)(C). As an example of the commensurate breadth of the term "company" in OTS practice, the included term "similar organization," is defined in the regulations to mean--

> a combination of parties with the potential for or practical likelihood of continuing rather than temporary existence, where the parties thereto have knowingly and voluntarily associated for a common purpose pursuant to identifiable and binding relationships which govern the parties with respect to either:
>
> (1) The transferability and voting of any stock or other indicia of participation in another entity, or

(continued...)

precedents in the context of the SLHC Act. The BHC Act's definition is "expansive" and its use of the phrase "or similar organization" indicates "Congress' intent to include all business-related organizations. . . ."[31]

With reference to the FRB precedents, then, we are of the opinion that the facts in your case support a conclusion that the Commonly Controlled Companies are "acting as a group with a single purpose and at the direction and under the control of" the Controlling Shareholder.[32] Under the direction of the Controlling Shareholder, the Commonly Controlled Companies have acted together to acquire the voting stock of Holding B, attempted to achieve compliance with the 5% prohibition by selectively apportioning the total amount of Holding Company B's voting stock they acquired and made filings pursuant to 12 C.F.R. § 563b.3(i)(3) and 12 C.F.R. § 574.4(e) conceding that they were acting in concert to acquire Holding Company B's voting stock.

Under these circumstances, we regard the Commonly Controlled Companies as a "company" for purposes of the SLHC Act.[33] Since such a company would control[34] the Thrift Subsidiaries of Holding Company A, it would also be a "savings and loan holding company" as defined in the SLHC Act.[35] Accordingly, such company would be subject to the 5% prohibition, as it has acquired more than five percent of the voting shares of Holding Company B, which is not its subsidiary. Therefore, in our opinion, the company consisting of Holding Company A and the Partnership is required to divest any voting shares in excess of five percent of Holding Company B's voting shares.

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[30](...continued)

(2) Achievement of a common or shared objective, such as to collectively manage or control another entity.

12 C.F.R. § 574.2(r) (1994).

[31] First Nat. Bank of Blue Island v. Board of Governors, 802 F.2d 291, 294 (7th Cir. 1986).

[32] See Commerce Bank Corporation, supra note 24, at 507, n. 5.

[33] Our conclusion is not intended to impose additional registration or application requirements on the Commonly Controlled Companies.

[34] See 12 U.S.C. § 1467a(a)(2)(A) (Supp. V 1993).

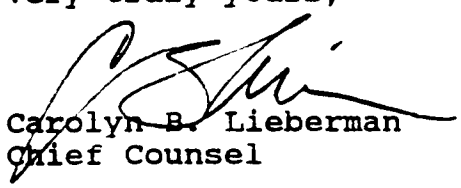
[35] See id. § 1467a(a)(1)(D).

In your correspondence you suggested that, if your positions on the applicability of the 5% prohibition were not confirmed, the OTS should still follow FRB policy and accept binding commitments from acquiring holding companies not to exercise control over institutions in which they acquire minority interests in lieu of divestiture of voting shares. As we have previously indicated, the OTS has no authority corresponding to the FRB's to approve acquisitions in excess of five percent of a non-subsidiary thrift organization. Moreover, the FRB Orders that you cite in support of your suggestion are inapposite. They merely show that the FRB typically requires binding commitments not to exercise control for all its approvals of bank holding company applications to acquire minority interests in non-subsidiary banks.[36]

In reaching the conclusions presented in this letter, we have relied on the factual representations contained in the materials presented to us. Our conclusions depend upon the accuracy and completeness of those representations. Any material change in circumstances from those set forth in your submissions could result in conclusions different from those expressed herein.

If you have any questions regarding the foregoing, please do not hesitate to contact Richard L. Little, Senior Counsel at (202) 906-6447.

Very truly yours,



Carolyn B. Lieberman
Chief Counsel

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[36] The FRB required these binding commitments not to exercise control in the following range of cases: SunTrust Banks, Inc., 76 Fed. Res. Bull. 542 (1990) (acquisition of up to 24.99% of the voting shares of a bank); First State Corporation, 76 Fed. Res. Bull. 376 (1990) (acquisition of up to 24.9% of the voting shares of a bank); First Banks, Inc., 80 Fed. Res. Bull. 34 (1994) (acquisition of up to 19.99% of the voting shares of a bank); Summit Bancorp, Inc., 77 Fed. Res. Bull. 952 (1991) (acquisition of up to 16.6% of the voting shares of a bank); United Counties Bancorporation, 75 Fed Res. Bull. 714 (1989) (acquisition of up to 9.9% of the voting shares of a bank) and Mansura Bancshares, Inc., 79 Fed. Res. Bull. 37 (1993) (acquisition of up to 9.7% of the voting shares of a bank).

Office of Thrift Supervision
Department of the Treasury
1700 G Street, N.W., Washington, D.C. 20552 • (202) 906-6000

March 28, 1995

Re: 12 U.S.C. § 1467a(c)(3)(B)

Dear

This is in response to your letters dated and and conversations with OTS staff, in which you request that we advise you that we will not recommend enforcement action under section 10(c) of the Home Owners' Loan Act if (the "Holding Company"), which was formed in connection with a corporate restructuring involving (the "Bank") and its two savings association affiliates, engages in activities other than those described in section 10(c)(2) of the HOLA.

On the basis of the facts presented in your request, and related materials, we would not recommend enforcement action should the Holding Company or its non-savings association subsidiaries engage in activities other than those set forth at section 10(c)(2) of the HOLA, provided that (i) the Holding Company merges ("FSB A") into ("FSB B"); (ii) FSB B and the Bank retain their status as qualified thrift lenders, and (iii) the Holding Company does not acquire any additional savings associations as separate subsidiaries in transactions that are not completed pursuant to one of the "Assistance Statutes", as defined below.

Further, we would not recommend enforcement action should the Holding Company or its non-savings association subsidiaries engage in new activities without complying with the notice and application requirements of 12 C.F.R. §§ 584.2-1(c) or 584.2-2(b), provided that the three conditions set forth above continue to be met.

Background

The Bank is a state stock savings bank, with approximately in assets.[1] The Bank's primary federal regulator is the Federal Deposit Insurance Corporation ("FDIC").

According to your correspondence, in , the Bank and its affiliated savings associations completed a corporate reorganization. Prior to the reorganization, the Bank was a multiple savings and loan holding company that controlled FSB A directly and FSB B indirectly. The Bank was not controlled by a holding company.

In the reorganization, the Holding Company, a newly-created corporation formed by the Bank, acquired all of the issued and outstanding common stock of the Bank. Also, FSB B became a first-tier subsidiary of the Holding Company, rather than a subsidiary of FSB A.

FSB A and FSB B are federal stock savings banks, with assets of and , respectively.

The Bank became a unitary savings and loan holding company in . Immediately after acquiring , the Bank acquired merging had been actively seeking a merger partner when the Bank submitted an unassisted proposal to acquire in combination with the acquisition of At the time of the acquisition. was larger than with assets of , compared to s assets of . Although was a healthy institution, was insolvent under Generally Accepted Accounting Principles at the time of the acquisition. with its liabilities exceeding its assets by

The Bank acquired both institutions for cash, with shareholders receiving a purchase price of share after arms-length negotiations between and the Bank. The acquisition was approved by the Federal Home Loan Bank Board ("FHLBB") on pursuant to section 408(e) of

1.

the National Housing Act ("NHA").[2] The combined entity, referred to herein as FSB A, operated under charter.

FSB B was formed as a result of the Bank's purchase of certain assets and assumption of certain liabilities of , from the Resolution Trust Corporation ("RTC") in Through FSB B, the Bank acquired branch offices of containing million in deposits.[3] The branches were awarded to the Bank by the RTC after a competitive bidding process. was being operated by the RTC as Conservator, and this transaction was part of its final resolution.

The Bank caused FSB A to form a new thrift subsidiary, FSB B, to effectuate the transaction. The acquisition was approved by the RTC pursuant to sections 13(c) and 13(k) of the Federal Deposit Insurance Act (the "FDIA").[4] As a result of the creation of FSB B as a separate savings association subsidiary, the Bank became a multiple savings and loan holding company.

Although it was a multiple savings and loan holding company, the Bank was not subject to the activities restrictions generally applicable to multiple savings and loan holding companies contained in sections 10(c)(1)(B) and (C) of the HOLA. Section 10(c)(3)(B) of the HOLA exempts any savings and loan holding company from the section 10(c)(1)(B) and 10(c)(1)(C) restrictions "if . . . all, or all but 1, of the savings association subsidiaries of such company were initially acquired by the company . . . pursuant to an acquisition under 13(c) or 13(k) of the [FDIA] . . . and . . . all of the savings association subsidiaries of such company are qualified thrift lenders . . . ."[5]

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2. 12 U.S.C. § 1730a(e) (1988) (repealed).

3. Upon the acquisition of the branch offices by FSB B, two of the branches were immediately transferred to the Bank. FSB B retained only one branch, with deposits of million.

4. 12 U.S.C. §§ 1823(c) and (k) (Supp. V 1993).

5. Id. § 1467a(c)(3)(B). The qualified thrift lender ("QTL") test is set forth at 12 U.S.C. § 1467a(m) (Supp. V 1993), and 12 C.F.R. §§ 563.50 and 563.51 (1994). The OTS has viewed the reference to section 13(c) of the FDIA, which is virtually identical to section 406(f) of the NHA (12 U.S.C. § 1729(f) (1988), as implicitly including a reference to former section 406(f) of the NHA. See Op. CASD (Dec. 12, 1989). Sections 13(c) and 13(k) of the FDIA, and former sections 406(f) and 408(m) of the NHA are referred to herein as the "Assistance Statutes." It is our understanding that

The Holding Company, upon its formation, became a multiple savings and loan holding company directly in control of the Bank and FSB B, and indirectly in control of FSB A. In order to avoid causing the Holding Company to become a bank holding company subject to the Bank Holding Company Act ("BHCA"),[6] the Bank elected, pursuant to section 10(l) of the HOLA,[7] to be treated as a "savings association" for purposes of section 10 of the HOLA (i.e., the HOLA's holding company provisions).[8]

Your correspondence requests that we advise you that we would not recommend that enforcement action be taken under section 10(c) of the HOLA if the Holding Company or its non-savings association subsidiaries engage in activities other than those set forth at section 10(c)(2) of the HOLA,[9] provided that FSB A merges into FSB B. The issue is whether the entity resulting after such merger would be a "subsidiar[y] ... initially acquired by the company ... pursuant to the [assisted] acquisition."[10]

Discussion

The scope of activities in which a given savings and loan holding company may engage depends on the number of savings institutions it controls, how those institutions were acquired, and the extent to which the operations of the holding company's subsidiary savings associations are concentrated in areas related to housing finance. The activities of unitary holding companies are essentially unrestricted, provided that all of their subsidiary savings associations meet the QTL test. Multiple savings and loan holding companies are not subject to activities restrictions if they qualify for the exception provided in section 10(c)(3)(B) of the HOLA (the "Exception"), which applies

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(Footnote 5 continued from previous page)
the Bank, FSB A and FSB B all satisfy the QTL test.

6. 12 U.S.C. §§ 1841 et seq.

7. 12 U.S.C. § 1467a(l) (Supp. V 1993).

8. State-chartered savings banks that elect to be treated as a "savings association" for purposes of section 10 of the HOLA are "insured institutions" under the BHCA, and therefore excepted from the BHCA's definition of the term "bank." See 12 U.S.C. §§ 1841(j)(3); 1841(c)(2)(B) (Supp. V 1993).

9. Sections 10(c)(1)(B) and (C) of the HOLA prohibit any nonexcepted savings and loan holding company from commencing or continuing "any business activity, other than activities prescribed in [section 10(c)(2) of the HOLA]."

10. 12 U.S.C. § 1467a(c)(3)(B)(i).

to savings and loan holding companies that acquired all, or all but one, of their subsidiary savings associations pursuant to one of the Assistance Statutes, provided that all of the savings association subsidiaries satisfy the QTL test.

The Exception grew out of a FHLBB practice of waiving the activities restrictions normally applicable to multiple savings and loan holding companies in the case of unitary savings and loan holding companies that acquired savings associations in assisted acquisitions, and held such associations as a separate subsidiary.[11] The FHLBB granted the waivers pursuant to former section 408(m) of the National Housing Act.[12] The purpose underlying the waivers was to encourage the acquisition of failed savings associations by unitary savings and loan holding companies.

This practice of granting waivers from the activities restrictions of the HOLA was addressed in the Competitive Equality Banking Act. 12 U.S.C.A. § 1730a(c)(3)(B) (1988); Pub. L. 100-86, § 104, 101 Stat. 552, 568 (1987). As originally enacted, the Exception read as follows:

> Notwithstanding paragraphs (4) and (6) of this subsection, the limitations contained in subparagraphs (B) and (C) of paragraph (1) shall not apply to any savings and loan holding company (or any subsidiary of such company), which controls -
>
> * * *
>
> (B) more than 1 insured institution, if -
>
> (i) all, or all but 1, of the insured institution subsidiaries of such company were acquired pursuant to an acquisition under subsection (m) of this section or section 1729(f) of this title. . . .

The House Conference Report explains that this provision meant that "nonbanking restrictions will not apply to a unitary savings and loan holding company that becomes a multiple savings and loan holding company by acquiring additional thrift institutions pursuant to section 406(f) and 408(m) of the National Housing Act, so long as all such additional institutions satisfy the [Qualified Thrift Lender] test." H.R. Conf. Rep. No. 100-261, 100th Cong., 1st Sess. 135 (1987), reprinted in 1987 U.S.C.C.A.N. 588, 603.

The Exception was amended by the Financial Institutions

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11. 12 U.S.C. § 1730a(c) (1988) (repealed).

12. 12 U.S.C. § 1730a(m) (1988) (repealed).

Reform, Recovery and Enforcement Act of 1989[13] to change cross-references to the appropriate statutory provisions for assistance and to add that the subsidiaries must be "initially" acquired in order to qualify for the Exception. There is no legislative history describing the reason for the addition.

There are no restrictions on the length of time the Exception applies and no bar to growth or shrinkage of the acquired institution or to the methods by which it may grow or shrink. The Exception simply provides that the savings association must be "initially acquired" under one of the Assistance Statutes and all of the savings association subsidiaries of the holding company must be qualified thrift lenders. One might conclude from the adjective "initially" that Congress contemplated that the institution could be transformed in some way over time and still be considered as having been "initially acquired" under one of the Assistance Statutes. Otherwise, the institution could be unreasonably limited in adapting to changing circumstances.

Under the facts described in your correspondence, and in view of the considerations set forth below, we would not recommend that enforcement action be taken if the Holding Company or its non-savings association subsidiaries engage in activities other than those described in section 10(c)(2) of the HOLA, subject to the conditions described below.

Prior to the reorganization, the Bank, a state-chartered savings bank whose primary federal regulator is the FDIC, was a multiple savings and loan holding company by virtue of its control of FSB A and FSB B. At that time, however, the Bank clearly was eligible for the Exception because it acquired FSB B pursuant to one of the Assistance Statutes. The Bank or its non-savings association subsidiaries had, in fact, engaged in various activities in which they would have been prohibited from engaging but for the Exception, including securities underwriting, certain insurance-related activities, and the operation of a travel agency.[14]

The Holding Company was formed in a simple corporate reorganization initiated by the Bank. The Holding Company did not exist prior to the reorganization. The reorganization did not result in the Bank, FSB A, or FSB B becoming affiliated with any depository institution with which it was not previously affiliated. The Bank is treated as a savings association solely for purposes of section 10 of the HOLA, by virtue of its election

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13. Pub. L. No. 101-73, 103 Stat. 183 (1989).

14. You have advised us that some of the Bank's insurance-related activities have been transferred to the Holding Company since the completion of the reorganization.

under section 10(l) of the HOLA.[15]

As previously noted, FSB A has a substantial supervisory component. FSB A was formed in a transaction in which the Bank acquired two savings associations, one in a nonsupervisory transaction, and the other in a supervisory conversion. The savings association acquired in the supervisory transaction had substantial assets, totaling million, or nearly 50 percent of the assets of the combined savings association.

Furthermore, the Bank, FSB A, and FSB B currently are well-capitalized institutions, and the savings association resulting from the merger of FSB A into FSB B would also be well-capitalized. There are no safety and soundness concerns presented by allowing the Bank to restructure as proposed without losing the benefit of the Exception.

Accordingly, on the basis of the particular facts presented in your request, and related materials, we would not recommend enforcement action should the Holding Company or its non-savings association subsidiaries engage in activities other than those set forth at section 10(c)(2) of the HOLA, provided that (i) the Holding Company merges FSB A into FSB B; (ii) FSB B and the Bank retain their status as qualified thrift lenders, and (iii) the Holding Company does not acquire any additional savings associations as separate subsidiaries[16] in transactions that are not completed pursuant to one of the Assistance Statutes.[17]

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15. The Bank is considered to be a savings association for purposes of section 10 of the HOLA. Accordingly, activities conducted by the Bank itself (as opposed to a non-savings association subsidiary of the Bank) are not subject to activities restrictions under section 10(c) of the HOLA, regardless of the applicability of the Exception. See 12 U.S.C. § 1467a(c)(1); Op. G.C., (Feb. 20, 1985).

16. This proviso does not preclude the Holding Company from holding an additional savings association as a subsidiary for a short period of time after the acquisition of such savings association until its merger into an existing subsidiary of the Holding Company is completed.

17. As noted above, the position taken herein is based in part on FSB B being the surviving association in the merger of FSB A and FSB B. Accordingly, in order for the no-action position taken herein to remain in effect, FSB B must be the surviving association in any future acquisitions of savings associations by the Holding Company not made pursuant to the Assistance Statutes, and involving the merger of FSB B and another savings association.

In addition, we would not recommend enforcement action should the Holding Company or its non-savings association subsidiaries engage in new activities, either de novo or by an acquisition of a going concern, without complying with the notice and application requirements of 12 C.F.R. §§ 584.2-1(c) or 584.2-2(b), provided that the Holding Company continues to comply with the conditions set forth in the preceding paragraph.

In reaching the foregoing conclusion, we have relied on the factual representations contained in the materials presented to us. Our conclusions depend upon the accuracy and completeness of those representations. Any material change in facts or circumstances from those set forth in your submission could result in conclusions different 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.

We trust that the foregoing has been responsive to your request. Any questions regarding this matter should be directed to Eric E. Berg, Counsel (Banking and Finance), Business Transactions Division, at (202)906-6464, or Kevin A. Corcoran, Acting Deputy Chief Counsel for Business Transactions, at (202)906-6962.

Sincerely,

Carolyn B. Lieberman
Chief Counsel

cc: Regional Director
Regional Counsel