

OFFICE OF THRIFT SUPERVISION

Approval of Minority Stock Issuance Application and Regulatory Waiver Requests

Order No.: 2009-26
Date: April 24, 2009
Docket No: 17936

Guaranty Bank, Milwaukee, Wisconsin (Association), a subsidiary of Guaranty Financial M.H.C. (MHC) and Guaranty Financial Corporation (Company), has filed an application with the Office of Thrift Supervision (OTS), pursuant to 12 U.S.C. § 1467a(o) and 12 C.F.R. § 575.7, regarding an issuance of preferred stock (Association Preferred Stock), as more fully described below. In connection with the application, the Company and the Association have requested that OTS waive 12 C.F.R. §§ 575.7(a)(3), 575.7(a)(4), 575.7(c)(2), 575.7(c)(6)(ii), 575.7(d), 575.8(a)(1), 575.8(a)(11), 575.8(a)(12), 575.8(a)(13), 575.8(a)(14), 575.8(a)(15), and 575.14(a).

Background

The Association is a federally chartered savings association, and is a wholly owned subsidiary of the Company. As of December 31, 2008, the Company had 1,867,431 outstanding shares of common stock. The MHC currently owns approximately 52 percent of the Company's outstanding common stock, and minority shareholders hold the remaining 48 percent of the Company's outstanding stock.

GB REIT Corporation (REIT) is currently a second-tier subsidiary of the Association. GBRC Holding Company (GBRC), a wholly owned subsidiary of the Association, owns all of the REIT's common stock. Currently, 50,120 shares of the REIT's Floating Rate Noncumulative Exchangeable Preferred Stock, Series A (REIT Preferred Stock) are outstanding. Of these shares, 50,000 are held by the MHC, 21 shares are held by GBRC, and 99 shares are held by current or former employees of the Association or their heirs.

The Association's charter provides that the Association's primary regulator, under certain circumstances, has the right to direct the exchange of all the outstanding shares of REIT Preferred Stock for a similar series of the Association's preferred stock (Exchange). The REIT's charter, similarly, provides for the Exchange. Further, the Association's charter provides that in the event OTS directs that the Exchange occur, each holder of the REIT Preferred Stock must unconditionally surrender the REIT Preferred Stock in exchange for Association Preferred Stock.

The Association has filed the subject application, and has requested the relevant waivers, in contemplation of the possibility that OTS may direct the Exchange. After any such Exchange, the MHC would hold 50,000 shares of the Association Preferred Stock and current or former employees of the Association or their heirs would hold the remaining 99 shares. The 21 shares of the Association Preferred Stock that would otherwise be held by GBRC will be cancelled.

Minority Stock Issuance Application

OTS's Mutual Holding Company regulations (MHC Regulations), at 12 C.F.R. § 575.7(a), provide that no savings association subsidiary of a mutual holding company may issue stock to persons other than its mutual holding company parent unless the association obtains advance approval of each such issuance from OTS and the issuance complies with the criteria for approval set forth in 12 C.F.R. §§ 575.7 and 575.8.

Specifically, (i) the proposed issuance must be made pursuant to a Stock Issuance Plan (SIP) that meets the requirements of section 575.8, (ii) the SIP must be consistent with the charter of the association, (iii) the SIP must provide the association with fully sufficient capital and not be inequitable or detrimental to the association or the mutual holding company, or to the members of the mutual holding company, (iv) the price range of the stock must be reasonable, (v) the mutual holding company must hold more than 50 percent of the association's outstanding common stock after the transaction, (vi) the association must furnish all information required by the OTS, (vii) the proposed stock issuance must meet the convenience and needs standards set forth in the mutual to stock conversion regulations at 12 C.F.R. § 563b.200(c), and (viii) the proposed issuance must comply with all other applicable laws and regulations.

The Association's SIP meets the requirements of § 575.8, except for the provisions for which the Association has requested a waiver. The SIP provides that (i) the MHC would hold more than 50 percent of the Company's common stock after completion of the issuance; (ii) the acquisition limitations specified in 12 C.F.R. §§ 575.8(a)(3)-(a)(9) are inapplicable because the stock issuance does not contemplate issuances to any stock benefit plans; (iii) the stock issuance would comply with applicable securities laws¹; and (iv) the Association's SIP conforms to the requirements of §§ 575.8(a)(16)-(a)(22).

The SIP is consistent with the Association's charter, which has authorized the number of shares that would be outstanding after the issuance, and does not require a shareholder vote for the issuance. Moreover, the Association's charter authorizes OTS to direct that the Exchange occur. The issuance would not appear to be inequitable to the Association, the Company, or to the MHC's members. The Association has furnished all information requested by OTS.

¹ Based on the relevant facts, it does not appear that the Exchange would implicate OTS's securities offering regulations set forth at 12 C.F.R. Part 563g.

In light of the Association's "Satisfactory" Community Reinvestment Act rating, its compliance activities, and the fact that the Association contemplates no change in its products or services as a result of any Exchange, the application meets the convenience and needs standard set forth at 12 C.F.R. § 563b.200(c). Finally, we are aware of no information indicating that the application is inconsistent with any statute or regulation (other than provisions for which a waiver has been requested).

The Company has requested that OTS waive several provisions applicable to minority stock issuances, including 12 C.F.R. §§ 575.7(a)(3), 575.7(a)(4), 575.7(c)(2), 575.7(c)(6)(ii), 575.7(d), 575.8(a)(1), 575.8(a)(11), 575.8(a)(12), 575.8(a)(13), 575.8(a)(14), and 575.8(a)(15). The MHC Regulations provide that OTS may waive a provision of the regulations for good cause.² In addition, OTS regulations provide generally that the "Director may, for good cause and to the extent permitted by statute, waive the applicability of any provision of [Chapter V of 12 C.F.R.]."³

None of the provisions for which the Company has requested a waiver is mandated by statute. Therefore, the only issue regarding the waivers is whether "good cause" exists. The pertinent issue here is whether any of the requested waivers would, under the circumstances, be contrary to the purposes of the relevant regulation.

With respect to the requirements of §§ 575.8(a)(1) and (a)(11) and § 575.7(a)(4) that the Association issue stock at an aggregate price equal to the total *pro forma* market value of the stock, based upon an independent appraisal; the sales price of the shares of stock to be sold in the issuance be at a uniform price in accordance with § 575.7; and the proposed price or price range of the stock to be issued be reasonable, these provisions contemplate a transaction in which the consideration for the stock to be issued has not been predetermined by the Association's charter. The terms of the Exchange are mandated by the Association's charter.

With respect to certain securities-related requirements of §§ 575.8(a)(12) and (a)(13) which require certain registration and listing requirements, the requirements are intended to be triggered by public offerings of stock. The Exchange is not a public offering, the REIT Preferred Stock was issued pursuant to a private placement, and is not currently listed on a stock exchange. Moreover, the Association Preferred Stock will not be, and is not intended to be, readily transferable or marketable.

With respect to certain purchase and sale restrictions of §§ 575.8(a)(14) and (a)(15) imposed on insiders of the Association or their associates, the requirements are intended to be triggered by public offerings of stock. The Exchange is not a public offering, the REIT Preferred Stock was issued pursuant to a private placement, and is not currently listed on an exchange, and the Association Preferred Stock will not be readily transferable or marketable.

With respect to § 575.7(a)(3), the Exchange will cause the Association's

² 12 C.F.R. § 575.1(b) (2009).

³ 12 C.F.R. § 500.30(a) (2009).

regulatory capital to improve.

With respect to the § 575.7(c)(2) limit on the duration of an offering, this regulatory limit is determined with reference to the end of the subscription period. In the event OTS requires the Exchange to occur, there will be no subscription period, and, moreover, the Exchange will occur promptly in the event OTS directs the Association to complete the Exchange.

With respect to §§ 575.7(c)(6)(ii) and (d), which requires the SIP to comply with 12 C.F.R. Part 563b, any Exchange would result in the MHC owning almost all of the Association Preferred Stock (50,000 shares). In the event of an Exchange, parties other than the MHC will hold only 99 shares. OTS considers such holdings to be de minimis, and does not believe that the issuance, in a manner that is contrary to Part 563b, of such a small number of shares having such an immaterial value, raises the potential for selective enrichment of insiders that led OTS to require that stock issuances by mutual holding company subsidiaries conform to the procedures set forth in the Part 563b.⁴

Based on the above, we conclude that there is good cause to grant the waivers to the extent necessary to enable the Association and the REIT to engage in the Exchange if OTS directs the transaction to occur.

Waiver of 12 C.F.R. § 575.14(a)

Under 12 C.F.R. § 575.14(a), the Company must own all of the outstanding stock of the Association. While the Company will continue to own all of the Association's common stock, the Exchange will result in the MHC owning 50,000 shares of the Association Preferred Stock, and other individual and entities owning 99 shares of the Association Preferred Stock.

The restriction in § 575.14(a) is intended to ensure that there are not minority shareholders of both a subsidiary holding company and a savings association.⁵ OTS concludes that ownership of the 50,000 shares of Association Preferred Stock by the majority shareholder, the MHC, does not raise the concerns that the regulation was intended to address. In addition, OTS considers the ownership of the remaining 99 shares by parties other than the MHC and the Company to be de minimis, and does not believe such ownership raises the concerns underlying the regulation. Accordingly, OTS concludes that there is good cause to grant the requested waiver to the extent necessary to enable the Association and the REIT to engage in the Exchange if OTS directs the transaction to occur.

Conclusion

Based on the foregoing analysis, OTS finds that the application satisfies the applicable approval standards and that there is an adequate basis to grant the waiver

⁴ See, 58 FR 44105, at 44111-44112 (Aug. 19, 1993).

⁵ See, 62 FR 30778, at 30781 (Jun. 5, 1997).

requests. Accordingly, the application is hereby approved and the requested waivers are granted.

By order of the Director of the Office of Thrift Supervision, or his designee,
effective April 24, 2009.



Grovetta N. Gardineer
Managing Director
Corporate & International Activities