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 a 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]

---

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[8] (i.e., the HOLA's holding company provisions).[9]

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,[10] 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

---

(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

---

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

---

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(1) 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]

---

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