

OFFICE OF THRIFT SUPERVISION

Approval of Conversion of a State Savings Bank to a Federal Savings Bank, Holding Company Applications, Waiver Request and Related Filings

Order No.: 2002-18
Date: May 17, 2002
Docket Nos.: H-3829, H-3830, and 17936

Guaranty Bank, S.S.B., Milwaukee, Wisconsin (State Bank) has filed an application to convert from a Wisconsin-chartered savings bank to a federal savings bank, to be named Guaranty Bank (Savings Bank), pursuant to 12 C.F.R. § 552.2-6. Guaranty Financial M.H.C., the present state-chartered mutual holding company of the State Bank (State Holding Company), has filed several applications seeking approval of the steps of a multi-step transaction in which a federal mutual holding company, also named Guaranty Financial M.H.C. (Mutual Holding Company), will become the Savings Bank's mutual holding company. The application further requests approval of the formation of a federally chartered subsidiary holding company, to be named Guaranty Financial Corporation (Stock Holding Company), and the Stock Holding Company's acquisition of all of the outstanding stock of the Savings Bank. The Mutual Holding Company and the Stock Holding Company have requested approval under 12 U.S.C. § 1467a(e) and 12 C.F.R. §§ 574.3 and 575.14 to acquire the Savings Bank, and the parties have filed an application seeking Office of Thrift Supervision (OTS) approval of the merger of the Savings Bank with an interim federal savings association under 12 U.S.C. §§ 1815(d) and 1828(c), and 12 C.F.R. §§ 563.22 and 552.13. In addition, the Savings Bank has filed a notice with OTS, pursuant to 12 C.F.R. Part 559 and 12 C.F.R. § 575.11, for its ten subsidiaries to become operating subsidiaries (Notice).

The applicants have requested that OTS waive 12 C.F.R. § 563.33(a)(1)(ii) to permit three Levy family members to be directors of the Savings Bank. The applicants have also requested that OTS waive 12 C.F.R. § 575.10(a)(6)(ii) to permit the Mutual Holding Company and the Savings Bank to own securities issued by a second tier operating subsidiary, a real estate investment trust. The Levy family collectively controls approximately 23.2 percent of the outstanding shares of the State Bank and has not applied to increase their individual or collective holdings in the Stock Holding Company.

The Application

The State Bank proposes to convert directly to a federal savings bank. As described in greater detail in the various applications, the State Holding Company proposes to form an interim federal association, which will in turn organize the Stock Holding Company. The Stock Holding Company will then form a second interim federal

association. The first interim association will convert to a federal mutual holding company (the Mutual Holding Company), and the State Holding Company will then merge into the Mutual Holding Company. The second interim federal association will merge with the Savings Bank. Upon completion of the transactions, the Savings Bank will be a wholly owned subsidiary of the Stock Holding Company, and the Stock Holding Company will be a majority owned subsidiary of the Mutual Holding Company. The Savings Bank will pay certain dividends in the transaction to capitalize its mutual holding companies.

Conversion of the State Bank to a Federal Savings Bank

Section 552.2-6 of OTS regulations provides that, with OTS approval, any stock depository institution that is, or is eligible to become, a member of a Federal Home Loan Bank, may convert to a federal stock savings association, provided that the depository institution, at the time of conversion, has deposits insured by the Federal Deposit Insurance Corporation (FDIC); and the depository institution, in accomplishing the conversion, complies with all applicable statutes and regulations. The resulting federal savings association must comply within the time prescribed by OTS to the requirements of section 5(c) of the Home Owners' Loan Act (HOLA).

The proposed conversion of the State Bank conforms to the requirements of section 552.2-6. The State Bank is a state-chartered, Bank Insurance Fund (BIF)-insured savings bank, with membership in a Federal Home Loan Bank, and its assets conform to the section 5(c) requirements.

Section 5(e) of the HOLA provides that OTS may grant a federal savings association charter only under the circumstances set forth in sections 5(e)(1) through 5(e)(4) of the HOLA. OTS regulations include the same standards, with the additional requirement that OTS consider whether the association will promote credit for housing consistent with the safe and sound operation of a federal savings association. In addition, OTS Community Reinvestment Act (CRA) regulations provide that an applicant for a federal thrift charter must submit with its application a description of how it will meet its CRA objectives and that OTS may deny or condition approval of the application on CRA grounds.¹

With respect to managerial resources, the proposed officers and directors of the Savings Bank are the officers and directors of the State Bank. OTS is familiar with the management of the State Bank because they are essentially the same persons who held the management positions of the State Bank prior to its conversion in 1993 from a federal savings association to a state savings bank. In addition, OTS has considered the State Bank's supervisory history since the 1993 charter conversion, and materials submitted with the application. OTS concludes that the applicants' character and responsibility are consistent with approval.

¹ 12 C.F.R. § 563e.29(b) (2002).

As for the two standards regarding the necessity for the Savings Bank in the community, and undue injury to properly conducted existing local thrift and home financing institutions, the Savings Bank will be continuing the State Bank's current business activities. Accordingly, OTS concludes that there is a necessity in the community for the Savings Bank, and that the existence of the federal savings bank will not result in harm to existing institutions.

Based on the Savings Bank's business plan, historical data on the State Bank, the Savings Bank's proposed capital levels, and competence of management, OTS has concluded that there is a reasonable probability of the Savings Bank's usefulness and success.

Based on the Savings Bank's plans to engage in mortgage lending to a significant extent, as well as the Savings Bank's business plan and management experience, OTS concludes that the Savings Bank's role in providing credit for housing consistent with safe and sound operations of a federal association is consistent with approval.

OTS reviewed the Savings Bank's plan for compliance with the CRA and the results of the State Bank's most recent compliance examination. OTS received no comments objecting to the application on CRA grounds. Accordingly, OTS concludes that approval of the charter conversion is consistent with the CRA.

The Savings Bank's proposed charters and bylaws are consistent with the model charter and bylaws for a federal stock association.

Regulatory Waivers

The applicants have requested that OTS waive 12 C.F.R. § 563.33(a)(1)(ii) to permit three members of the same immediate family who are officers and directors of the State Bank to be directors of the Savings Bank. Section 563.33(a)(1)(ii) permits only two members of the same immediate family to be directors of a savings association. The Applicants have also requested that OTS waive 12 C.F.R. § 575.10(a)(6)(ii) to permit the Mutual Holding Company and the Savings Bank to own securities issued by a second tier operating subsidiary of the Savings Bank, a Real Estate Investment Trust (REIT). Section 575.10(a)(6)(ii) prohibits a mutual holding company from holding shares of an entity that is controlled directly or indirectly by the mutual holding company's savings association subsidiary.

OTS regulations, at 12 C.F.R. § 500.30(a), include a general waiver provision, which states that the "Director may, for good cause and to the extent permitted by statute, waive the applicability of any provision of this chapter." There is no statutory limitation or requirement that the board of directors be limited to only a certain number of family members. Based on the expertise of the family members, the length and nature of their

service to the State Bank, and the presence of several independent directors with significant experience on the State Bank's board of directors, OTS concludes that there is good cause to waive the regulation.

There is no statutory prohibition on mutual holding companies investing in an entity that is controlled directly or indirectly by the mutual holding company's savings association subsidiary. The prohibition is a regulatory requirement imposed for safety and soundness reasons.² Based on the terms of the REIT and other relevant circumstances pertaining to the REIT, and the Savings Bank's financial position, OTS concludes that the investment does not pose a significant safety and soundness concern for the Savings Bank. Therefore, OTS concludes that there is good cause to waive the regulation for the investment in the REIT.

Formation of Interim Savings Banks

The transaction requires OTS approval of the formation of two interim federal associations pursuant to 12 C.F.R. § 552.2-2. OTS must condition approval of an application to organize an interim federal stock savings association on approval of an application to merge the interim federal association, or upon OTS approval of the other transaction that the interim was designed to facilitate. In addition, OTS must consider the purpose for which the interim is organized, the form of the proposed transactions involving the association, and certain other enumerated factors.

The subject application contemplates the merger of one of the interim associations into the Savings Bank, and the conversion of the other into a federal mutual holding company. It is contemplated that OTS will act on the notice at the same time that it acts on the applications to form the interim associations. Accordingly, the proposed formation of Interim 1 and Interim 2 is consistent with 12 C.F.R. § 552.2-2.

Establishment of the Mutual Holding Company and the Stock Holding Company

The proposed structure of the transaction, including but not limited to the formation of the Mutual Holding Company and the Stock Holding Company, and the merger of the State Holding Company into the Mutual Holding Company, is consistent with the MHC regulations. Interim federal savings associations routinely have been authorized to convert to Mutual Holding Companies. The merger of the State Holding Company into the Mutual Holding Company is contemplated under 12 C.F.R. § 575.10(a)(3). The Mutual Holding Company and the Stock Holding Company will have a federal charter, as required by the OTS Mutual Holding Company regulations. The Mutual Holding Company's charter is consistent with 12 C.F.R. § 575.9 and the Stock Holding Company's proposed federal charter is consistent with 12 C.F.R. § 575.14(c). The Stock Holding Company proposes to hold all of the common stock of the Savings Bank, as required under 12 C.F.R. § 575.14(a).

² See, 56 FR 1126, 1134 (Jan. 11, 1991).

Holding Company Applications

In the proposed transaction, the State Holding Company would acquire two interim federal associations, and the Mutual Holding Company and the Stock Holding Company would acquire one of the interim associations, as well as the Savings Bank. Accordingly, the transaction requires OTS approval under Section 10(e) of the HOLA, and the OTS regulations thereunder (Control Regulations).

Section 10(e)(2) and the Control Regulations provide that in reviewing the proposed acquisition of two savings associations by a company, such as the State Holding Company, the Mutual Holding Company, and the Stock Holding Company, OTS must consider the managerial and financial resources and future prospects of the company and associations involved, the effect of the acquisition on the associations, the insurance risk to the Savings Association Insurance Fund (SAIF) or the BIF, and the convenience and needs of the community to be served.³ OTS also must consider the impact of any acquisition on competition. Further, 12 C.F.R. § 563e.29 requires that OTS take into account assessments under the CRA when approving holding company acquisitions.

As for managerial resources, for the reasons set forth in the discussion of the State Bank's charter conversion, OTS concludes that the Savings Bank's managerial resources are consistent with approval. With respect to the Savings Bank and the Stock Holding Company, the boards of directors will consist of the present directors of the State Bank. Five of the present independent directors of the State Bank will become the directors of the Mutual Holding Company. The executive officers of the Savings Bank, the Stock Holding Company and the Mutual Holding Company will consist of the executive officers of the State Bank. The trustees of the family trusts are two family members who are officers of the State Bank, an independent director of the State Bank, and one other individual. OTS concludes that the managerial resources of the holding company applicants, including the family trusts, are consistent with approval.

As for financial resources, the State Bank's core, tier 1 risk-based, and total risk-based capital ratios were 6.27 percent, 9.58 percent, and 10.29 percent, respectively, as of December 31, 2001. Although the Savings Bank proposes to pay certain dividends to the Stock Holding Company in connection with the transaction, the Savings Bank will be well-capitalized upon consummation of the transaction. The only activities of the Mutual Holding Company will be its majority ownership of the stock of the Stock Holding Company, and ownership of certain securities issued by the REIT, and the only activity of the Stock Holding Company will be ownership of the stock of the Savings Bank. The family trusts hold only stock of the State Bank, which will be exchanged for stock of the Stock Holding Company in the proposed transaction. Accordingly, OTS concludes that the financial resources of the applicants, the family trusts, and the Savings Bank are consistent with approval. In addition, OTS does not object to the Savings Bank's proposed dividend to capitalize the Stock Holding Company.

³ 12 U.S.C. § 1467a(e)(2); 12 C.F.R. § 574.7 (2002).

After considering the financial and managerial resources of the applicants and the Savings Bank, and the Savings Bank's business plan, OTS concludes that the future prospects of the applicants and the Savings Bank, and risks to the BIF and the SAIF, are consistent with approval.

The proposed acquisition will not cause the Savings Bank to become affiliated with any other operating depository institution. Accordingly, the transaction is not objectionable on competitive grounds.

As for the CRA, and convenience and needs of the community, the State Bank currently has a Satisfactory CRA rating. The Mutual Holding Company and the Stock Holding Company, as newly formed entities, have no CRA experience. OTS has received no comments objecting to the proposed transaction. Accordingly, OTS concludes that approval of the holding company acquisitions is consistent with the CRA and with the convenience and needs standard.

Bank Merger Act Application

The proposed merger of Interim 2 into the Savings Bank requires OTS approval under section 12 U.S.C. §§ 1828(c) and 1815(d) (sections 18(c) and 5(d) of the Federal Deposit Insurance Act (FDIA)), and 12 C.F.R. §§ 552.13 and 563.22(a). The approval standards for the merger are similar to the approval standards set forth under section 10(e) of the HOLA, which have been discussed previously.⁴ The OTS merger regulations include certain additional approval standards, set forth at 12 C.F.R. § 563.22(d)(1). Further, section 5(d)(3) of the FDIA sets forth certain requirements.⁵ The CRA requires that OTS consider the CRA record of the State Bank in evaluating the merger application.

The merging interim association would be a shell entity. Accordingly, the merger would have no material effect on the Savings Bank's managerial and financial resources and future prospects, and no effect on competition. Because the State Bank has a Satisfactory CRA rating and does not propose to reduce its service, and because OTS has received no comments objecting to the transaction, OTS concludes that the merger application satisfies the convenience and needs and CRA criteria. As the proposed transaction does not involve any material alteration of the interests of savings account holders, creditors and stockholders of the State Bank, OTS concludes that the transaction is fair and equitable. The proposed transaction, including any agreements, was disclosed to the State Bank's savings account holders and shareholders. OTS concludes that the compensation to officers and directors is consistent with the regulations. The applicants have supplied all information required by OTS, and the Savings Bank will be well-capitalized after the merger.

⁴ 12 U.S.C. § 1828(c)(5), and 12 C.F.R. § 563.22(d) (2002).

⁵ 12 U.S.C. § 1815(d)(3)(E)(i) and (iii).

Operating Subsidiaries

A federal savings association generally may invest in an operating subsidiary if: (1) the subsidiary engages only in activities permissible for federal associations to engage in directly; (2) the federal association owns, directly or indirectly, more than 50 percent of the voting shares of the operating subsidiary; and (3) no person or entity other than the federal association exercises operating control over the operating subsidiary.⁶ In addition, OTS may, at any time, limit a savings association's investment in operating subsidiaries, or may limit or refuse to permit any activities of an operating subsidiary, for supervisory, legal, or safety and soundness reasons.

The State Bank's subsidiaries engage in activities that are permissible for a federal savings association. The Savings Bank will own, directly or indirectly, more than 50 percent of the voting shares of each proposed operating subsidiary. In addition, no party other than the Savings Bank will exercise effective control over any of the proposed operating subsidiaries. Two of the operating subsidiaries will be limited liability companies. OTS has previously stated that an operating subsidiary may be a limited liability company.⁷ With regard to supervisory considerations, OTS has no supervisory objections to the establishment of the operating subsidiaries. In addition, the subsidiaries are engaged in activities that are permissible for non-savings association subsidiaries of a mutual holding company under 12 C.F.R. §§ 575.11(a) and 575.10(a)(6)(i). OTS has concluded that savings association investments of the type contemplated by the Savings Bank (other than the REIT investment for which a waiver has been discussed elsewhere), where the Mutual Holding Company and the Stock Holding Company will not hold interests in the subsidiaries other than through the Savings Bank, are permitted under 12 C.F.R. § 575.10(a)(6)(ii).

Conclusions

Based on the foregoing analysis, OTS concludes that each of the foregoing applications, and the waiver requests, meets the applicable approval criteria. Accordingly, the foregoing applications are hereby approved and the waiver requests granted, provided that the following conditions are complied with in a manner satisfactory to the Midwest Regional Director, or his designee (Regional Director):

1. The State Bank, the Mutual Holding Company and the Stock Holding Company must receive all required regulatory and shareholder approvals prior to consummation of the reorganization and acquisition with copies of all such approvals supplied to the Regional Director;
2. The proposed transactions must be consummated no sooner than June 1, 2002, and no later than 120 calendar days after the date of this approval letter;

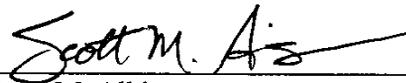
⁶ 12 C.F.R. § 559.2, 559.3(c)(1), and (e)(1) (2002).

⁷ See, for example, OTS Order No. 2001-71 (Nov. 19, 2001).

3. On the business day prior to the date of consummation of the proposed transactions, the chief financial officers of the State Holding Company and the State Bank must certify in writing to the Regional Director that no material adverse events or material adverse changes have occurred with respect to the financial condition or operations of the State Holding Company, or the State Bank, respectively, since the date of the financial statements submitted with the applications. If additional information having a material adverse bearing on any feature of the applications is brought to the attention of the State Holding Company, the State Bank, or OTS since the date of the financial statements submitted with the applications, the transaction must not be consummated unless the information is presented to the Regional Director, and the Regional Director provides written non-objection to consummation of the transaction;
4. Upon completion of the organization of the interim federal savings associations, the board of directors of the interim federal savings associations, the Mutual Holding Company, the Stock Holding Company, and the Savings Bank must ratify the reorganization; and
5. No later than five calendar days from the date of consummation of the reorganization and acquisition, the Mutual Holding Company, the Stock Holding Company, and the Savings Bank must file with the Regional Director a certification by legal counsel stating the effective date of the reorganization and acquisition, the exact number of shares of stock of the Savings Bank acquired by the Stock Holding Company, the exact number of shares of the Stock Holding Company acquired by the Mutual Holding Company, that the interim federal savings associations did not open for business, and that the reorganization was consummated in accordance with all applicable laws and regulations, the applications, the Agreement and Plan of Reorganization, all representations made by the State Bank and its counsel in connection with OTS' review of the proposed transactions, and this Order.

Any time period set forth herein may be extended for up to 120 calendar days, for good cause, by the Regional Director.

By order of the Director of the Office of Thrift Supervision, or his designee,
effective May 17, 2002.



Scott M. Albinson
Managing Director
Office of Supervision