

OFFICE OF THRIFT SUPERVISION

Approval of Application to Amend Bylaws

Order No.: 2005-13
Date: March 17, 2005
OTS No. H-3943

ASB Holding Company, Bloomfield, New Jersey (Applicant), a mid-tier federal mutual holding company that holds all of the common stock of American Savings Bank of New Jersey, Bloomfield, New Jersey, OTS No. 05639, seeks the Office of Thrift Supervision's (OTS) permission to adopt a bylaw amendment. Specifically, the Applicant seeks permission to adopt a bylaw that would prohibit a person from serving on the Applicant's board of directors or nominating anyone to serve on such board if such person: (1) is under indictment for or has ever been convicted of a felony involving dishonesty or breach of trust; (2) has been subjected to a cease and desist order by a banking agency for conduct involving dishonesty or breach of trust; or (3) has been found by a regulatory agency or court to have breached a fiduciary duty involving personal profit or committed a willful violation of any law, rule or regulation governing banking, securities, commodities or insurance, or any cease and desist order issued by a banking, securities, commodities or insurance regulator.

The Home Owners' Loan Act (HOLA) authorizes OTS to regulate mutual holding companies but does not require any specific mutual holding company bylaws.¹ OTS' regulations provide that the bylaw rules and regulations for federal stock savings associations (12 C.F.R. Part 552) shall apply to the bylaws of subsidiary mutual holding companies.² OTS' regulations do not provide for a bylaw of the type the Applicant has proposed. However, OTS has preapproved an optional bylaw provision that is similar to the Applicant's proposal with two exceptions: (1) the optional bylaw limits the exclusion of persons subject to cease and desist orders to ten years from the date the order is entered; and (2) the optional bylaw does not prohibit a person from nominating other persons for the board of directors.

OTS' bylaw regulations do not provide any standards for consideration of bylaw amendments. Therefore, OTS may exercise its discretion in reviewing the proposed bylaw amendment.

As OTS noted in preapproving the first optional bylaw, "trust is fundamental to the banking industry and the lack of trust in the managers of institutions will adversely affect their businesses." 66 Fed. Reg. 15017, 15019 (March 15, 2001). Here, the Applicant is concerned about the same conduct by individuals that led OTS to preapprove the optional bylaw.

¹ See 12 U.S.C. § 1467a(o)(7).

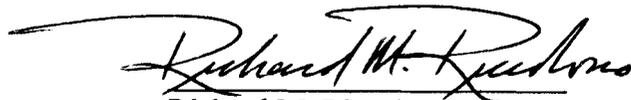
² See 12 C.F.R. § 575.14(c)(3) (2004).

OTS concludes that the fact that the proposed bylaw, unlike the preapproved optional bylaw, does not limit the effect of a cease and desist order to a ten-year period does not override the interest of a federal savings association, or subsidiary mutual holding company, in ensuring that its board members have the necessary character and responsibility to conduct a safe and sound operation and in ensuring that its reputation is uncompromised. While a ten-year limit may be reasonable, OTS recognizes that any attempt to formulate a "bright-line" test to determine when an individual's integrity is consistent with holding a director position is fraught with difficulties. OTS believes it is appropriate to enable a federal savings association or federally chartered mutual holding company, which would directly bear the consequences of any misconduct by a director or any reputational risk associated with having such a person as a director, to have flexibility regarding the standards it utilizes to ensure that directors will not negatively affect the association or mutual holding company.

With respect to the provision regarding nominations by such individuals, OTS recognizes that otherwise ineligible individuals would not choose their nominees at random. Rather, such individuals are typically chosen, at a minimum, because the ineligible individual believes that the nominee will act in the manner the ineligible individual desires. Such a connection, without more, may not engender a significant safety and soundness risk for a mutual holding company or its subsidiary savings association. Accordingly, OTS did not include a prohibition on nominating otherwise qualified candidates in the preapproved optional bylaw. However, a mutual holding company or savings association must, in the first instance, make its own judgment concerning its reputational risks. Moreover, it does not appear that the proposed bylaw is harmful to the Applicant. If an ineligible stockholder identifies someone who is qualified to serve on the Applicant's board of directors, some one other than the ineligible person may nominate that candidate and, if elected, the candidate may serve on the board. Thus, worthy candidates will not necessarily be excluded just because an ineligible individual first identified them. Therefore, OTS believes it is appropriate to enable the Applicant to address the preclusion of ineligible persons from nominating others in an integrity bylaw provision.

For the reasons stated, OTS concludes that the proposed bylaw is an appropriate exercise of discretion by a federal savings association or federally chartered mutual holding company. Therefore, the application to amend the Applicant's bylaws is approved.

By order of the Director of the Office of Thrift Supervision, or his designee, effective March/7, 2005.



Richard M. Riccobono
Deputy Director