

**Office of Thrift Supervision Docket No. 2001-69: Notice of Proposed Rulemaking
Authority for Certain Savings and Loan Holding Companies to Engage in Financial
Activities**

Notes of meeting held with the American Bankers Association on November 26, 2001, noon to 1:00 p.m. at the ABA office, 1120 Connecticut Ave., NW, Washington, DC

OTS:

Scott M. Albinson, Managing Director, Supervision
Donna M. Deale, Manager, Affiliates & Holding Company Supervision
Sally Warner Watts, Senior Attorney, Regulations & Legislation Division

ABA:

C. Dawn Causey, Director, Financial Institution Affairs & Counsel, ABA
Paul Smith, Senior Counsel, Regulatory and Trust Affairs, ABA
Lawrence D. Kaplan, Sidley Austin Brown & Wood
Marc P. Levy, Holland & Knight LLP
Dwight C. Smith III, Counsel, Alston & Bird LLP
Nancy Stiles, Silver Freedman LLP
Christopher Willard, E*Trade

Ms. Causey welcomed everyone to the ABA. The purpose of the meeting was to discuss questions that have arisen concerning the November 8, 2001, proposed rule. Ms. Causey noted that there was particular interest in the deference shown to the Federal Reserve Board (FRB) and the conditions it imposes on activities authorized for financial holding companies (FHCs). Ms. Causey turned to Mr. Albinson to give some of the background concerning the rulemaking.

Mr. Albinson stated that there had been considerable internal discussion about how to implement the new activities authorized under section 4(k) of the Bank Holding Company Act (BHCA), as added by the Gramm-Leach-Bliley Act (GLBA). OTS wanted to make it clear that savings and loan holding companies (SLHCs) could engage in the new activities, recognizing that FRB would be issuing guidance also. The goal was to create an efficient process that provided a level playing field for SLHCs. OTS decided it was most efficient to start with FRB's conclusions. The rule would allow OTS to exercise its own judgment to change the FRB conditions if appropriate, but the industry would be able to engage in financial activities as soon as FRB approves them. Mr. Albinson anticipated a high degree of comfort with the FRB actions.

Turning to questions, Ms. Causey asked whether the OTS would apply the conditions imposed by FRB. Mr. Albinson responded that they would apply, but OTS could take a fresh look at the appropriateness of the conditions if an SLHC asked to be exempted from the conditions. Ms. Watts added that the rule provides for a case-by-case approval for any complementary activity.

Mr. Levy asked about OTS's expectation of working with FRB. Mr. Albinson indicated that OTS would like to strengthen its communications with FRB and be an active participant in FRB's development of policy on permissible activities.

Mr. Willard thanked the OTS for being willing to take a look at the appropriateness of conditions to assure a level playing field for SLHCs. He encouraged OTS to remain mindful of the uniqueness of SLHCs and potential competitive disadvantage issues.

Mr. Dwight Smith asked what process would be followed if OTS's position is different with respect to permissibility of an activity from FRB's position. Mr. Smith suggested that the issue of real estate brokerage was an activity that OTS has already ruled on (permissible), but FRB is still considering. He asked whether OTS would allow such an activity for a savings association subsidiary, but not in a holding company structure. Ms. Deale noted that the authority for activities previously recognized for multiple holding companies still remains and may address some real estate related activities. She was not sure whether real estate brokerage activities would be included in the authorized activities. In response to a question from Mr. Paul Smith, Mr. Albinson stated that OTS did not forward an opinion on the issue of real estate brokerage to FRB during the comment period on the FRB proposed rule.

Ms. Stiles asked whether OTS plans to change the holding company reporting form, H-(b)11. Ms. Deale stated that the OTS was beginning to conduct a zero-based review of the form, which hasn't been substantially revised for roughly ten years. Ms. Deale indicated that OTS will reconsider the H-(b)11 along with the PERK (pre-examination response kit) and the new information collected in Schedule HC of the TFR (Thrift Financial Report, submitted quarterly).

Mr. Kaplan asked whether the activities authorized in the rule affect OTS's interpretation of section 11 of HOLA. Ms. Deale and Ms. Watts stated that the agency was unable to make that leap at this time. Mr. Kaplan also questioned whether an SLHC could obtain authority to conduct a new activity first, rather than wait for an FRB-supervised institution to receive permission (can the SLHC lead, not just follow?). Mr. Albinson stated that FRB and Treasury are the statutory decision makers on financial activities permitted under GLBA. However, an SLHC could come to the OTS and OTS could assist in obtaining FRB and Treasury approval.

Ms. Causey expressed a concern about possible conflicting messages sent by footnotes 11 and 12 of the rule's preamble. She stated that footnote 11 seems to provide latitude to SLHCs with reference to FRB restrictions, while footnote 12 seems to provide little room for SLHCs to deviate from FRB requirements. Mr. Albinson explained that the example in footnote 12, merchant banking, was a situation where FRB had imposed certain limitations on the activity based on safety and soundness concerns. FRB had placed a limitation on activities as a percentage of holding company capital. The terminology used for FHCs (Tier 1 capital) did not work for SLHCs, so OTS looked for a reasonable equivalent term (GAAP-consolidated capital). There was no intention in footnote 12 to impose a capital requirement on SLHCs. Ms. Causey asked a pointed question: "so this rule does not attempt to establish a capital rule for holding companies?" Mr. Albinson responded: "absolutely not."

Ms. Stiles noted that traditionally OTS has taken the position that the reference in section 10(c)(2) of HOLA to activities approved under section 4(c) of BHCA refers to section 4(c)(8). Is

that still the case? Ms. Watts responded that OTS has issued no opinion interpreting that provision differently.

Mr. Dwight Smith asked whether the FRB requirement for an FHC to have a securities affiliate or insurance affiliate in order to engage in merchant banking activities would apply to an SLHC. Ms. Deale stated that as currently drafted, the proposed rule would require compliance with that FRB condition. Mr. Albinson said that if an SLHC wanted to engage in such an activity without having such an affiliate, it could petition OTS for a deviation from that FRB condition, using the proposed rule's three criteria.

Mr. Kaplan noted that in many cases, FRB imposes restrictions through the use of commitments contained in correspondence. These are not public. He questioned whether OTS would have access to the commitments. Mr. Albinson stated that the agency will work with FRB, but acknowledged that there would be challenges.

Mr. Dwight Smith questioned whether it would be wise for an SLHC to consult with OTS in advance of engaging in an activity to make sure that the SLHC had appropriate authority. Mr. Albinson complimented the industry for the increased communications with OTS about holding company activities. Ms. Deale indicated that the rule's intent was to impose on SLHCs the conditions FRB imposes on FHCs in a rule or order.

Ms. Causey suggested that because of the competitive issue, knowledge about the conditions FRB imposes might be limited. This may be particularly true with complementary activities.

Ms. Stiles asked whether OTS is extending the comment period on this rule beyond the 30 days provided. Mr. Albinson said that OTS is still considering the request submitted by America's Community Bankers. She asked what an SLHC should do before a final rule is issued. Until the rule is finalized, Mr. Albinson indicated the SLHC should contact OTS, starting with the regional office.

Ms. Causey asked if there is a timeframe for revision of the H-(b)11. Mr. Albinson said that project has not been assigned to anyone yet, so no. He restated that the H-(b)11 update will be done as part of a comprehensive review of the PERK and other information filed with OTS. In response to a question from Mr. Kaplan about applicability of the PERK, Mr. Albinson said it would apply to all SLHCs, not just nonexempts, and that the OTS goal is to develop one standard PERK for use nationwide.

Mr. Willard indicated satisfaction that OTS would look at activities on a case-by-case basis. He said that innovators will want to be able to propose activities that may not already have been approved by FRB and Treasury.

The discussion concluded with a brief discussion of another unrelated subject. Ms. Causey thanked the OTS participants for their time.