LAW OFFICES
SILVER, FREEDMAN & TAFF, L.L.P.
A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
1100 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3934
(202) 414-6100
WWW.SFTLAW.COM

SIDNEY J. SILVER, P.C.
ROBERT L. FREEDMAN, P.C.
BARRY P. TAFF, P.C.
JAMES S. FLEISCHER, P.C.
JEFFREY M. WERTHAN, P.C.
KIP A. WEISSMAN, P.C.
MARTIN L. MEYROWITZ, P.C.
RICHARD S. GARABEDIAN, P.C.
DAVE M. MUCHNIKOFF, P.C.
STEVEN M. ABRAMSON, P.C.
BRIAN L. ALPERT, P.C.
GARY A. LAX, P.C.
MICHAEL S. SADOW, P.C.
NANCY M. STILES, P.C.
BETH A. FREEDMAN
CRAIG M. SCHEER
MICHAEL A. TROY*
MICHAEL R. GARTMAN

*NOT ADMITTED IN D.C.

TELECOPIER NUMBER
(202) 682-0354

OF COUNSEL
JOHN F. BREYER, JR.
LAWRENCE J. EISENBERG
E. PRESTON RUTLEDGE
JOHN B. SELMAN*
JAMES W. LANCE*
MARTIN J. O'RIORDAN*
DANIEL C. HOLDGREIWE*

WRITER'S DIRECT DIAL NUMBER
(202) 414-6102

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Manager, Dissemination Branch
Information Management and Services Division
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

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Attention: Docket No. 2000-91

Dear Sir or Madam:

Silver, Freedman & Taff, L.L.P. is pleased to comment on the notice of proposed rulemaking issued by the Office of Thrift Supervision ("OTS") to require certain savings and loan holding companies to notify the OTS before engaging in significant transactions and activities.[1] The firm represents financial institutions nationwide in mergers and acquisitions, mutual-to-stock conversions, mutual holding company formations, de novo charters and other financial transactions.

NOTICE REQUIREMENTS

The stated purpose of the proposed rule is to monitor significant holding company transactions and activities to ensure that they do not pose a material threat to the safety and soundness and stability of subsidiary savings associations.[2] To achieve this objective, the OTS would require a 30-day advance notice of these transactions and activities.[3] Specifically, the notice

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[1] 65 Fed. Reg. 64392 (October 27, 2000).

[2] Id. at 64393.

[3] Id. at 64395.

would cover plans to (1) issue, renew or guarantee debt which increases the amount of the holding company's consolidated non-thrift liabilities by five percent or more (unless consolidated non-thrift liabilities after the transaction are less than 50 percent of the holding company's consolidated tangible capital, (2) acquire non-liquid assets if the amount exceeds 15 percent of the holding company's consolidated assets, (3) conduct any transaction which reduces the ratio of the holding company's consolidated tangible capital to consolidated tangible assets by 10 percent or more, and (4) conduct any transaction or activity the OTS deems, in writing, to be risky.[4]

Although certain exemptions will apply to the notice requirement, the OTS has not established, other than by sketchy illustrations, that problems actually exist to warrant this burdensome and potentially disruptive requirement. The OTS merely notes that savings and loan holding companies are becoming more integrated and, as a result, this "may" cause certain problems for subsidiary savings associations. According to the OTS, these problems could be due to double leveraging, outsourcing of critical functions of the thrift subsidiary and too rapid holding company growth relative to capital.[5]

Even if these potential problems should arise, the proposed notification approach with arbitrary thresholds is inappropriate for identifying such problems. The so-called significant transactions to be reported to the OTS in advance can have limited or no value to the OTS. Existing supervisory procedures can be considerably more useful without the operational and compliance difficulties associated with the proposed notice requirement. The overall risk profile of the consolidated holding company structure in relation to the thrift subsidiary(s) rather than isolated transactions and activities should be the focus of the OTS's attention.

OTHER INITIATIVES

The OTS has embarked on a comprehensive approach for assessing the risks of integrated savings and loan holding companies, consisting of improved off-site and on-site evaluations.[6] The off-site monitoring effort involves collecting electronically new holding company data from the Thrift Financial Report, including debt, cash flow and income information. In addition, the OTS intends to supplement its basic holding company data base with information from regulatory filings (including SEC), analyst and rating agency reports and other outside information. More efficient

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[4] Id. at 64394.

[5] Id. at 64392.

[6] OTS Director Offers a Flexible Approach to Holding Company Supervision, Presentation to the Exchequer Club of Washington, D.C., January 17,2001, Office of Thrift Supervision Press Release 01-03.

collection of this information and rigorous analysis of trends, performance variability and outliers could help considerably in targeting holding companies that pose the greatest risks to their thrift subsidiaries.

This undertaking would be effectively complemented by the new on-site joint holding company and thrift examinations.[7] Under this risk-focused approach, holding companies with greater risk profiles will receive more intensive examination scrutiny. While the procedures are presumably evolving, an interim approach would distinguish between complex and non-complex holding company structures based on the size of the thrift in relation to the entire holding company, how the thrift is funded, the amount of leverage at the holding company level and at significant subsidiaries, the reliance on the thrift to service holding company debt, the level, quality and volatility of consolidated holding company earnings, the riskiness of the assets and activities of the holding company and significant affiliates, and the ability of the thrift subidiary to stand alone. The Holding Companies Handbook is also being updated. The OTS concludes that it is "confident that this approach gives us wide discretion to ensure that we focus our limited resources on those holding companies and affiliates posing the greatest degree of risk".[8]

The OTS should withdraw from consideration any transaction notice requirement in light of its enhanced reporting, analysis and examination efforts regarding savings and loan holding companies and their thrift subsidiaries. Absent any evidence of widespread abuses, these other OTS safeguards are sufficient.

MARKETPLACE DISRUPTIONS AND COMPLIANCE ISSUES

One of the most critical problems associated with the notice requirement is that it is tantamount to a pre-approval process if the OTS raises issues about some transactions. This concern and the prospects of delays in the OTS review process could have a chilling affect on previously-negotiated and prospective opportunities. The pricing of deals could be disrupted in the face of such uncertainties. Some financially sound low-risk transactions would be delayed, renegotiated, or simply cancelled. Others would be structured to fit below the thresholds, resulting in *de facto* regulatory limits contrary to the stated intent of the proposal.

These problems are compounded by the wide discretionary authority vested in the OTS regional offices to deem <u>any</u> transaction or activity to be unsafe and unsound and, thus, requiring a

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[7] Interim Holding Company Examination Approach, Office of Thrift Supervision, New Directions 00-01, April 27, 2000.

[8] <u>Id.</u> at page 4.

notice.[9] The review of complex transactions are likely to be lengthy as the regional office consults with the OTS headquarter office. Apart from the inevitable inconsistencies among regional offices in acting on this authority, any notices required by a particular OTS regional office will surely limit any deals similar to such transactions from coming to market, even in other OTS regions. The perception will be that the OTS headquarter office disapproves of such transactions and activities.

The proposal also poses significant and burdensome compliance requirements for affected savings and loan holding companies. A notice may be required even for small, routine transactions after the transaction thresholds are reached. Holding companies would also be required to carefully track previous transactions and activities on a monthly basis in calculating the thresholds used to trigger the notice requirement. In some cases, it may be difficult to determine what constitutes "related" previous transactions and activities to include in the threshold calculations (e.g. hybrid securities or assets, purchased or originated loans, general categories or subcategories of assets, and offsetting transactions). Finally, the timing of a required notice may be unclear if the impact of transactions and activities with respect to the thresholds are transitory or not immediate.

CAPITAL REQUIREMENTS

The OTS has a long and successful history of evaluating the capital adequacy of savings and loan holding companies on a flexible case-by-case basis without imposing a rigid requirement on these entities. It correctly recognizes that holding companies are far too diverse to develop a single, uniform capital standard. There is no reason for the OTS to depart from this approach.

The OTS is considering whether it should adopt a rule codifying its current case-by-case approach.[10] Any consideration of a holding company capital rule at this time would be premature. The OTS's enhanced supervisory initiative is new. A thorough evaluation of the success of this program should precede any formalization of a holding company capital adequacy approach beyond the provisions in the Holding Companies Handbook. Numerical capital thresholds should not be considered in any context. However intended, a capital ratio of 10% or more which would trigger a notice exemption in the ANPR can be perceived as the first step in constructing a broader minimum capital standard for savings and loan holding companies.[11]

The Basle Committee on Banking Supervision ("Basle Committee") is considering revisions to the 1988 Capital Accord and would apply the requirements to consolidated holding company

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[9] 65 Fed. Reg. 64392, 64394, (October 27, 2000).

[10] Id. at 64396.

[11] Id. at 64393.

structures.[12] In a parallel initiative, the federal banking agencies ('Agencies") have requested public comment on whether they should adopt a different, more simplified regulatory capital framework for non-complex institutions.[13] The Agencies correctly observe that the Basle Committee proposed provisions would apply only to complex institutions. Tailoring the risk-based capital requirements to non-complex institutions is one option under consideration. Yet to be determined is whether capital requirements for non-complex institutions would apply to stand-alone banks and thrift institutions, their holding companies, or both. It is also unclear whether it is feasible for these separate efforts to be implemented in tandem.

Any contemplated changes to the case-by-case approach for evaluating holding company capital adequacy should be subject to public comment, but postponed until resolution of the above issues and after ample experience with a new capital regime. Public comments should be solicited irrespective of the vehicle through which changes are considered (e.g. regulation, policy statement, examiner guidance, Thrift Bulletin).

In summary, there is no justification for a notice requirement for transactions or activities of savings and loan holding companies. Market disruptions and compliance burdens are likely to result from this approach. Existing supervisory procedures are sufficient to identify risks to holding company thrift subsidiaries. The OTS should continue its case-by-case approach for evaluating holding company capital adequacy.

We appreciate your consideration of our comments.

Yours truly,

Silver, Freedman & Taff, L.L.P.

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[12] The New Capital Accord, Basle Committee on Banking Supervision, Bank for International Settlements, January 16, 2001.

[13] 65 Fed. Reg. 66193 (November 3, 2000).