GUARDIAN

(28)

Margherita L. DiManni
Senior Counsel

February 9, 2001

RECEIVED
2001 FEB -9 P 5:25
INFORMATION SERVICES DIVISION

Via Facsimile
(202) 906-7755

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

Attention: Docket No. 2000-91

Re: Proposed Savings and Loan Holding Companies Notice of Significant Transactions or Activities and OTS Review of Capital Adequacy Regulations

Ladies and Gentlemen:

On October 27, 2000 the Office of Thrift Supervision ("OTS") published a notice of proposed rulemaking to require certain savings and loan holding companies to notify the OTS before engaging in or committing to engage in a limited set of debt transactions, transactions that reduce capital, some asset acquisitions, and other transactions ("Proposed Regulation"). The Proposed Regulation also seeks comment on the OTS's proposal to codify its current practices for reviewing the capital adequacy of savings and loan holding companies and, when necessary, requiring additional capital on a case-by-case basis. On December 6, 2000, the OTS extended the comment period on the Proposed Regulation to February 9, 2001.

Set forth below are the comments of The Guardian Life Insurance Company of America ("GLIC") and Guardian Trust Company, FSB ("Trust Company") (collectively "Guardian") to the Proposed Regulation.

The Guardian Life Insurance Company of America 7 Hanover Square, New York, New York 10004
\\HO4HLAWA\COMMON\REMD\LettersOTS Letter 212.598-3948 fax: 212.919.2690/2694 e-mail: mdimanni@glic.com

I. General

The Proposed Regulation generally would require certain thrift holding companies to notify OTS before engaging in certain debt transactions, transactions that reduce capital, some asset acquisitions, and other transactions determined by the OTS on a case-by-case basis, with two exceptions.[1] First, the OTS would not require a holding company to file a notice if all of its subsidiary thrifts have consolidated assets that, when aggregated, represent less than 20% of the holding company's consolidated assets. Second, a holding company would not be required to file a notice if the holding company would have consolidated tangible capital of 10% or greater following the proposed transaction. In addition to the above notice requirements, the appropriate OTS Regional Director would have the authority to require any savings and loan holding company to file a notice if the Regional Director "has concerns" relating to the holding company's financial condition or the safety and soundness of its subsidiary thrift.

---

[1] The three transactions that would trigger the OTS notice requirement include:

1. Issuing, renewing, or guaranteeing debt that would increase the amount of the holding company's consolidated non-thrift liabilities by 5% or more. In addition, a holding company would not be not required to file a notice for debt, however, if its consolidated non-thrift liabilities would be less than 50% of its consolidated tangible capital after the proposed debt transaction;

2. Acquiring assets (other than cash, cash equivalents, and securities or other obligations unconditionally guaranteed by the United States Government) that would exceed an amount equal to 15% of the holding company's consolidated assets; and

3. Engaging in any transaction that would reduce the ratio of the holding company's consolidated tangible capital to consolidated tangible capital assets by 10% or more. In addition, the Proposed Regulations would require that if a holding company's consolidated tangible capital is less than zero, if must file a notice unless the Regional Director informs the holding company, in writing, that a notice is not required.

Finally, the Proposed Regulation also seeks comment on the OTS's proposal to codify its current practices for reviewing the capital adequacy of savings and loan holding companies and, when necessary, requiring additional capital on a case-by-case basis.

As a general matter, Guardian does not see a compelling reason to undertake this rulemaking at the present time. To date, the OTS's experience has been favorable with regard to its philosophy in regulating and examining savings and loan holding companies through ensuring the safety and soundness of the subsidiary thrift as stated in the *OTS Holding Company Regulatory Handbook* ("Handbook"), in contrast to the source of strength doctrine of the Federal Reserve Board. Further, the Handbook states that holding companies should not be examined on a stand-alone basis; rather it states that they should be analyzed for the effect the holding company complex has on the subsidiary association. Guardian sees no reason why the OTS should deviate from this current "do no harm" policy. In addition, no industry-wide phenomena has occurred at the holding company level which necessitates increased oversight by the OTS of savings and loan holding companies. Indeed, the passage of the Gramm-Leach-Bliley Act ("GLB Act") actually limited the scope of permissible activities for new savings and loan holding companies.

The OTS has been successful in its regulatory approach with regard to savings and loan holding companies by focusing on determining the overall effect of the holding company complex on its subsidiary thrift. The reason for this success is somewhat obvious - its enables the OTS to focus its limited resources on examination of the thrift, while controlling the actions of the parent holding company through various regulatory restrictions already in place in the OTS regulatory structure. These regulatory restrictions include, among other things:

- Capital Distribution Regulations;
- Transactions with Affiliates Regulations;
- Annual/Quarterly Report Filings on Form H-(b)11;
- Tax Sharing Agreements; and
- the Reporting of Certain Holding Company Data on the Thrift Financial Report ("TFR") beginning March 31, 2001;

This regulatory scheme restricts the activities of a holding company by protecting the thrift from certain actions of the holding company and ensuring that the holding company maintains a proper relationship with its affiliates. It is worth noting that thrift holding companies and their affiliates are subject to more stringent restrictions with respect to the transactions with affiliates regulations than those imposed on banks under sections 23A and 23B of the Federal Reserve Act. Further, thrifts are subject to more onerous restrictions with regard to capital distributions than banks since 12 C.F.R. § 563.143(b)(3) requires a subsidiary of a savings and loan holding company to file a notice with the OTS for each proposed capital distribution to its parent savings and loan holding company.

On a more practical level, with respect to the diversified holding companies that own thrifts, Guardian believes that the OTS should not take on the role of the consolidated regulator of such entities and should continue to focus its limited resources on the thrift itself. Furthermore, the GLB Act explicitly supports the premise of functional regulation regarding depository holding companies and their functionally regulated subsidiaries. In that spirit, the OTS should defer to a thrift holding company's primary functional regulator in order to determine the appropriate level of supervision of diversified holding companies. Indeed, OTS Director Ellen Seidman, in a recent speech to the Exchequer Club in Washington, DC on January 17, 2001 reiterated that the OTS has never been in the business of regulating the non-bank related activities of commercial firms, insurances companies, investment banks, securities firms and other companies. Rather, Director Seidman stated that the OTS relies "on functional regulatory agencies to monitor and control the non-bank related financial activities under their purview and on the marketplace to assist [the OTS] with oversight of financial and commercial activities." In summary, Guardian believes that the Proposed Regulation is contrary to the notion of functional regulation because it imposes additional restrictions on the activities of a thrift holding company, rather than serving to increase the OTS's reliance on the primary regulators of diversified holding companies.

Even more significantly, the GLB Act, the last major piece of legislation providing for major restructuring of the financial services arena, specifically addressed and reduced the permissible activities for savings and loan holding companies by prohibiting commercial activities for any holding company which acquired a control of a thrift after May 4, 1999 (or had an application pending with the OTS to become a savings and loan holding company on or before such date). Further, neither the legislative history nor a reading of the of the GLB Act directs the OTS to undertake further regulation of savings and loan association holding companies. In contrast, the GLB Act provides sound reasons for the Federal Reserve to streamline its regulation of bank holding companies.

Guardian believes that the OTS already has clear and unambiguous authority under its safety and soundness authority to address problem savings associations and their holding companies on a case-by-case basis, without resorting to the adoption of a regulation that would impose additional regulatory standards on an industry-wide basis. Such an initiative can only serve to cause thrift holding companies to rethink whether the thrift charter is best suited for the holding companies' business.

Finally, we believe that the proposed initiative is in direct conflict with representations and assurances given by the OTS to parties applying for a thrift charter with respect to the OTS's currently stated policies on regulating savings and loan holding companies. The Proposed Regulation and the OTS's shift in policy regarding the regulation of thrift holding companies somewhat vitiates the advantage of the thrift charter in contrast to other bank charter alternatives.

II. Comments

This section addresses Guardian's comments with respect to specific sections of the Proposed Regulation.

1. The OTS Should Adopt a Higher Percentage Threshold for Filing a Notice

While Guardian does not support any further regulation of thrift holding companies beyond the OTS's current policies, and thus does not support the Proposed Regulation, Guardian believes that the 20% threshold for exempting thrift holding companies from filing a notice with the OTS with regard to a significant transaction is not appropriate. As such, Guardian believes that the Proposed Regulation, if adopted, should be revised to substantially increase the 20% threshold exemption.

Guardian supports the use of reliance on the definition of a diversified savings and loan holding company i.e., a 50% threshold, rather than the proposed 20% threshold. By relying on the definition of the diversified savings and loan holding company, the OTS would have some consistency within its holding company regulatory scheme, while allowing more holding companies to be exempt from the notice requirements set forth in the Proposed Regulation.

2. The 10% Consolidated Tangible Capital Requirement is a De Facto Capital Requirement for Savings and Loan Holding Companies

The Proposed Rule states that a thrift holding company would not be required to file a notice of a proposed transaction if it would have consolidated tangible capital of 10% or greater following the transaction. The Proposed Regulation further states that the rationale for this exemption is that where a holding company has a significant capital base, it is less likely that its transactions will present a significant risk to the subsidiary thrift.

Guardian strongly supports the OTS in its role as the primary regulator of the thrift and its role in regulating and examining a thrift holding company by primarily being concerned with the safety and soundness of the subsidiary thrift. Guardian believes, however, that it is inappropriate set capital standards at the holding company level, if the holding company is meeting the regulatory requirements of its primary regulator.

The Proposed Regulation states that the 10% of consolidated tangible capital exemption is not intended in any way, as a *de facto* capital requirement for savings and loan holding companies and goes on further to state that its purpose is solely to exclude the most financially sound holding companies from the notice requirement. While the stated intention of the 10% consolidated tangible capital requirement is to limit the number of holding companies subject to the proposed notice requirement, we respectfully assert that the 10% consolidated tangible capital requirement is a *de facto* capital requirement in the Preamble to the Proposed Regulation. As such, this is directly inconsistent with the OTS assertion that it is not imposing capital requirements on savings and loan holding companies. While Guardian appreciates the OTS's attempt to limit the number of holding companies subject to the notice requirement, we believe that the determination as to the financial soundness of the holding company should best be left to the holding company's primary regulator and recommends that the OTS continue to focus its resources on ensuring that the thrifts that it regulates operate in a safe and sound manner.

3. <u>The Proposed Rule Allowing the Regional Director to Require a Holding Company to File a Notice is Too Vague</u>

The Proposed Regulation provides that notwithstanding the two exceptions (20% of assets or 10% consolidated tangible capital), an OTS Regional Director would have the authority to require any savings and loan holding company to file a notice if the Regional Director has concerns relating to the holding company's financial condition or the safety and soundness of its subsidiary thrift. The Proposed Regulation states that the Regional Director must notify the holding company, in writing, of this determination. While Guardian recognizes the OTS's concern regarding overseeing the activities of a savings and loan holding company, Guardian believes that this portion of the Proposed Regulation is unnecessary given the existing authority of the OTS under the Home Owners' Loan Act to regulate savings and loan holding companies.

Further, as a general matter, the standard set forth in the Proposed Regulation that the Regional Director "has concerns relating to the holding company's financial condition or the safety and soundness of its subsidiary thrift" is vague on its face and provides neither the OTS Regional Directors nor others any understanding of the criteria to be utilized in determining whether notices will be required to be filed before a holding company engages in a significant transaction.

4. <u>The OTS Should Exempt Holding Companies That Control Savings Associations With Limited Operations</u>

The Proposed Regulation specifically seeks comment on whether it is also appropriate to exempt holding companies that control only savings associations with limited operations. Guardian strongly supports this proposed exemption for a subsidiary thrift that conducts only fiduciary operations under part 550 of OTS regulations.

Savings associations with limited operations do not represent the same risk profile as other savings associations that engage in a wider range of activities. For example, a thrift that engages in the lending business would be subject to a higher risk profile than a thrift that only engages in fiduciary activities, i.e., trust activities. The primary duty of a savings association engaging in trust activities is to exercise its fiduciary duties in a manner consistent with the best interests of account beneficiaries and other interested parties through compliance with applicable laws, regulations and standards of fiduciary conduct. The activities of the parent holding company in no way vitiate the need of the trust company to comply with its fiduciary duties with regard to the trust assets it administers. Further, the only other activities conducted at a savings association that engages primarily in fiduciary activities, such as Guardian Trust Company, FSB are to make investments that comply with the Qualified Thrift Lender Test and to maintain adequate capital levels. Therefore, Guardian believes that savings and loan holding companies with subsidiary thrifts that engage only in limited activities should be exempt from the Proposed Regulation. Such holding companies are adequately supervised, and their activities are sufficiently restricted by the current OTS regulatory scheme.

5. <u>The OTS Should Not Codify Its Current Policy of Reviewing the Capital Adequacy of Savings and Loan Holding Companies</u>

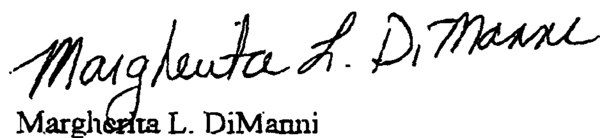
The OTS currently reviews the financial condition, including the capital adequacy, of holding companies in the course of its supervisory monitoring and examination of savings and loan holding companies as part of its thrift examination process. The Proposed Regulations seek comment on whether the OTS should adopt a rule codifying its current practice for reviewing capital adequacy on a case-by-case basis, and, when necessary, requiring additional capital of savings and loan holding companies. Guardian believes that the OTS's current practice of reviewing the capital on a case-by-case basis is an appropriate supervisory practice. The Proposed Regulation states that "it is often a relatively simple matter to identify problem holding companies and holding companies that control troubled thrifts." Guardian believes that it is more appropriate to apply additional capital adequacy standards on a case-by-case basis to troubled holding companies, rather than to codify the OTS's current practice on an industry wide basis. Guardian opposes this approach, because, by codifying such practice, the OTS will, in essence, be imposing bank holding company type regulation on the thrift industry.

III. Conclusion

The Proposed Regulation recognizes that integration of operations may be a key incentive to forming a holding company and states that the financial stability and health of a savings and loan holding company can have a direct impact on the financial condition of its subsidiary thrift. The Proposed Regulation goes on to discuss the certain actions of the holding company which may have a negative impact on the subsidiary thrift. The Proposed Regulation, however, does not acknowledge that the holding company structure can provide financial strength to a savings association in a number of ways. As discussed in the Handbook, the holding company structure may be beneficial to the thrift subsidiary by, among other things, purchasing newly-issued stock of an association, raising capital, achieving cost reductions through economies of scale, and providing low cost access to experienced management and accounting systems. In summary, we believe that the current regulatory and examination structure is sufficient to adequately examine and supervise holding companies and that the holding company structure has proven to be beneficial to most subsidiary thrifts.

We hope that the comments of Guardian set forth in this letter are helpful in the OTS efforts to improve and streamline the regulation of savings and loan holding companies. The officers of Guardian would greatly appreciate the opportunity to discuss these comments with the OTS staff. Please contact the undersigned if you have any questions regarding these comments or require additional information.

Very truly yours,



Margherita L. DiManni

/dp