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1700 G Street NW
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RE: Federal Savings Association Bylaws; Integrity of Directors; OTS No. 2000-93; 65 Fed. Reg. 66116 (November 2, 2000).

Dear Sir or Madam:

The American Bankers Association ("ABA") appreciates the opportunity to comment on the proposed, optional, pre-approved bylaw provision concerning the qualifications of directors.[1] The American Bankers Association brings together all categories of banking institutions to best represent the interests of the rapidly changing industry. Its membership – which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks – makes ABA the largest banking trade association in the country.

The duties a director of a regulated financial institution assumes are enormous and under constant scrutiny. Not only must a director scrupulously exercise his or her duties of care and loyalty, but every action and the failure to take action, are subject to question, review and challenge by a plethora of federal and state agencies. The personal reputations and wealth of directors and their families are placed at risk for every day and moment that

[1] The proposed bylaw is as follows:

A person is not qualified to serve as a director if he or she: (1) Is under indictment for, or has ever been convicted of, a criminal offense involving dishonesty or breach of trust and the penalty for such offense could be imprisonment for more than one year, or (2) is a person against whom a banking agency has, within the past ten years, issued a cease and desist order for conduct involving dishonesty or breach of trust and that order is final and not subject to appeal, or (3) has been found either by a regulatory agency whose decision is final and not subject to appeal or by a court to have (i) breached a fiduciary duty involving personal profit or (ii) committed a willful violation of any law, rule or regulation governing banking, securities, commodities or insurance, or any final cease and desist order issued by a banking, securities, commodities or insurance regulatory agency. 65 Fed. Reg. 66116, 66117 (Nov. 2, 2000).

they wear the hat of director. It is a tremendous burden with few safe harbors. Even use of the business judgment rule has been called into question over the years as federal banking regulators sought to create a federal standard that trumped state standards (c.f., Atherton v. FDIC, 519 U.S. 213 (1997)). In the frenzy of enforcement, recovery and receiver actions that flowed after enactment of FIRREA, the ability to find qualified and dedicated directors diminished substantially.

Contrast the tremendous authority both statutory and persuasive of the federal and state banking agencies. Since the enactment of FIRREA, all of the federal banking agencies have the authority to remove and prohibit directors, review and approve new directors for *de novos*, assess civil money penalties, issue Director's orders for affirmative relief, refer actions to the Department of Justice, the SEC and others.[2] The FDIC has Section 39 authority to approve the hiring or retention of employees and others in positions of trust when they have been convicted of dishonesty (among other things). The arrows in the enforcement quiver of the federal banking agencies are many and staggering in their power and reach.

ABA respectfully suggests that the proposed, optional bylaw is inconsistent and directly contradicts the standards the US Supreme Court set for imposing federal standards of corporate governance in Atherton v. FDIC[3]. As a consequence, it is disingenuous for the agency to circumvent the *Atherton* ruling by offering an optional bylaw provision. As attractive as the optional bylaw may be to the OTS, it is simply unnecessary from a practical standpoint and wrong from a jurisprudence point of view. Optionality does not rescue this proposal from its contradiction of the Supreme Court in the absence of Congressional action.

In the area of director actions, the OTS has not succeeded in creating new and stricter standards, (c.f. Kaplan v. OTS, Seidman v. OTS). It is prudent regulatory behavior to consider the lessons of the courts when promulgating rules in the absence of new law even when "cloaked" in voluntarism. This provision, if adopted, would set the unsophisticated and less, well advised financial institution in the position of retroactively applying standards that did not exist, indeed, were soundly criticized in court when the agency attempted to use them in the past. It is misleading for the agency to insert one of its regulatees into a judicial debate that it has lost without even a mention of the court cases.

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[2] See, generally, 12 U.S.C. 1818.

[3] *Atherton* overturned an attempt by the FDIC to set a federal standard of liability for directors and officers arising out of the failure of City Federal Savings Bank, a New Jersey savings institution placed into receivership. The Supreme Court recognized that state law sets the standard of conduct for officers and directors of federally insured savings institutions so long as the floor contained in 12 U.S.C. 1821(k) of gross negligence is maintained. Atherton v. FDIC, 519 U.S. 213, 11 S. Ct. 666, 136 L.Ed. 2d 656 (1997).

Further, financial institutions are subject to a number of technical and complicated laws and regulations and the potential to violate one of the requirements is high. For this reason, Congress empowered the banking agencies to issue cease and desist orders and civil money penalties. These enforcement tools focus intently the attention of management and the board on compliance. In contrast, a removal and prohibition order requires personal gain or financial harm and specific intent (not the "or" as proposed in subpart (3) of the optional bylaw).[4] It is a higher burden that has a higher and more intense remedy. To graft a removal and prohibition remedy as a consequence of a cease and desist violation exceeds the statutory bounds of the Home Owners Loan Act even if adopted by the savings association as a "voluntary" bylaw provision. If the remedy is needed, and quite frankly it isn't, it is the responsibility of Congress to add the provision to the enforcement quiver of the federal banking agencies.

Accordingly, the ABA urges the OTS to reconsider this regulatory action. Voluntary adoption of this optional bylaw does not redeem this proposal. The agency should not advocate adoption, even on a voluntary basis, of a provision that is questionable under both statute and case law.

Your consideration of these comments is appreciated. If there are any questions on the issues raised by this letter, please do not hesitate to me at (202) 663-5434.

Sincerely,

C. Dawn Causey

[4] 12 U.S.C. 1818(e).