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Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552

Re: Proposed Rulemaking No. 2006-29

Dear Sir or Madam:

On behalf of our mutual institution and mutual holding company clients, we are writing to express our support of the proposed rulemaking by the Office of Thrift Supervision ("OTS") captioned "Stock Benefit Plans in Mutual to Stock Conversions and Mutual Holding Company Structures" (No. 2006-29) (hereinafter referred to as the "Proposed Rulemaking"). By way of background, this firm has over the past 30 years assisted more than 250 mutual institutions convert to stock form or reorganize into the mutual holding company form of organization. We served as special counsel to some of the very first institutions to convert in the mid-1970s as well as some of the first institutions to form mutual holding companies in the 1990s.

Our comments on the Proposed Rulemaking are focused on the provisions therein regarding clarification of the stockholder vote requirement for the adoption of stock benefit plans by companies in the mutual holding company ("MHC") format. Currently, the OTS staff has interpreted the provisions of 12 C.F.R. §§ 500(a)(7) and 575.7(b)(1) to require that stock benefit plans implemented by companies in the MHC structure be approved by vote of a majority of votes eligible to be cast by stockholders other than the MHC, *i.e.*, a majority of the minority. See, OTS Chief Counsel Letter No. P-2004-6, dated September 17, 2004 (the "September Letter"). The Proposed Rulemaking would, among other things, clarify that a majority of the minority standard, which in effect disenfranchises the MHC, will be required only with respect to stock benefit plans implemented within the first year after a minority stock issuance. We support the Proposed Rulemaking because it is consistent with general principles of corporate law, furthers a fundamental purpose of the MHC structure and addresses recent abusive and threatening actions by certain activist stockholders.

As you know, the MHC is a statutory creation designed to permit mutual savings associations to remain community based with certain of the benefits of a capital stock structure, but without some of the pressures that often follow a full mutual-to-stock conversion. The rights of stockholders of Federal MHCs and their subsidiary mid-tier holding companies are spelled out in their charters, issued by the OTS. Section 5 of the model Federal charter for a subsidiary holding company states that, except for the possibility of cumulative voting, each holder "of shares of common stock shall be entitled to one vote for each share held by such holder. . . ." The basic principle of corporate law reflected in this provision of the Federal subsidiary holding company charter is that every stockholder, including the MHC of the subsidiary holding company, is entitled to one vote per share on all matters to be considered by stockholders. The requirement that stock benefit plans implemented within one year of a minority stock issuance be approved by a majority of the minority is an exception to this basic corporate principle which, in effect, nullifies the vote by an MHC and which we believe should be narrowly construed.

Generally, there is no requirement under state corporation laws that, where there is a majority or controlling stockholder or bloc of stockholders, actions which require stockholder approval must be approved by a majority of the minority shares. As one leading case interpreting Delaware law has held: "There is no requirement under the Delaware General Corporation Law that a majority of the outstanding minority shares must vote in favor of a transaction . . .[w]here . . . there is a controlling stockholder or a controlling bloc, there is no requirement under the Delaware General Corporation Law that the transaction be structured or conditioned so as to require an affirmative vote of a majority of the minority group of outstanding shares." Williams v. Geier, 671 A.2d 1368, 1382 (Del. 1996), see also, e.g., Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985); Van de Walle v. Unimation, Inc., [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95, 834 at 99,033 (Del. Ch. 1991); McMullin v. Beran, 765 A.2d 910, 919 (Del. 2000). If a majority of the minority voting requirement was imposed whenever there was a controlling stockholder, it would effectively disenfranchise majority stockholder(s). Yet Delaware law is clear that controlling stockholders have the right to vote their shares: "Stockholders in Delaware corporations have a right to control and vote their shares in their own interest. They are limited only by any fiduciary duty owed to other stockholders. It is not objectionable that their motives be for personal profit, or determined by whim or caprice, so long as they violate no duty owed other shareholders." Bershad v. Curtiss-Wright Corporation, 535 A.2d 840, 845 (S. Ct. Del, 1987). See also, e.g., Tanzer v. International General Industries, Inc. 379 A.2d 1121, 1123 (S. Ct. Del. 1977); Freedman, et al. v. Restaurant Associates Industries, Inc., [1990] Fed. Sec. L. Rep. (CCH) ¶ 95,617 at 97,887 (Ct. Ch. Del. 1990). Under Delaware law, "a controlling stockholder has the power, absent violation of fiduciary duty, to cause a cash-out merger, cause a break-up of the company merger with another company, sell substantially all the corporate assets, etc." See Williams, supra, 671 A.2d at 1382. The above authorities clearly show that a majority of the minority vote requirement is not prescribed under general principles of corporate law, and may even be considered inconsistent with such principles, and as such should be required by the OTS only in the most limited circumstances.

We note that the rules of corporate governance and the listing standards of the national securities exchanges in the United States generally require that stockholders in listed companies

approve stock option plans and other stock benefit plans. See, e.g., Nasdaq Rule 4350(i)(1)(A) and Rule 303A.08 of the New York Stock Exchange ("NYSE"). However, nothing in the rules of the Nasdaq or the NYSE require, or even suggest, that any majority of the minority vote requirement be imposed for stockholder approval of benefit plans by listed companies controlled by one or more large stockholders. Again, such a requirement would eliminate the voting rights of the controlling stockholder(s). Because certain activist stockholders who have submitted comments objecting to the Proposed Rulemaking also filed formal objections with the Nasdaq and asserted that MHCs should not be permitted to vote their shares in connection with the consideration of stock compensation plans, we submitted to the Nasdaq a written response on behalf of a client and have discussed extensively the issue of voting rights of MHCs which are majority stockholders of listed subsidiary holding companies with the Listing Qualifications section of the Nasdaq Stock Market. After considering the issue, the Nasdaq agreed with the position that an MHC has full authority to vote the shares it owns in a listed subsidiary holding company and that nothing in the Nasdaq Marketplace Rules imposes a majority of the minority vote requirement. We note that there are numerous publicly traded, listed companies that are majority owned subsidiaries of parent controlling stockholders. There is no requirement under the rules of either the Nasdaq or the NYSE that, in such situations, the parent, controlling stockholder is not fully entitled to vote its shares or that otherwise imposes a majority of the minority requirement with respect to stockholder approval of stock benefit plans.

Previously we referred to the September Letter wherein Chief Counsel John Bowman stated the staff's position that the majority of the minority vote requirement of 12 C.F.R. § 563b.500(a)(7) applies to the approval of stock benefit plans by subsidiary holding companies of a mutual holding company regardless of the length of time that has elapsed after a public offering. The September Letter indicates that each issuance of stock by a mid-tier holding company constitutes a distinct "conversion" for purposes of determining the periods governing approvals of management and employee benefit plans under Section 563b.500. The September Letter also states that the issuance of shares pursuant to a stock benefit plan itself is a "conversion" for purposes of the Section 563b.500 requirement and then concludes that Subsection 563b.500(a)(7) requires that stockholders of a mid-tier holding company approve each stock benefit plan by a majority of the total votes eligible to be cast other than those of the parent mutual holding company.

In our opinion, the staff's position in the September Letter is not supported by a plain reading of Section 563b.500(a). Even assuming that each stock issuance by a mid-tier holding company is a "conversion" for these purposes, if at the time stockholders are asked to consider stock benefit plans more than one year has elapsed since the mutual holding company reorganization and initial public offering and, as generally will be the case, there has been no intervening stock issuance at the time stockholders vote, then, in our view, under the plain language of Section 563b.500, the plans would not be implemented within 12 months of a conversion and the vote provisions of Subsection 563b.500(a)(7) should not apply. The staff's position in the September Letter may be based on some notion, although this is not expressly stated, that in a mutual holding company reorganization the conversion is never completed and, accordingly, the special vote provisions of Subsection 563b.500(a)(7) are applicable unless, and until, one year subsequent to an institution's "second-step" conversion. Such a position is not

explicitly stated in the mutual-to-stock conversion regulations nor, as far as we can determine, in the preamble of any of the notices of proposed rulemaking or notices of interim final or final rules relating to revisions of the mutual-to-stock conversion regulations and/or regulations regarding mutual holding company reorganizations in 1994, 2000 or 2002. In fact in its July 2000 Notice of Proposed Rulemaking regarding mutual holding company reorganizations, the OTS indicated that mutual holding companies and mid-tier holding companies could adopt additional stock benefits plans subsequent to their initial reorganizations without requiring an additional stock issuance to all categories of subscribers. The preamble continues that additional stock benefit plans would be subject to certain restrictions, such as retention of majority MHC ownership and, due to Nasdaq qualifications and regulations of the Internal Revenue Service ("IRS"), may require stockholder ratification. It was indicated that ". . . of course OTS's regulation has no impact on these requirements. Additional plan offerings would require notice to OTS, but could be adopted unless OTS objects within 30 days of submission." See 65 Fed. Reg. No. 134 at 43096 (July 12, 2000). One can clearly infer from this language that, at least in July 2000, it was not the view of the OTS that the special vote requirement provisions of Subsection 563b.500(a)(7) were always applicable to a mutual holding company.[1]

We note that the Federal Deposit Insurance Corporation ("FDIC") has promulgated rules which are substantially similar to the OTS' with respect to the adoption of stock benefit plans by institutions in the MHC structure. See 12 C.F.R. § 333.4(e). The FDIC, consistent with our view of a plain reading of and the intention behind these provisions, has stated, and reconfirmed, its position that stock benefit plans implemented more than one year subsequent to an MHC reorganization and additional stock issuance are not required to be approved by a vote of a majority of the minority stockholders. We would be happy to provide the staff with correspondence from the FDIC on this point if desired.

We would also like to address the suggestion of at least one commenter that, if the rule is promulgated as proposed, it should not have retroactive application to existing MHC organizations. We strongly disagree with that position. As we discuss in detail above, the Proposed Rulemaking is consistent with general principles of corporate law and governance, the clear language of the OTS' regulation and the FDIC's interpretation of that regulation for MHCs that it regulates. While the September Letter implemented a policy without the benefit of public comment, the Proposed Rulemaking gives all members of the public an opportunity to share their views with the OTS. After the OTS considers those comments, we believe that the final rule that it implements should have immediate and equal application to all parties. To provide otherwise would create two different classes of MHCs with widely diverse means for compensating their management and employees.

We believe that the Proposed Rulemaking would appropriately address a significant issue which has arisen as activist stockholders have exploited the position announced in the September Letter by accumulating blocs of stock in MHCs or their subsidiary holding companies that have recently reorganized. Activist stockholders have threatened, both on an individual basis with

[1] At the least, we believe the conclusions reached in the September Letter to be substantive changes to the plain language of the regulations which should have been the subject of the rulemaking process. Accordingly, we believe that application of the September Letter should be stayed.

MHC management and on a public basis, to engage in proxy contests against management unless (i) the activist, or his/her representative, is elected to the institution's board of directors and (ii) the institution agrees to consider various schemes to maximize stockholder value including massive stock repurchase programs and sales of control. We note that one activist stockholder, Mr. Joseph L. Stilwell, recently filed a Schedule 13D only 15 days after the closing of an additional share issuance and reorganization by Roma Financial Corporation announcing that Mr. Stilwell and affiliated entities had acquired 6.6% of the outstanding shares of common stock of Roma Financial (which amounts to approximately 22.0% of the shares owned by persons other than the mutual holding company). In the Schedule 13D, the purpose of the transaction was stated as ". . . to profit from the appreciation in market price of the shares . . . and through the payment of dividends by asserting shareholder rights." The Schedule 13D continues that Mr. Stilwell and the other affiliated members of his group ". . . do not believe the value of the Issuer's assets is adequately reflected in the current market price of the Issuer's Common Stock." The Schedule 13D then describes in detail eight other instances where the Stilwell group took positions in other companies and engaged in tactics such as proxy contests, etc., in order to maximize stockholder value. All but one of these entities have ended up selling control. Roma Financial Corporation is not a client of this firm. However, Mr. Stilwell has taken similarly aggressive positions with a client of this firm. Other activist stockholders have taken similarly aggressive positions with recently reorganized MHCs.

The actions now being taken by activist stockholders against MHCs create exactly the type of pressure that Congress was trying to neutralize when it authorized the mutual holding company structure. A primary purpose behind MHCs was to permit institutions certain benefits of the stock form while being able to control their own destiny without the untoward threats and disruptions that dissident stockholders can create. As stated in the OTS' letter, dated January 9, 2006, to Senator Mike Crapo, which was quoted in Director Reich's testimony on Regulatory Burden Relief before the Senate Committee on Banking, Housing and Urban Affairs on March 1, 2006, ". . . part of the rationale supporting the MHC structure is that it allows for an infusion of capital into the institution without subjecting the institution to the types of shareholder pressures that may compromise and/or eventually eliminate the institution as a separate community banking organization." (Statement of Director John M. Reich, concerning Regulatory Burden Relief, before the Senate Committee on Banking, Housing and Urban Affairs, March 1, 2006, at page 35.)

Today, activist stockholders are leveraging their stock ownership in the context of approval of industry standard stock benefit plans in order to pressure MHCs into transactions designed to maximize stockholder value. As a result, institutions reorganizing into the MHC form are finding themselves under siege by the activist almost immediately upon their adoption of an MHC charter. This is the current *modus operandi* embraced by activist stockholders to advance their own interest and self-aggrandizement without regard to the best interest of the mutual institution or its insured subsidiary. The words of the OTS in 2002, when, among other things, it enhanced the anti-takeover protections available to MHCs, are as true today as they were then: "Recently completed or proposed transactions have demonstrated that takeover pressures now exist in the context of the MHC structure to be acquired by mutual institutions or other MHC structures . . . ." 67 Fed. Reg. at 17233 (April 9, 2002). Because of such pressures,

the OTS determined that it was necessary to take action in order to ". . . give a newly converted MHC time to deploy its new capital and adjust to managing its institution in the MHC environment." id at 17234. Because MHCs again find themselves under attack by activist stockholders, we are writing to express our support for the Proposed Rulemaking in order to permit recently reorganized MHCs to implement their business plans, including industry standard stock benefit plans, without having to address threats of proxy contests and the like from dissident stockholders.

Very truly yours,

Raymond A. Tiernan

Hugh T. Wilkinson