



August 27, 2007

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

Attention: OTS-2007-0012

Re: Optional Charter Provisions in Mutual Holding Company Structures
72 FR 35205 (June 27, 2007)

Dear Sir or Madame:

America's Community Bankers ("ACB")¹ is pleased to have this opportunity to comment on the proposal issued by the Office of Thrift Supervision ("OTS") to amend its regulations to permit certain mutual holding company ("MHC") subsidiaries to adopt an optional charter provision that would prohibit any person from offering to acquire, or acquiring the beneficial ownership of more than 10 percent of the outstanding stock of the minority stock of a MHC savings association subsidiary or MHC subsidiary holding company.² Minority stock is stock held by persons other than the subsidiary's MHC.

ACB Position

ACB strongly supports the OTS's proposal to amend its regulations to permit the adoption by MHC subsidiaries of an optional charter provision that would prohibit any person from beneficially owning more than 10 percent of the outstanding minority stock of the MHC subsidiary. We further support the condition in the optional charter provision that shares acquired in excess of the 10 percent limitation would not be counted as shares eligible to be voted in matters submitted to minority stockholders for a vote. ACB believes that the charter provision should be optional and we support the clause that permits a MHC subsidiary to include the provision in its charter during the five years following a minority stock issuance.

ACB believes that the OTS proposal is a necessary step following the OTS's recent reaffirmation of its rules governing minority stockholder voting requirements on the approval of stock benefit plans in mutual-to-stock conversions and in mutual holding company structures.³ ACB supported the earlier proposal that would have amended the rules governing the adoption of stock benefit plans by mutual holding companies. We believe that the current proposal will make available added protection for those

¹ America's Community Bankers is the national trade association committed to shaping the future of banking by being the innovative industry leader strengthening the competitive position of community banks. To learn more about ACB, visit www.ACB.us.com.

² 72 Fed. Reg. 35205 (June 27, 2007)

³ 72 Fed. Reg. 35145 (June 27, 2007)

MHC subsidiaries that adopt the optional charter provision from activist shareholders seeking to influence or control the MHC to gain personal profit.

However, we recommend that the OTS in the final rule make certain revisions to clarify the effective date of the rule and whether the optional charter provision may be adopted for minority stock issuances that have occurred prior to the adoption of the rule but less than five years ago.

Background

On September 15, 2006, ACB filed a letter with the Office of the Chief Counsel commenting on the OTS's proposal to clarify the regulations that govern the voting requirements for stockholders to approve stock benefit plans established in MHC structures.⁴ Current OTS rules require an affirmative vote of the minority stockholders voting to adopt a stock benefit plan. The OTS proposed to change that requirement to require an affirmative vote of the stock outstanding, which would include the stock of the MHC. ACB supported this proposed revision as consistent with basic corporate governance practices.⁵

However, after receiving public comments, the OTS decided not to adopt the proposed revision and retain its current rules. Therefore an affirmative vote of the majority of the minority stockholders continues to be required for approval for stock benefit plans. The OTS did adopt a revision to its rules that limits the voting requirement to a majority of the minority of the shares actually voting on the stock benefit plan rather than a majority of the minority shares outstanding.

ACB supports the OTS proposal to permit the adoption of the optional charter provisions, which limit the acquisition of the beneficial ownership of shares of minority stock to 10 percent of the minority stock outstanding. Under current OTS rules, a similar optional charter provision may be adopted in both the case of a mutual converted to a Federal stock association and in the formation of a MHC subsidiary holding company.⁶ However, the 10 percent limitation applies to the total shares of stock outstanding, which includes the stock of the MHC. Therefore the existing optional charter provisions based on the total shares of stock outstanding would not prevent a minority stockholder from acquiring a majority of the minority shares of stock outstanding and thus be able to influence the outcome of a minority stockholder vote. In addition, such an acquisition could be less than is necessary to trigger the protections afforded by the OTS's Acquisition Control Regulations.

The OTS is concerned that minority stockholders could acquire enough shares of stock under current charter provisions that they would be able to influence the outcome of certain issues that the OTS requires to be put before minority shareholders for a vote.⁷ Depending upon the exercise of their vote, these

⁴ See letter dated September 15, 2006 from Patricia A. Milon, Chief Legal Officer and Senior Vice President, Regulatory Affairs, to Regulation Comments, Chief Counsel's Office.

⁵ Ibid.

⁶ The OTS recognized long ago that mutual institutions converting to Federal Stock associations were vulnerable to takeover attempts because of the significant amount of capital that is raised from a conversion. As a result, the OTS adopted regulations that permitted a converting association to adopt a takeover charter provisions and charter provisions that would prohibit the acquisition of more than 10 percent of the stock of a converted association. At a later time and with the development of the MHC structures, the OTS adopted rules that permit a MHC subsidiary holding company that holds 100 percent of the stock of its savings association subsidiary to adopt a similar optional charter provision.

⁷ OTS regulations require a minority stockholder vote on the following issues: 1) approval of a stock option plan or an employee stock benefit plan; 2) approval of a charitable contribution of mutual conversion shares or proceeds; and 3) approval of a conversion of a MHC to stock form. See 12 CFR 563b.500 (a) (7), 563b.555, 575.11(i) and 575.12(a) (3).

stockholders could pressure the MHC to engage in stock repurchases, force the sale of the institution or claim a seat on the board of directors.

ACB shares these concerns and believes that the proposed optional charter provisions if adopted by the MHC subsidiary would reduce the influence of these minority stockholders by prohibiting any person from acquiring more than 10 percent of the beneficial ownership of minority shares outstanding of the subsidiary. ACB supports the condition in the optional charter provision that would provide that shares acquired above the 10 limit would be considered "excess shares" and would not be counted as shares entitled to vote on matters submitted to minority in a vote. The proposed optional charter provision would cross-reference the definitions used in the anti-takeover and optional charter provisions rules that apply to Federal stock associations following a mutual conversion. ACB supports the broad scope of the term "person" contained in the foregoing rules which definition includes an individual, a group acting in concert, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated association or similar company or a syndicate.

Finally, ACB strongly supports the clause of the proposed rules that permits MHC subsidiaries to include the optional provision in its charter during the five years immediately following a minority stock issuance. Once adopted the 10 percent limitation on the acquisition of beneficial ownership of minority stock would continue until altered by the board of the subsidiary.

We recommend that the OTS in the final rule clarify the effective date for the adoption of the optional charter provision. It is not clear from the proposal whether the optional charter provision only may be included in a MHC subsidiary's charter following future minority stock issuances, or whether a MHC subsidiary may include the provision in its charter immediately if the minority stock issuance was completed prior to the adoption the rule but within the five year period.

ACB appreciates the opportunity to comment on this important proposal concerning the regulation of MHCs. Should you have any questions please contact Sharon Haeger at (202) 857-3186 or shaeger@acbankers.org or the undersigned at (202) 857-3121 or pmilon@acbankers.org.

Sincerely,



Patricia A. Milon
Chief Legal Officer and Senior Vice President
Regulatory Affairs