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August 24, 2007

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2007-0012

By Electronic and Hand Delivery

RE: Notice of Proposed Rulemaking on Optional Charter Provisions in Mutual Holding Company Structures, 72 Fed. Reg. 35205 (June 27, 2007), No. OTS-2007-0012

To The Chief Counsel's Office:

This letter is written on behalf of my clients Joseph Stilwell, Stilwell Value Partners VI, L.P. and other Stilwell entities (collectively, "Stilwell"). Stilwell has investment interests in entities subject to the above-referenced rule ("proposed rule").

Stilwell recognizes the importance of preserving the integrity of the mutual holding company ("MHC") structure, but the proposed rule bears no relation to this objective. Rather, the rule represents an unprecedented and radical use of the Office of Thrift Supervision's ("OTS") rulemaking authority that disenfranchises substantial owners of the MHC's public shares. The proposed rule lacks any nexus to its stated purpose, dilutes the majority of the minority rule adopted the same day as this rule was proposed, and would authorize thrifts to adopt charter provisions which will be challenged in courts as unsustainable under corporate law. Accordingly, Stilwell believes the proposed rule lacks a rational basis, is arbitrary and capricious, and could not withstand the judicial review that Stilwell will seek if the proposed rule is adopted. Accordingly, Stilwell urges the OTS not to adopt the proposed rule.

Since the MHC does not unilaterally control the outcome of the vote for stock benefit plans, the proposed rule will directly disenfranchise economic owners of the MHC for the improper purpose of making passage of such plans potentially easier. This outcome directly conflicts with the consistent position of the OTS, reaffirmed just this past June in a final rule (published the same day as the proposed rule) preventing insiders from self-adopting stock benefit plans. *See* Rule Regarding "Stock Benefit Plans in Mutual-to-Stock Conversions and Mutual Holding Company Structures," 72 Fed. Reg.

35145 (June 27, 2007) ("Stock Benefit Plans Rule"). The proposed rule sneaks through the back door what the OTS turned away at the front door in June 2007 -- *i.e.*, allowing insiders to get stock benefits without a fair vote by all public shareholders.

This letter contains three parts. The first part discusses MHCs, the Stock Benefit Plans Rule, and the proposed rule. The second part describes the historical and proper uses of anti-takeover provisions (*i.e.*, to protect the institution). Against this background, the third part details the proposed rule's fatal flaws.

I. MHCs, The Stock Benefit Plans Rule, And The Proposed Rule

A. MHC Governance

Under OTS regulations, a mutual savings association ("MSA") may convert into a stock-form savings association. In such a conversion, the mutual thrift may choose to become wholly owned or partially owned by the public. In the latter case (a so-called "first-step conversion"), the converting institution reorganizes itself into a MHC organization. A majority of the shares issued by the former mutual thrift (or a majority of the shares issued by a mid-tier holding company that is formed to hold all the shares of the former mutual thrift) are held by a top-tier MHC for the benefit of the members of the former mutual thrift, while the public holds a minority of those shares.

The MHC itself has no authorized capital stock and no shareholders, and it is controlled by its directors. The directors of the MHC typically consist of members of senior management of the converted thrift or mid-tier holding company. As a result, senior management is able to control any shareholder vote, such as determining whether to repurchase shares or ultimately selling the institution.

Federal regulation authorizes MSAs that convert to the MHC structure to offer stock benefit plans to their officers, directors and employees. Stock benefit plans have the direct effect, however, of diluting the ownership percentage of each of the minority shareholders in an MHC organization.

The requirements for offering such a plan are set forth in 12 C.F.R. Parts 563b and 575, and require that a majority of the outstanding *minority* shares (*i.e.*, the shareholders other than the MHC) must approve any stock benefit plan. 12 C.F.R. §§ 563b.500 & 578.8(c) (effective Oct. 1, 2007). *See* Stock Benefit Plans Rule, 72 Fed. Reg. 35145. Because management controls the vote of the majority stock held by MHC, and because stock benefit plans could benefit that management, allowing the MHC to vote would create a clear conflict of interest. Accordingly, the minority-approval rule operates as a safeguard against that conflict of interest by precluding management from voting on and approving its own benefit plans. It also offers protection to minority shareholders against dilution of their ownership positions without their consent.

On July 20, 2006, OTS published a notice of proposed rulemaking in which it proposed to limit the minority-approval requirement to a period of one year after the

issuance of stock. *See* 71 Fed. Reg. 41179 (July 20, 2006). In the Stock Benefit Plans Rule it adopted, however, the OTS rejected this concept and codified the agency's existing policy as stated in OTS Letter No. P-2004-6 by establishing that the requirement of majority-of-the-minority approval for stock benefit plans applied at all times. In explaining its reasoning, the OTS stated:

> Historically . . . OTS has required a majority of the minority vote when a Subsidiary Company proposes to engage in certain actions that would have a significant direct effect on minority shareholders.
>
> Although the relevant statutes and regulations generally preserve the continuing control of the mutual, majority interest, OTS has long recognized that it is appropriate to consider minority interests separately in certain situations.
>
> Several commenters who supported the proposal asserted that activist shareholders often have used the minority vote requirement for stock benefit plans as leverage to influence management to take actions the activist shareholders sought on other matters. Even if certain minority shareholders have used the minority vote requirement as a means of pursuing other interests, however, it does not mean that the purpose of the minority voting requirements is invalid.
>
> Having considered the public comments, and considering the conflict of interest issues involved, OTS concludes that it is appropriate to continue to impose the separate minority shareholder vote requirement for stock benefit plans in MHC structures . . . .

Stock Benefit Plans Rule, 72 Fed. Reg. at 35147-48.

B. The Proposed Rule

On the same day the Stock Benefit Plans Rule was published in the Federal Register, the OTS published the proposed rule, 72 Fed. Reg. 35205 (June 27, 2007).

Under current regulations, a thrift converted to a MHC structure may adopt a charter provision that prohibits any person from acquiring or offering to acquire beneficial ownership of more than 10% of the outstanding shares of the issuer's equity securities for a period of not more than five years after the date that such class of stock is issued to the public. *See* 12 C.F.R. § 575.14(c)(2) (applicable to mid-tier holding companies), which incorporates by reference 12 C.F.R. § 552.4(b)(8) (applicable to federal stock associations). The OTS now proposes to permit a thrift subsidiary of a MHC (or a mid-tier holding company formed to hold such a thrift) to adopt even more restrictive charter provisions.

With certain exceptions not relevant here, this newly proposed charter provision would prohibit any person, for a period of up to five years after the date that a converted thrift or mid-tier holding company issues a class of voting stock to the public, from acquiring (or offering to acquire) beneficial ownership of more than 10% of the publicly held shares. Proposed Rule, 72 Fed. Reg. at 35207. For example, if a MHC organization was formed and 30% of the voting stock of the organization's mid-tier holding company was issued to the public, no member of the public could own more than 3% in the aggregate of the voting stock, for up to five years after the date that the voting stock was issued. Shares held above the limit would be sterilizied for voting purposes.

C. Stated Purpose of the Proposed Rule

The proposed rulemaking indicates that in "several situations" minority shareholders have *apparently* sought to "influence" management to repurchase stock from the public or to consider the sale of the institution.[1] *Id.* at 35206. In a similar vein, the OTS has expressed concern that a public shareholder in a MHC organization could acquire a large enough percentage of the publicly held shares to obtain "a significant amount of influence" without making any filing with the agency. *Id.* Although OTS does not explain it in the proposed rule, this "influence" apparently is wielded through the stock benefit plan approval process.[2] Based on these considerations, the OTS has propounded the proposed rule.

D. Operation and Effect of the Proposed Rule

The proposed rule seeks to address the "influence" issue by substantially tilting the playing field in management's favor to gain public shareholder approval of their stock benefit plans. *Id.*

First, the Stock Benefit Plans Rule adopted in June provides that the only shares to be counted when the public shareholders vote on a stock benefit plan are those actually voting. Stock Benefit Plans Rule, 72 Fed. Reg. 35145. As a result, where management previously needed a majority of *all* publicly held shares to approve an insider stock benefit plan, under the new rule it only needs a majority of those voting. In other words, management will now need fewer votes to approve a plan.

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[1] The only issues for which the approval of a majority of the public shareholders is required, however, are the implementation of a stock option plan or employee stock benefit plan (12 C.F.R. § 563b.500(a)(7)), a contribution of shares or the proceeds thereof to a charitable foundation (12 C.F.R. §§ 563b.555 & 575.11(i)), and the conversion of a MHC organization to full public ownership in a so-called "second-step conversion" (12 C.F.R. § 575.12(a)(3)).

[2] It is important to recognize that this same claim of undue "activist" minority shareholder "influence" was offered as the reason OTS should limit the majority-of-the-minority rule to a one-year period. As discussed above, OTS rejected this purported justification and left the minority-approval requirement fully intact when it issued the final Stock Benefit Plans Rule on June 27, 2007.

Second, having reduced the absolute number of votes needed for approval of a plan, the OTS proposed rule is designed to depress any vote count, thereby further reducing the number of votes needed to approve the plan. Specifically, the proposed rule will not count the votes of any shareholder above 10% of the outstanding minority shares, no matter how many shares are actually owned. Proposed Rule, 72 Fed. Reg. at 35207. For example, suppose the MHC has issued 1 million shares of the subsidiary thrift, 600,000 owned by the MHC, and 400,000 publicly owned. If an investor owned 80,000 shares, it would be able to vote only 40,000 of those shares (10% of 400,000), thereby reducing the number of shares required to approve a stock benefit plan by 20,000 shares (that is, from a majority of 400,000 shares to a majority of 360,000 shares (assuming all publicly held shares are voted)).[3]

In sum, although the proposed rule keeps in place the requirement of minority shareholder approval of insider stock benefit plans, it is designed to decidedly tilt the playing field in management's favor to make it extremely difficult for public shareholders to vote down such plans. In other words, the OTS is doing through the back door what it would not do through the front door: the proposed rule is simply a veiled effort effectively to undo the majority of the minority rule.

II. THE HISTORICAL PRECEDENT FOR ANTI-TAKEOVER PROVISIONS

A. Development of Anti-Takeover Regulations

An historical review of anti-takeover provisions is helpful in understanding the unprecedented proposed use of them. Traditionally, anti-takeover provisions have been employed to prevent undue control and influence from being exerted *on the institution* (*e.g.*, from being taken over). However, MHCs, by their nature, are immune from

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[3] This vote depression effect of the proposed rule would be magnified (and the proposed rule even more objectionable) if it also precludes a minority shareholder from soliciting proxy votes above the 10% of the minority shares threshold. The preclusion on voting shares above the threshold is couched in terms of beneficial ownership, which might be understood to preclude obtaining proxies in excess of the threshold. "Beneficial ownership" is not defined in the proposed rule, in 12 C.F.R. Part 575 (where the proposed rule would be set forth), or in 12 C.F.R. § 552.4(b)(8) (the definitions of which are incorporated by reference in the proposed rule). *See* Proposed Rule, 72 Fed. Reg. at 35207. As a result, it is not clear whether "beneficial ownership" in the proposed rule includes all or some proxy solicitations. Other anti-takeover provisions provide inconsistent guidance on the impact of the proposed rule on proxy situations. Section 563b.525(b), which sets forth a mandatory three-year prohibition on the acquisition of the stock of a converted thrift, references the OTS's Acquisition of Control Regulations and thereby permits the holding of revocable or irrevocable proxies, except when voting for the election of one-third or more of a thrift's directors, the reorganization or sale of the thrift, or other matters that would have a material continuing influence on business operations. *See* 12 C.F.R. § 574.4(b). The predecessor of section 563b.430, which is analogous to the proposed rule, shared this definition of beneficial ownership, but, when Part 563b was revised and restated, section 563b.430 was left without a definition, notwithstanding that the change was described as "nonsubstantive." *See* 51 Fed. Reg. 40127, 40130-31 (Nov. 5, 1986); 67 Fed. Reg. 52010, 52016 (Aug. 9, 2002). Thus, based on the guidance provided by other anti-takeover provisions, the limitation on beneficial ownership in the proposed rule may arguably include all, none, or some proxy solicitations, and the OTS should clarify its intention for the proposed rule.

takeover and control because mutuality is retained through the MHC's majority position and other regulatory safeguards. Now, the OTS proposes a truly radical use of anti-takeover provisions: to protect insiders' stock packages from shareholders who may seek to oppose them.

Optional charter provisions limiting the participation of public shareholders in a converted thrift have developed over several years. In 1974, when the Federal Home Loan Bank Board ("FHLBB") adopted 12 C.F.R. Part 563b to govern mutual-to-stock conversions, it noted that an administrative moratorium on conversions had been in place since 1963 because of abuses of the conversion process. 39 Fed. Reg. 9142, 9143 (March 7, 1974). To prevent the squeezing out of mutual members as public shareholders, windfall distributions of conversion proceeds, and disruption of housing finance, section 563b.3(i)(2) prohibited any company engaged in a business activity that was not permissible for a multiple savings and loan holding company from acquiring control of a converted thrift for three years following the thrift's conversion. *Id.* at 9145. In section 563b.3(i)(3), the FHLBB authorized a converted thrift to adopt a substantively identical provision in its charter. This option to adopt an anti-takeover provision was the forerunner of the proposed rule.[4]

Over time, the FHLBB permitted converting institutions to adopt somewhat broader restrictions. In 1982, the FHLBB deleted section 563b.3(i)(3) and replaced it with section 563b.3(i)(6), which permitted a converting thrift to prohibit any person from acquiring more than 10% of any class of equity security for three years following conversion, and to renew the prohibition for successive one-year periods. 47 Fed. Reg. 19672, 19676 (May 7, 1982) (codified at 12 C.F.R. § 563b.3(i)(7) (revised as of Jan. 1, 1983)). The following year, the FHLBB simplified the conversion regulations. It eliminated its prescribed form of the anti-takeover charter provision and permitted converting thrifts to adopt any anti-takeover provision that could be adopted by a corporation chartered by the state in which the thrift's principal office was located. 48 Fed. Reg. 15591, 15594 (April 12, 1983).

In 1984, the FHLBB reinstated its prescribed provision. On an interim basis, it authorized converting thrifts to adopt a charter provision that prohibited the acquisition of more than 10% of any class of equity securities by any person for up to five years after the securities were issued to the public. The FHLBB also expanded the prohibition to include the gathering of proxies and authorize a converting thrift to disregard any shares owned in excess of the limit either for voting or general quorum purposes. 49 Fed. Reg. 7356, 7357 (Feb. 29, 1984). In the final rule, the FHLBB adopted the same standard at section 552.4(b)(8) in order to make it available to all federally chartered savings associations, and revised section 563b.3(i)(7) to incorporate the general provision by reference. 49 Fed. Reg. 32340, 32342 (Aug. 14, 1984); *see* 12 C.F.R. §§ 552.4(b)(8) &

[4] 12 C.F.R. § 563b.3(i)(2) and (3) (revised as of Jan. 1, 1975). In 1975, all federally chartered savings associations were authorized to adopt the same prohibition. 40 Fed. Reg. 20943 (May 14, 1975); 12 C.F.R. § 552.4(b) (revised as of Jan. 1, 1976).

563.b(3)(i)(7) (revised as of Jan. 1, 1985). In 1986, the FHLBB expanded the meaning of beneficial ownership in Section 563b.3 to include the holding of revocable or irrevocable proxies. 51 Fed. Reg. at 40130-31.

When the OTS revised and restated 12 C.F.R. Part 563b in 2002, it retained the substance of section 563b.3(i)(7) (previously renumbered as 12 C.F.R. § 563b.3(i)(6)) at new section 563b.430. It also authorized converted thrifts and mid-tier holding companies in a MHC organization to adopt the same charter provision. 67 Fed. Reg. at 52014-15; *see* 12 C.F.R. §§ 563b.430 & 575.14(c)(2). Thus, the current regulations authorizing anti-takeover charter provisions are essentially unchanged since 1986.

B. Purpose of Anti-Takeover Regulations

The FHLBB considered mutual-to-stock conversions to be an extremely valuable financial option for mutual thrifts. The conversion process infused new capital into an insured depository institution without requiring the institution to rely on increased earnings to generate funds, which could help an institution to meet its regulatory capital requirements. The restructuring also could help an institution to compete more effectively. 51 Fed. Reg. at 40129.

The period immediately following a conversion, however, was considered a critical moment for a converted thrift. Management needed to deploy the conversion proceeds into housing finance and other productive assets and to adjust to operating a publicly held company. 49 Fed. Reg. 7356; 49 Fed. Reg. at 32341. Yet, "cash rich" recently converted thrifts were unusually attractive takeover candidates. 41 Fed. Reg. 50414 (Nov. 16, 1976). As a result, such thrifts faced many potential challenges: distraction of management; significant legal expenses; pressure from shareholders to increase return on equity and the corresponding incentive to invest conversion proceeds to achieve rapid profit growth instead of to serve more prudent local community needs and to support housing; and possible loss of independence. *Id.*; 49 Fed. Reg. 7356; 49 Fed. Reg. at 32341; 65 Fed. Reg. 43092 (July 12, 2000). The anti-takeover regulations eased these pressures for a temporary period after the conversion.

As can be seen from this history, the proposed rule would represent a radical change in the agency's use of anti-takeover rules, by using them to enable MHC insiders to advance their *personal* interests, rather than to protect the interests of the *institutions*.

III. THE PROPOSED RULE IS FATALLY FLAWED AND SHOULD NOT BE ADOPTED

A. The Proposed Rule Has No Nexus To The Stated Objective Of Protecting The Conversion Process -- It Only Protects The Insiders' Interests

The proposed rule does not explain why it is necessary as an anti-takeover device to prevent minority shareholder "influence" over management decisions given that, as the rule notes, public shareholders are in the minority and cannot control the outcome of

votes except in very limited situations, unrelated to the integrity of the institution. There is no nexus between the proposed rule's supposed purpose and its effect.

To elaborate, as the rulemaking itself recognizes, it is indisputable that a MHC controls a majority of the voting stock of its subsidiary thrift or mid-tier holding company, and that, as a result, the public or minority shareholders in a MHC organization have no ability to control the organization's most important corporate decisions and actions. The public shareholders cannot elect any directors in opposition to management, compel the board of directors to replace executive officers, restrain executive cash compensation, question major business decisions, disapprove major corporate transactions, require share repurchases, force a sale of the company, or direct the distribution of capital. They cannot wrest control of -- or takeover -- a MHC organization from management. By its very nature, the MHC is already protected from all outside influence to address the critical challenges confronted by newly converted mutuals. *See supra* § II.B. Of relevance here, all that the public shareholders can do is to disapprove certain stock based compensation plans. As the OTS recognized in its recently adopted Stock Benefit Plans Rule, however, the ability of public shareholders to disapprove such plans is necessary in light of conflict of interest issues.

Therefore, while the proposed rule purportedly addresses combating "influence," all that it would accomplish is to substantially impede the ability of public shareholders to challenge management stock benefit plans -- it tilts the playing field decidedly in favor of management and away from the economic owners. There is no argument made in the rulemaking notice, and no reason to believe, that tilting the playing field in management's favor to adopt stock based compensation would somehow protect the mutual-to-stock conversion process, especially with respect to take-over-proof MHCs. *Because the only effect of the proposed rule is to make it easier for management to gain approval of stock based compensation, and does nothing to protect the mutual-to-stock conversion process, it has no nexus to the objective of the rule*. Consequently, the proposed rule lacks a rational basis, and is arbitrary and capricious.

B. The Proposed Rule Disenfranchises The Economic Owners For An Improper Purpose

The Stock Benefit Plans Rule amended sections 563b.500 and 578.8 and confirmed that the public shareholders of a MHC organization have the sole right to disapprove stock option plans and employee stock benefit plans. Stock Benefit Plans Rule, 72 Fed. Reg. 35145. The only discernible effect of the proposed rule would be to disenfranchise the economic owners from opposing such plans, despite the publication of the Stock Benefit Plans Rule on the same day as the proposed rule and the strong, longstanding policy reasons supporting that rule. If a shareholder vote is important -- and the OTS confirmed that it is when it adopted the Stock Benefit Plans Rule -- it makes no sense to disenfranchise the economic owners from that vote. But that is what the proposed rule would do. It is offered without any acknowledgement of the Stock Benefit Plans Rule or any explanation as to how it can be consistent with that rule. The proposed rule also fails to address the specific findings in the notice for the Stock Benefit Plans

Rule that, whenever thrift management controls a MHC, it faces a conflict of interest in voting for stock based compensation, and that the OTS has historically protected minority shareholders from such a threat to their economic interests. The failure of the OTS to even address -- much less reconcile -- these contradictions deprives the proposed rule of any rational basis.[5]

C. The Proposed Rule Would Undermine Sound Corporate Governance

As discussed above, in 2006, the OTS proposed to reverse the right of public shareholders of a converted thrift or mid-tier holding company to approve the adoption of an employee stock benefit plan. 71 Fed. Reg. 41179. That proposal, if adopted, would have not only abruptly reversed longstanding OTS policy, but would have been contrary to steps taken over the last several years by all the federal banking agencies, as well as the efforts of Congress, the Department of Justice, the Securities and Exchange Commission, the Public Company Accounting Oversight Board, the accounting profession, and several state attorneys general to increase management accountability. Prosecutions and newspaper headlines regarding stock option back-dating also demonstrated most clearly that the power to award stock based compensation was frequently abused.

The OTS corrected its course when the final Stock Benefit Plans Rule was adopted in June 2007, as discussed above. The rule now proposed, however, would have almost the identical effect of the 2006 proposal. The current proposed rule appears to be an attempt effectively to reinstate the 2006 proposal, and it should be rejected for all the reasons that the 2006 proposal ultimately was rejected. To use a metaphor, if the 2006 proposal was a "pig," the proposed rule is nothing more than a "pig with lipstick."

D. The Proposed Rule Would Authorize The Adoption Of Shark Repellents Likely Actionable Under Corporate Law

The proposed rule enables MHC directors to adopt what in essence amounts to a "shark repellent"[6] to insulate their stock benefit plans from a meaningful shareholder vote. (*See* Dennis J. Block, Nancy E. Barton, Stephen A. Radin, *The Business Judgment Rule: Fiduciary Duties of Directors*, at 1245, 1249 (5th ed. 1998) (discusses shark

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[5] An agency rule is arbitrary and capricious if, for example, the agency entirely "failed to consider an important aspect of the problem," or "offered an explanation for its decision that runs counter to the evidence before the agency . . . ." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. ___; 127 S.Ct. 2518, 2529 (slip op. 10-11) (June 25, 2007), citing *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

[6] "Shark repellents" are provisions contained in a corporation's charter or bylaws "intended to deter a bidder's interest in that company as a target for a takeover." *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1377 n.19 (Del. 1995). They include voting rights ceilings (which is what the proposed rule authorizes), as well as such provisions as those eliminating or limiting cumulative voting, allowing dual class common stock, anti-greenmail provisions, staggered boards, and supermajority provisions. *See Block et al. Business Judgment Rule* at 1245-49.

repellent charter provisions, including "voting rights ceiling"). Even if authorized by the OTS's proposed rule, Stilwell believes that the adoption of such a charter provision, without public shareholder approval, would not survive judicial scrutiny.

Although courts tend to be "particularly deferential" when shareholder approval is secured on shark repellent provisions, *id.* at 1250, courts will invalidate board adopted provisions that "unjustifiably and inequitably interfere with shareholder voting." *Id.* at 1253. The OTS contemplates that this shark repellent would be self adopted by boards in order to make it more difficult for shareholders to challenge or defeat boards' stock benefit plans. Since the OTS has now excluded the board controlled MHCs from voting on the plans, the proposed shark repellent would unjustifiably and inequitably strike at the very heart of the recently affirmed public shareholders' voting rights.

Furthermore, "board actions taken for the sole or primary purpose of impeding the effectiveness of the shareholder vote are deeply suspect and can only be sustained upon the showing of some compelling justification." *IBS Fin. Corp. v. Seidman Assocs., L.L.C.*, 954 F. Supp. 980, 992 (D.N.J. 1997) (citing *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).) Additionally:

> "[The shareholder franchise] is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own. Thus, when viewed from a broad institutional perspective, it can be seen that matters involving the integrity of the shareholder voting process involve considerations not present in any other context in which directors exercise delegated power."

Id. (quoting *Blasius*, 564 A.2d at 659).

The sole purpose of the shark repellent authorized under the proposed rule is to impede the effectiveness of the shareholder vote in order to protect stock benefit plans for the board and other insiders. Such shareholder vote now excludes the board-controlled MHC. The justification offered by the OTS -- that this provision will protect the institution from votes requiring share repurchases and a sale of the institution -- is pretextual because only the MHC controls those votes. This repellent will impede the effectiveness of the shareholder vote now ensured by 12 C.F.R. § 575.8(c). Consequently, the proposed charter provision is contrary to the foregoing legal principles.

IV. CONCLUSION

The concern expressed in the proposed rule is that shareholders who own more than 10% of the public float may take actions that appear intended to influence management to repurchase shares or sell the company. But MHC management alone makes these decisions, not public shareholders. MHC management can *always* block repurchases or a sale even if sought after by 100% of the public shareholders -- it is in their complete control. The historical rationale for an anti-takeover provision simply is inapplicable here because an MHC is immune from take-over.

What the OTS is actually doing with the proposed rule is protecting *insiders* (not the *institution*) from possibly losing their valuable stock benefit plans if they are subject to public shareholder approval. Thus, the proposed rule gives insiders unprecedented protection on their stock benefit plans, diminishes the power of economic investors to oppose plans, and makes management less accountable to public shareholders who would be diluted by stock plans. Why should management be allowed to receive stock benefit plans without full public shareholder approval simply because public shareholders may have concerns and make demands? How does making management more accountable to public shareholders hurt the issuer or otherwise take unfair advantage of the offering or its integrity? After all, it is the shareholders who invest in the institutions and, in an MHC, they can do nothing to hurt the institution. The most they can do is to vote down stock benefit plans. The OTS has no legitimate interest in amending the anti-takeover rules to protect insiders from possibly not getting their plans.

The proposed rule should not be adopted.

Respectfully,

Spencer L. Schneider