Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G St., NW
Washington, D.C. 20552
Attn: No. 2006-05

Re: OTS
No. 2006-05
RIN 1550-ACOO
71 FR 7695 (Feb. 14. 2006)

Dear Madam/Sir:

This is a comment regarding the above OTS proposal. It is submitted by me in my personal capacity, not as a lawyer for any client, and not as a representative of the Dechert or any other law firm. I am not being compensated, directly or indirectly, by anyone for submitting this comment.

I believe this pre-approved optional by-law violates the law for a number of reasons. Many of those reasons are spelled out in my letter to you of December 22, 2000, about the predecessor pre-approved by-law, a copy of which letter is attached hereto and is incorporated by reference.

Apart from your agency's motivation for permitting this particular pre-approved by-law—and that ad hominem purpose is fairly well known—you are purporting to delegate federal legislative authority to federally chartered associations and to mutual holding companies. I suggest strongly your agency does not have such authority, under the provisions of any federal statute or the U.S. Constitution.

Possibly you believe you could extend this authority by means of a pre-approved by-law to bar as a director:

(1) any person who has overdrawn his or her checking account;
(2) any person who has shown willful disregard for the environment by throwing a receipt from an ATM on the sidewalk; or
(3) any person whose conduct some sub group of the S&L community contends is violative of "the public trust".

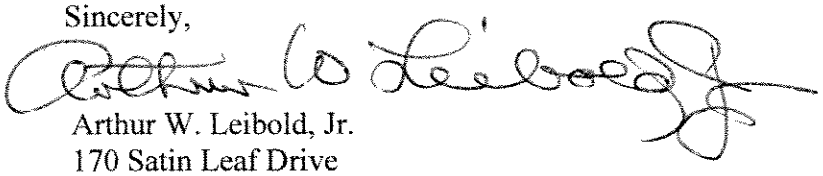
The Supplementary Information, General, contained in your proposal could be modified to allegedly support virtually any pre-approved by-law, regardless of its content.

In closing, I suggest your agency's current management group should read or reread Administrative Law Judge Arthur Shipe's September 12, 2001, Opinion, Findings and Conclusions in the Matter of In Re MAXXAM. ALJ Shipe addresses in some detail the past over reaching of your agency and the unlawful positions it took against various respondents in that case.

This proposed pre-approved by-law is an attempt to do indirectly what your agency has not been permitted by Congress, the Courts and by ALJs to do directly. It also attempts to provide retroactive legal consequences not permitted, not even contemplated, when your agency's original cease and desist orders were entered. (See

sub-part 2 thereof.) Very likely additional litigation will be necessary to limit your attempts to act outside your governing law.

Sincerely,



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(3)

Dechert

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December 22, 2000

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Manager
Dissemination Branch
Information and Services Division
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552

Re: Proposal: 65 F.R. 66116 (Nov. 2, 2000);
Attention: Docket No. 2000-93

Dear Sir/Madam:

This is a comment regarding the above OTS proposal. It is submitted by me in my personal capacity and not as a lawyer for any client. I am not being compensated, directly or indirectly, by anyone for submitting this comment.

I believe the first proposed pre-approved optional by-law, particularly Subpart 2, is violative of law for a number of reasons.[1] They include:

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[1] The language of the proposed by-law for convenience, is set forth below:

> 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.

(1) It is an attempt to use federal agency created federal common law rather than state law to determine certain qualifications for service on the Board of Directors of a federally-chartered association. The decisions of the U.S. Supreme Court in O'Melveny & Myers v. FDIC, 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994), and Atherton v. FDIC, 519 U.S. 213, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997), have circumscribed the use of such federal common law. I suggest that the decision of the U.S. Supreme Court in Murphy v. Beck, No. 00-46, very likely will further limit the use of and application of such federal common law.

(2) The optional by-law is an attempt to amend FIRREA, without using the services of Congress. 12 U.S.C. § 1818(e)(6) contains the consequences of a final OTS order of removal and prohibition. These are not the consequences of a cease and desist order issued pursuant to 12 U.S.C. § 1818(b)(6) or (7). The optional by-law is an attempt by OTS to have some of the statutory consequences of a prohibition order follow from the issuance of a certain OTS cease and desist order.

(3) The fact that this agency process is structured as a voluntary (permissive) action of the association, as contrasted to an action required or demanded by the OTS, is a distinction without a difference. The associations are being invited to adopt a by-law which provides a punitive consequence of an agency-issued (final) cease and desist order, which goes beyond OTS's statutory authority under 12 U.S.C. § 1818 to include within the cease and desist order. The association has no authority, under state or federal law, to expand 12 U.S.C. § 1818(b) or § 1818(e) or otherwise expand the authority of OTS. Such an attempt at expansion, at the invitation of OTS as a "voluntary" act, does not make it more "legal" but rather less so.

(4) The language of the by-law, particularly subpart 2, is unclear. Are consent cease and desist orders included? Is the Notice of Charges controlling or the language of the Order? Or the consent stipulation if there is one? Or all three?

This may invite a court, federal or state, in proxy or related civil litigation, to interpret OTS documents. I question if such courts on the basis of primary jurisdiction would refer or defer to OTS' interpretation. When I was General Counsel of OTS's predecessor agency, the Federal Home Loan Bank Board, I would not, as a legal policy issue, have wanted to cede authority to civil courts to interpret Federal Home Loan Bank Board cease and desist documents. This result very likely would occur, particularly since OTS, by using the voluntary, optional by-law approach, has attempted to distance itself from the process of banning potential directors.

(5) Any cease and desist order pre-dating the adoption of this proposed regulation, or adoption of the proposed by-law, should not have the consequences of barring the respondent from service as a director of a federal association. In criminal matters, this consequence would be described as an ex post facto order. In the civil law arena, it is referred to as the application of a provision retroactively, arguably in violation of the U.S. Constitution, when there is no clear Congressional statutory authority in FIRREA or any other applicable statute for doing so.

(6) Since this optional by-law may be directed by OTS to at least one, possibly a few more individuals, it might properly be described as, or compared to, a bill of attainder or special legislation.

When OTS, during the last ten years, issued cease and desist orders against certain individuals, it is likely they did not choose to seek review in one of the two U.S. Courts of Appeal because -- based on the language of the order and the applicable sub-provisions of 12 U.S.C. § 1818 -- they and their counsel

believed they knew the natural consequences of their actions. After the fact, through the action of the very same agency, the agent of the agency is invited -- certainly permitted -- to expand the language of the agency's order and/or the applicable statutory authority for the order. No appropriate statutory authority has been cited in the proposal for this result.

OTS relied heavily for many years on Briggs v. Spaulding, 141 U.S. 132, 11 S. Ct. 924, 35 L. Ed. 662 (1891), for its authority in certain supervisory matters, particularly applicable to federal associations. The U.S. Supreme Court, in the O'Melveny & Meyers and Atherton cases, indicated clearly that the Briggs v. Spaulding authority enunciated in 1891 should have been laid to rest in 1938 when the U.S. Supreme Court decided Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). See also Wichita Royalty Co. v. City National Bank, 306 U.S. 103, 59 S. Ct. 420, 83 L. Ed. 515 (1939).

In simplistic terms, the consequences of the by-law proposal "ain't fair," and the courts, sometimes admittedly in a convulated fashion, oftentimes strike down agency actions which "ain't fair."

Rather than taking action which is legally highly questionable -- in fact appears downright contrary to law -- I suggest the optional by-law be withdrawn. If OTS nonetheless proceeds, I believe subsequent litigation will show that its adoption was in violation of law.

Sincerely,

Arthur W. Leibold, Jr.

cc: Aaron B. Kahn
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