AMERICAN BANKERS ASSOCIATION ®

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April 17, 2006

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

RE: Federal Savings Association Bylaws; Integrity of Directors; OTS No. 2006-5; RIN 1550-AC00; 71 Fed. Reg. 7695 (Feb. 14, 2006).

Dear Sir or Madam:

The American Bankers Association ("ABA") appreciates the opportunity to comment on the Office of Thrift Supervision's ("OTS's") proposed rule that would preapprove certain bylaws for use by federal savings associations and mutual holding companies. ABA, on behalf of the more than two million men and women who work in the nation's banks, brings together all categories of banking institutions to best represent the interests of this 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.

General Observations:

ABA originally opposed a similar provision when the OTS proposed it for notice and comment in November of 2000.[1] Much has changed in the intervening years. Corporate governance concerns have taken center stage since the passage of the Sarbanes Oxley Act of 2002. Operational and reputational risks impact capital adequacy and growth opportunities. Allowing institutions to make a choice to adopt the optional bylaw consistent with the statutes of their home or incorporating state gives savings associations an important tool in their efforts to continually earn and maintain customer and community trust.

[1] 65 Fed. Reg. 66116 (Nov. 2, 2000).

We do suggest that OTS add a *de minimis* threshold so that the mere assessment of a civil money penalty for a failure to file a form with no willful intent, for example, does not unnecessarily trigger the provision. Addition of the threshold will ameliorate concerns about the potential for heightened bank/examiner tension that may result from adoption of the bylaw. With that addition, ABA commends the OTS for proposing the optional, preapproved bylaw provision and urges its prompt adoption. The proposal not only benefits the institutions directly regulated by the OTS, but will also serve as a model for state chartered institutions with similar goals.

In addition, ABA notes that the preapproved bylaw has its antecedents in the Section 19 determinations of the Federal Deposit Insurance Corporation ("FDIC") and will contribute to consistency in requirements between the two regulators. Specifically, Section 19 of the Federal Deposit Insurance Act (12 U.S.C. § 1829) requires anyone convicted of any criminal offense involving dishonesty or a breach of trust or money laundering or who has agreed to enter into a pretrial diversion or similar program in connection with the prosecution of such offense, to apply to the FDIC for prior written approval to become or continue as an institution-affiliated party with respect to an insured depository; to own or control directly or indirectly an insured depository institution ; or to participate directly or indirectly in any manner in the conduct of the affairs of an insured depository. 12 C.F.R. §308.156. The regulations also list standards to be considered as part of the FDIC's deliberations including:

1) Whether the participation directly or indirectly by the person in any manner in the conduct of the affairs of the insured depository constitutes a threat to the safety or soundness of the institution or the interests of its depositors, or threatens to impair public confidence in the institution;
2) The position to be held by the applicant;
3) The amount of influence and control the applicant will be able to exercise over the affairs and operations of the institution;
4) The ability of the institution's management to supervise and control the activities of the applicant;
5) The level of ownership that the applicant will have in the institution;
6) Whether there is fidelity bond coverage for the applicant; and,
7) Whether there is evidence of any rehabilitation of the applicant.

12 C.F.R. § 308.157. A denial of an application remains in effect until removed by the FDIC.

The corollaries between the cited FDIC rules and the proposed OTS optional bylaw are many. As directors are individuals with significant ability to influence and control the affairs of the institution and are, in many cases, independent of management and reflect a level of ownership of the institution, a director that trips the triggers of the proposed integrity bylaw would also trip the Section 19 factors. In short, the adoption of the proposed optional bylaw helps harmonize the requirements between the two federal regulators. And, because the FDIC already has a process for the consideration and disposition of Section 19 applications, there is no need for the OTS to duplicate those efforts. Rather, the proposed bylaw puts the issue of director qualification at an even earlier stage of the process and avoids causing additional harm or embarrassment to either the individual or institution by a potential denial of a Section 19 application.

Turning to the specific questions, we have the following comments:

1. Indefinite v. Ten Years. We note that a Section 19 bar remains in place until removed by the FDIC. There is no time limit. Elimination of a time limit actually helps harmonize the approaches of the FDIC and OTS.

2. Issuing Agencies – Financial or Broader? The current proposal takes a Gramm- Leach-Bliley Act approach by limiting the types of cease and desist orders to those "financial in nature." There are other areas that may directly impact the operations of the savings association. These include disciplinary actions for appraisers, attorneys, and accountants. It may be useful to include both domestic and international proceedings. A slightly broader universe may avoid inconsistent results.

3. Nominating Prohibition. ABA supports the inclusion of this provision and the flexibility proposed by OTS to allow institutions to adopt the optional bylaw, with or without the inclusion of this provision. In essence, the provision closes the "indirect" pathway when the direct path is barred by the rest of the provision.

4. Reduction of Reputational Risk. We believe that the optional bylaw will allow institutions to manage reputational risk and enhance the confidence that depositors and customers have in their financial institutions. It will also encourage early disclosure of issues potential directors may have, thereby avoiding harm or embarrassment to either the institution or potential director.

Conclusion

For all of the above reasons, ABA supports adoption of the proposal modified to include a threshold trigger. We commend the OTS for its diligent consideration of all of the factors surrounding the issues of corporate governance and the need for qualified, engaged directors. If there are any questions on the issues raised by this letter, please do not hesitate to contact the undersigned at (202) 663-5434.

Sincerely,

C. Dawn Causey