American Bankers Association
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Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street & Constitution Ave., NW
Washington, DC 20551

Re: Interim Final Rule, Savings and Loan Holding Companies
76 Fed. Reg. 56508-56606 (Sept. 13, 2011)

Dear Ms. Johnson:

The American Bankers Association (ABA) welcomes the opportunity to comment on the Board of Governors of the Federal Reserve System (Board) interim final rule addressing a number of transition rules including new Regulations LL and MM for savings and loan holding companies (SLHCs), including capital adequacy assessments. This comment letter focuses on Regulation MM (mutual holding companies ("MHCs")); a separate letter addresses Regulation LL. ABA represents banks of all sizes and charters and is the voice for the nation's $13.3 trillion banking industry and its 2 million employees. Institutions directly affected by the proposal are strongly represented in ABA's membership and participated in the development of this comment letter.

The interim final rule transfers the regulation of MHCs to the Board's regulatory framework and attempts to preserve those items of statutory difference between the Home Owners Loan Act (HOLA) and the Bank Holding Company Act (BHCA). It is a difficult task and we commend the Board's efforts. ABA notes that the transfer and supervision of MHCs will provide opportunities for greater understanding as the Board and the mutual industry learn from each other. During this learning period, ABA urges the Board to exercise supervisory discretion while systems and expectations are harmonized. As noted in conversations with Board staff, the industry and the Board are both learning as the process evolves.

Mutuality

Mutual savings banks are some of the oldest savings institutions in the country dating back to the early 1800s[1]. They capitalized on the antipathy toward the earlier banks due to among other issues the experiences with paper money and colonial bills of credit[2]. While Bank of New York may be the oldest continuously operating national bank (opened in 1784)[3], the New England savings banks are quite proud of their continuous service to their communities approaching 200 years. The "youngsters," the federal savings associations, date their existence to the Home Owners Loan Act of

[1] Weldon Welfling, Mutual Savings Banks: The Evolution of a Financial Intermediary, (Case Western Reserve, 1968).
[2] Id., at p. 12.
[3] http://www.bnymellon.com/225years/transcripts/transcript.pdf

1933, and at one time all federal savings associations were mutual in form. Attached to this comment letter is a short primer on mutual institutions.

The universe of mutual savings associations has waxed and waned with the history of the United States and the needs of communities and businesses served. Those remaining in mutual form have withstood World Wars, depression, recessions, boom times and stagnant growth. They are both federal and state chartered institutions and while their current numbers have been dwindling (ABA's website cites 655 mutuals including 162 mutual holding companies holding more $273 billion in assets while other sources list 679 mutuals, nonstock MHCs, and public MHCs),[4] there is a broader universe of similar institutions that are potential mutual savings bank charters – credit unions. The similarities between federal savings associations and federal credit unions are numerous including their focus on the long-term and their community base. And, like mutual savings banks, credit unions grow through retained earnings. There are 7, 442 credit unions in the United States including 173 with assets over $1 Billion Dollars holding $449.1 Billion Dollars in assets.[5] Conversions of credit unions occur at a single-digit pace along with contra conversions (mutual savings banks to credit unions – most recent announcement is Trivent Financial for Lutherans[6]) Credit union conversions to a mutual savings bank charter peaked in 2001 before the NCUA adopted a number of restrictive rulemakings.

The purpose of the recitation of history and identification of the broader mutual industry is to place the MHC form into context. Creation of the MHC dates to the enactment of the Competitive Equality Banking Act of 1987. The purpose of the MHC is to provide a mechanism that preserves the mutual charter while providing a means for acquisitions, controlled capital raising, and flexibility to offer other financial services. Many MHCs have not issued minority shares. The industry continues to explore the flexibility of the charter and its many benefits. It provides needed support without raising more funds than necessary or deployable – a means of providing prudent capital to well managed entities while maintain their local focus and presence. For these and the many endeavors the industry has put the MHC charter to use, ABA respectfully encourages the Board to view the MHC as a positive option for the mutual industry.

Regulation MM

The interim final regulation moves the regulatory provisions governing MHCs from the OTS regulations to the new Board regulation MM. Most of the provisions of the prior OTS rules remain including the ability of the supervisor to charter a new institution as part of the creation of the MHC. This authority is intrinsic to the MHC charter and while clearly envisioned by the transferred regulations, the industry would find it useful if the regulations included a clear statement in the preamble or regulation to that effect.

[4] http://www.aba.com/Solutions/Mutuality.htm "Today's Mutual Community Banks 2011 Fact Sheet".
[5] NCUA
[6] http://www.cutimes.com/2011/11/03/thrivent-financial-plans-new-credit-union.

The Dividend Waiver

For MHCs and mutuals, the section that gives them the most pause, is the dividend waiver. The ability to raise targeted amounts of capital and use of the holding company structure to make acquisitions of lines of business and other depositories is a useful tool in the strategic planning and growth of mutuality. The Board has dealt with dividend waivers for years and approaches it from its "source of strength" viewpoint. It is difficult to understand why a holding company that must serve as a source of strength to the subsidiary savings association would waive dividends that might provide the basis for that support. As in most things, the issue is a bit more complicated than it may appear at first blush.

Why Are Dividends Waived?

Historically, the ability to waive dividends enabled minority stock MHCs to pay a higher dividend necessitated by less attractive nature of the investment due to the minority status of the stock. Now, dividends are much more reflective of the market and the yields are similar in amounts to dividends paid in fully stock institutions. However, there are other practical reasons that remain today for waiving dividends to the MHC. Because little or no activity is conducted at the MHC level, capital lies dormant subject to taxation (a second time) and erosion. Passive capital may not be the best source of strength.

ABA suggests that the Board consider the strength of the mid-tier holding company as an alternative to the MHC. Most minority stock MHCs have a mid-tier holding company and it is this entity that is most readily available to support the depository institution, not the MHC top tier. Placing funds in the top tier may limit their availability and make prudent deployment and investment more cumbersome both in terms of time and expense. ABA respectfully suggests that the existence of the mid-tier may change the dynamic and solve the source of strength concern in the dividend waiver discussion.

Overlapping Boards, Stock Ownership and Fiduciary Duties.

The OTS regulations and Section 625 of Dodd-Frank Act require the board of directors to "expressly determine that a waiver of the dividend by the mutual holding company is consistent with the fiduciary duties of the board of directors to the mutual members of the mutual holding company."[7] The Board is concerned that overlapping boards at the subsidiary institution and MHC level (or mid-tier) may provide an inherent conflict of interest as well as directors maintaining ownership interest in the bank and benefiting from the dividend waiver. ABA respectfully suggests that overlapping boards and stock ownership are extremely common and encouraged in most lines of commerce. Investors often want to know that management and the board has a vested interest in the company doing well because their own capital is at stake. Employee stock plans provide a similar incentive to employees to want their company to do well. Regulation MM appears to consider the denial of one

[7] 12 U.S.C. 1467a(o)(11)(D)(ii).

group's right to receive dividends by the other groups that receive enhance dividends presents a conflict of interest. To overcome that conflict, Regulation MM adds a member vote.

The first issue presented is who or what is being protected at the MHC level. The mutual interest that is represented has no right to the capital at the MHC other than in the case of a liquidation.

The capital issue was decided in the context of tax law and whether the accumulated surplus of a mutual was taxable income to a depositor. The U.S. Supreme Court ruled in *Society for Savings v. Bowers*, 349 U.S. 143(1955) on the ownership issue:

> The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest. If he continues, his only chance of getting anything more would be in the unlikely event of a solvent liquidation, a possibility that hardly rises to the level of an expectancy. It stretches the imagination very far to attribute any real value to such a remote contingency, and when coupled with the fact that it represents nothing which the depositors can readily transfer, any theoretical values reduces almost to the vanishing point.[8]

Secondly, because mutual ownership is incomplete, the rights granted are limited. The MHC members have the right to vote on major corporate items, *i.e.*, mergers. Companies in the stock world declare dividends and shareholders do not vote on the amount. If a corporate shareholder is displeased with the rate, the shareholder may sell the stock and seek one with a track record of a better return. Corporate directors who own stock do vote on dividends – it is a normal function.

The perceived potential conflict of interest may be addressed by using concepts of fairness under statutes similar to Delaware's approach when one or more of its directors has a financial interest – the material facts of that relationship or interest are disclosed and the action "is fair as to the corporation as of the time it is authorized."[9]

Vote of Members.

Regulation MM creates a new right for MHC members to approve any dividend waiver even for grandfathered MHCs in an effort to deal with the perceived conflict of interest. There are practical difficulties with a member vote. First, most depositors are unaware that they have voting rights by virtue of their deposits. The member has not made a decision to "invest" in the same manner that a consumer makes a conscious purchase of the stock of a company. And, like proxy votes in other

[8] Society for Savings v. Bowers, 349 U.S. 143, 149-150 (1955).
[9] Del. Code Ann. Tit. 8, Sec. 144 (2010 Supplement).

companies, the returns of actual votes are quite low. The average citizen simply does not exercise his or her voting rights in anything, even elections. Soliciting the vote of a majority of the members is a high hurdle and may require the hiring of proxy solicitors because the population voting are the depositors and customers of the bank – a large and diffuse group. As noted in other comment letters, proxy solicitation firms can charge $125,000 to conduct the vote with success not guaranteed. And, the depositors are voting on a benefit that even if not waived, they would not share in. The potential for consumer confusion is enormous. And, the benefit of the vote is questionable. ABA respectfully suggests that the solution of a member vote has little or no benefit to the depositor, the institution or the MHC.

Grandfathered MHCs have a stronger argument that prior OTS practice should continue. The statute recognized this in its explicit language dealing with the exchange ratio and valuation. The basic thought as stated by staff members present during the drafting was that existing MHCs with minority shareholders should not have the rules changed on them out of fairness and to avoid a "takings" debate. For this and the other reasons stated in this comment letter and other letters filed by MHCs, ABA urges the Board to consider an alternative that does not create new member rights and mandate expense that was not contemplated by the Congressional grandfather in Section 625 of the DFA.

For nongrandfathered MHCs, the Board may wish to reconsider the depositor confusion the process established in Regulation MM causes. Indeed, if the Board engaged focus groups to explore the effectiveness of potential disclosures, the impossibility of the process would soon be evident. If the issue the Board wants to address is the capital support of the holding company for the depository institution, the MHC dividend waiver is the wrong tool.

Conclusion

Regulation MM surprised the industry with its approach to dividend waivers that appeared to many to exceed Section 625 of DFA. It left the impression that the Board wanted to discourage the use of the MHC charter and encourage the migration to stock of mutual institutions. Indeed, in a law suit recently filed, the plaintiff seeks to force judicially a second step conversion because "the Federal Reserve Board recently issued new regulations which practically eliminate the ability of mutual holding companies to waive their dividends in favor of public shareholders." [10] ABA believes that the Board has no such desire and is seeking to supervise in a manner that meets its overall statutory obligations. ABA stands ready to assist in finding a regulatory framework that meets the Board's needs without confusing consumers or causing undue and disproportionate expense to mutuals and MHCs. The mutual industry is a resilient segment that serves its communities. It is a segment that deserves support and workable rules.

Sincerely,

[10] Complaint, para. 23, Stilwell Value Partners, LP v. Cavanaugh et al, filed N.Y. Sup.Ct. (case number not assigned).

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Attachment: Mutual Primer

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Mutual Savings Banks – A Primer

Mutual savings associations are some of the oldest types of financial institutions in the United States. The first two, Philadelphia Savings Fund Society and the Provident Institution for Savings, date their creation to 1816 with doors open and accepting deposits in 1817. The founders of these saving societies were philanthropists interested in encouraging savings among the poor.[i] In fact, some savings banks were named for coins, *e.g.*, The Dime[iii] or Salem Five Cents[iv], because the savings banks would take deposits as small as a dime or five cents.

There are two types of mutual savings institutions – the older, state-chartered mutual that uses the trustee/corporator form of governance, and the newcomer, the federal mutual savings association, dating its origin to the Home Owner's Loan Act of 1933. Both are non-stock institutions built on the foundation of pledged deposits (think of pledged deposits as long term certificates of deposit that provide the fundamental core capital to open doors and make loans). Both have the mission to provide a means of savings for those who were uncomfortable or discouraged by the financial institutions of their day. Many of the early savings associations were truly "pooled" funds, money collected in a barrel in the local general store or bar and loaned out once enough funds were gathered. They had limited hours and served immigrant and other populations. Their focus was home ownership and wealth accumulation. These were the institutions that the average citizen turned to after World War II to buy and finance their homes.

Because mutuals are nonstock, ownership is incomplete. Depositors in federal mutual savings associations have the following rights: they have the right to vote[v], the right to amend the bylaws,[vi] the right to nominate and elect directors,[vii] the right to remove directors for cause,[viii] the right to request special meetings,[ix] the right to communicate with other members,[x] the right to inspect the corporate books and records,[xi] and the right to share pro rata in the assets of the association following liquidation[xii]. Ownership is incomplete because unlike ownership of stock in a corporation where you have title to your shares of stock and may freely transfer that ownership, ownership in a mutual ends when your account or relationship with the mutual ends. You can't take mutual ownership with you. It is the same in many cooperatives – the ownership exists only to the extent of participation in the cooperative. Once you move your money or once you no longer are part of the cooperative, your ownership interest is over.

This also means that neither the income nor the capital of the mutual is taxable to depositors. Indeed, the issue of whether the accumulated surplus of a mutual was taxable income to a depositor was decided by the U.S. Supreme Court in *Society for Savings v. Bowers*, 349 U.S. 143(1955). The Court specifically addressed the ownership issue:

> The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest. If he continues, his only chance of getting anything more would be

> in the unlikely event of a solvent liquidation, a possibility that hardly rises to the level of an expectancy. It stretches the imagination very far to attribute any real value to such a remote contingency, and when coupled with the fact that it represents nothing which the depositors can readily transfer, any theoretical values reduces almost to the vanishing point.[xiii]

One of the recent innovations for mutual institutions is the ability to create mutual holding companies. First enacted on the federal level in 1987 in the Competitive Equality Banking Act, mutual holding companies preserve the mutual interest while providing the flexibility of a holding company (sometimes two tiers of holding companies) to allow acquisition of new lines of business, multiple charters and the ability to raise capital in more precise and targeted means than a full conversion to stock. MHCs may or may not offer stock. MHCs may access trust preferred offerings to raise just enough capital to fund precisely the acquisition or growth. The MHC structure permits management to focus on longer term goals while providing a proven vehicle for safe and sound capital formation.

Why is capital important? As a mutual institution, the ability to raise capital is restricted to retained earnings. These are the earnings that stay with the bank after expenses, salaries, taxes, and interest is paid on accounts. It can take a long time to grow retained earnings. Because retained earnings grow slowly, many mutuals are conservative in their capital deployment and maintain healthy capital levels to weather severe economic storms. Before 1987, a mutual seeking to acquire another institution or purchase an insurance agency had to save sufficient retained earnings to fund the purchase. With the provision of MHC flexibility, the capital issues of the mutual are solved while preserving the mutual nature of the entity as a whole.

If the capital needs of the mutual are significant, a mutual may convert to stock form. Although at one time, all savings associations were mutual in form, approximately 600 institutions remain in mutual or MHC form currently. These are healthy, well-run institutions that have chosen the mutual form to remain independent and community focused institutions.

Much has been written about the process of converting from mutual to stock form and the history of the process demonstrates a need for experienced regulatory oversight. The Office of Thrift Supervision and its predecessor, the Federal Home Loan Bank Board, have actively supervised the process for over thirty years. The process seeks to balance the rights of depositors with the need to raise capital in a fair process that results in the widest distribution of stock possible. For this reason, the ability of management to purchase capital is limited, the ability to purchase a controlling share of stock is limited, and the stock is fairly priced based on an appraisal that is regulatorily reviewed and approved.

The OTS regulations on mutual to stock conversion have also withstood court challenge. In *York v. Federal Home Loan Bank Board*, 624 F.2d 495 (1980), the plaintiffs argued that the proposed conversion to stock form would deprive depositors their rights in the accumulated surplus of the institution. The court rejected this line of reasoning stating:

> Although the depositors are the legal "owners" of a mutual savings and loan association, their interest is essentially that of creditors of the association and only secondarily as equity owners. Depositors' rights are circumscribed by statute and regulation. They are not allowed to realize or share in profits of the association, but are entitled only to an established rate of interest. The depositors do not share in the risk of loss since their deposits are federally insured and their only opportunity to realize a gain of any kind would be in the event the savings and loan association dissolved or liquidated. . . . In fact federal regulations prohibit savings and loans from dissolving without [FHLBB] approval, and no solvent association has ever secured approval for dissolution. Thus, it is apparent that depositors will not be deprived of property rights by conversion to a federal stock organization. Depositors' only actual rights, their rights as creditors, will remain unchanged by the conversion.[xiv]

The modern OTS regulations governing the conversion from mutual to stock form date from 1974.[xv] As originally promulgated and in their current form,[xv] the regulations continue to recognize the mutual depositor's right to share in the net worth of the mutual in the event of a liquidation or dissolution by the establishment of a liquidation account in the newly stock institution.[xvi] In addition, the regulations require that: i) depositors be given nontransferable subscription rights to purchase the stock in the converted institution on a priority basis;[xvii] ii) depositors be given extensive disclosure statements about the conversion and information on the institution's operations for a minimum of three years;[xix] iii) depositors approve the plan of conversion by a majority of the votes eligible to be cast;[xx] iv) no one group or person may purchase sufficient stock to acquire control of the converting institution;[xx] and v) dividends are limited and subject to supervisory oversight.[xxii]

The OTS regulations have been refined over the ensuing decades to address concerns over potential abuses.[xxii] The OTS regulatory framework was adopted by the Federal Deposit Insurance Corporation in 1994[1] after extensive notice and comment and Congressional oversight. A fundamental purpose behind the OTS rules is the prevention of manipulation of the process by institution insiders or other third parties to acquire inappropriate benefits or windfalls.[xxiv]

The OTS conversion regulations have successfully allowed 1,370 mutual savings institutions to raise over $28 billion dollars in additional capital, even during difficult and troubling times.[xxv] The mutual savings bank segment has over $153 billion in assets,[xxv] is financially strong, [xxvii] while paying taxes and providing community investment under the Community Reinvestment Act. Mutual savings banks are thriving financial institutions with long and proud pasts. Many of them are well over 100 years in their existence.

[1] 59 FR 61245 (Nov. 30, 1994) adopting 12 C.F.R. sec. 303.15, *currently at* 12 C.F.R. Part 303, Subpart I, Mutual-to- Stock Conversions (sections 303.160-303.163) (2005).

Why Mutual?

Mutuals are community focused institutions just like stock community banks. What makes mutually chartered institutions or mutual holding companies different from other community banks is not their dedication to service – both institutions are dedicated to service. What makes the mutually chartered institutions different is their commitment and longevity. It is easier for a mutually chartered savings bank to focus on the needs of the local township or city – the shorter, quarter to quarter return is not a driving force. A mutual can assess the needs and participate over a longer time horizon without criticism or market pressures.

For most consumers choosing financial services, the issue of corporate charter is irrelevant. Consumers want institutions that offer competitive rates both on savings and loans, with convenience and friendly, knowledgeable service. They want their monies to be safe and profitable. The same holds true for mutually chartered institutions. They are not chosen by most consumers because of their mutual form. Mutuals compete daily with all forms of financial institutions. There is no special treatment, in the marketplace or from the regulator, because the institution is mutually chartered. It either succeeds or not on the same rules, the same competitive playing field as other banks.

Modern Mutuals – Community Partners

And succeed they do. What sets them apart from their stock community bank brethren is their longer and independent view that allows them to partner with their communities in a variety of creative ways.

Evergreen Federal decided a number of years ago that for it to survive, it had to take a proactive approach to growing the communities in which it does business focusing primarily on Grants Pass, Oregon. Evergreen Federal partnered with Grants Pass, developing a plan for boosting tourism and industry and tapping the burgeoning California market moving to Oregon. As CEO Brady Adams explains, "we act as the chamber of commerce for Grants Pass and create events for our community that give our residents and visitors a quality, enjoyable experience." Evergreen Federal has sponsored the "Bearfest" a display of the decorated bears that celebrates the community of Grants Pass, Oregon, and other events that create connections and "buzz" for the community, visitors, and Evergreen Federal. If there was ever a bank that truly partnered with its community to benefit both the bank and community, it is Evergreen Federal.

Eastern Savings Bank in Boston, Massachusetts, may be on the other side of the country, but its commitment to Boston is as fervent as Evergreen Federal's is to Grants Pass. When the larger national banks determined to forego certain services and markets because they didn't meet their profitability needs, Eastern picked up those services, such as the underwriting of municipal bonds, because if it did not, Boston and many communities in Massachusetts would not be able to participate in the bond market. There were simply no other options. Eastern stepped in, gave a home to the business unit divested, and now is a recognized player in that market. And towns and cities in Massachusetts continue to have access to the financial markets they need to grow their communities and provide for their citizens.

Again, what made it possible for Eastern to provide a home for the municipal bond group chopped off in a larger, commercial bank's restructuring? It is a mutual holding company. Or as Eastern prefers to say, "a privately held bank" with the goal of providing services for business, both private and government. As a mutual holding company, it is difficult to acquire – giving its longer term focus a secure home and the Boston community a stable partner in the economic development in eastern Massachusetts and surrounding states. As the health of the communities served go, so goes the fortunes of Eastern Bank.

For the mutuals that have chosen to remain mutual, like Evergreen Federal or Eastern Bank, their choice is re-examined and re-affirmed each day. The ability to partner with their communities, the ability to take a longer view rather than focus on quarterly returns, and the ability to remain independent are key drivers to their success. They are proud of their long histories and community involvement. And, most importantly of all, they are proud of their communities and pleased to be the local, hometown bank with staying power.

[i] Weldon Welfling, Mutual Savings Banks, pp. 9, 10 (1968).

[ii] *Id.* at 10.

[iii] The Dime Savings Bank of New York, FSB, located in New York City, was acquired by Washington Mutual Bank, FA, of Stockton, California, effective January, 2002.

[iv] Salem Five Cents Savings Bank is located in Salem, Massachusetts, and was established in 1855.

[v] 12 C.F.R. sec. 544.1, *Federal Mutual Charter*, Section 6, Members, and 12 C.F.R. sec. 544.2(b)(4) (2005).

[vi] 12 C.F.R. sec. 544.5(a) (2006).

[vii] 12 C.F.R. sec. 544.5(b) (1), (12), & (13) (2006).

[viii] 12 C.F.R. sec 544.5(b)(11) (2006).

[ix] 12 C.F.R. sec. 544.5(b)(2) (2006).

[x] 12 C.F.R. sec. 544.5(b)(7) and sec. 544.8 (2006).

[x] 12 C.F.R. sec. 544.5 (b)(7) (2006) states what members may not review of the association's books and records.

[xi] 12 C.F.R. sec. 544.1, *Federal Mutual Charter*, section 8 and sec. 546.4(b) (2006).

[xii] Society for Savings v. Bowers. 349 U.S. 143, 149-150 (1955).

[xiv] York v. Federal Home Loan Bank Board. 624 F.2d 495, 499-500 (1980). *See also* Lovell v. One Bankcorp, 818 F. Supp. (D.Me. 1993), *aff'd*, No. 93-1533, 1994 U.S. App. LEXIS 178 (1st Cir. 1994), *cert denied under different name* Lovell v. Peoples Heritage Savings Bank 512 U.S 1235, 114 S.Ct. 2739 (1994); Goldberg v. Philadelphia Savings Fund Society, 9 Phila. 459, 463 (Pa. Ct. Com.Pl. 1983) wherein the court stated, "to compel ... some form of payment or compensation to the depositors for their alleged 'ownership' interest in the surplus accumulated would ... frustrate and thwart the legislative intent in permitting such a conversion in the first place."

[xv] 39 Fed. Reg. 9142 (1974).

[xvi] 12 C.F.R. Part 563b(2006).

[xvii] 12 C.F.R. secs. 563b.450-563b.485 (2006).

[xvii] 12 C.F.R. sec. 563b.320(a) (2006).

[xix] 12 C.F.R. secs. 563b.300 – 563b.310 address the stock solicitation offering circular; 12 C.F.R. 563b.225-563b.295 address the required member vote and the solicitation of member votes including the means by which a member may have alternative materials distributed (sec. 563b.280); the plan of conversion available for public comment is governed by secs. 563b.125-563b.205 and includes the business plan for use of the conversion proceeds and three years of projected operations and activities (sec. 563b.105(a)(1).

[xx] 12 C.F.R. sec. 563b.225(b) (2006).

[xxi] 12 C.F.R. sec. 563b.370 (2006). Shares in a tax-qualified employee stock benefit plan are not included in the limitation because by IRS regulation, tax-qualified employee benefit plans may not be weighted in favor of management or highly compensated employees. Also, for three years after conversion, no one shareholder may acquire ownership of a controlling interest without OTS's prior written approval. 12 C.F.R. sec. 563b.525 (2006).

[xxii] 12 C.F.R. sec. 563b.520 (2006).

[xxiii] OTS updated its conversion regulations in 2002 (67 FR 52020 (Aug. 9, 2002); reissued all of its regulations when the OTS was created to succeed the Federal Home Loan Bank Board (54 FR 49596 Nov. 30, 1989); and adopted amended regulations between 1979 and 1987, *e.g.,* the vote of members (former 12 C.F.R. sec. 563b.6) was amended 44 FR 18881, Mar. 29, 1979; 47 FRR 19680, May 7, 1982; 48 FR 8431, Mar. 1, 1983; 50 FR 20557, May 17, 1985, and the scope (former 12 C.F.R. sec. 563b.1) was amended 44 FR 18881, Mar. 29, 1979, 48 FR 15601, Apr. 12, 1983; 49 FR 19002, May 4, 1984; 52 FR 8550, Mar. 18, 1987.

[xxiv] Dwight C. Smith & James Underwood, *Mutual Savings Associations and Conversion to Stock Form*, Supra., at Section III, Mutual –To-Stock Conversion, Subsection B., Basis for Current Regulations. "

[xxv] OTS 2004 Fact Book: A Statistical Profile of the Thrift Industry, published May 2005, Table 1.12, "OTS-Regulated Mutual-to-Stock Conversion Applications Filed and Mutual Holding Companies Issuances of Stock, 1972-2004.) *available at* http://www.ots.treas.gov/statisticalreleases.

[xxvi] FDIC, December 31, 2004.

[xxvii] In 2004, OTS had five institutions (both mutual and stock) in any capital category other than the highest category of "well capitalized" and none were in the lowest capital category. OTS 2004 Fact Book, supra. Table 4.2, "OTS-Regulated Thrift Industry Prompt Corrective Action Capital Categories 1999-2004."