

**Retention of Unitary Savings and Loan Holding Company Status During a Multi-Step Acquisition**

**Summary Conclusion:** A savings and loan holding company that was excepted from the HOLA section 10(c)(9)(A) and (B) holding company activities limitations, pursuant to section 10(c)(9)(C), did not become subject to those restrictions where the holding company held the target savings association as a separate subsidiary for up to 45 days before merging it into the holding company's existing savings association subsidiary, and the savings and loan holding company: (i) had solid business reasons for holding the two associations separately for the 45-day period, and (ii) provided a commitment before it engaged in the acquisition to merge the two institutions within 45 days.

**Date:** May 26, 2004

**Subjects:** Savings and Loan Holding Companies/Change in Control

P-2004-3



**Office of Thrift Supervision**  
Department of the Treasury

**P-2004-3**

*Chief Counsel*

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6251

May 26, 2004

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Re: Retention of Unitary Savings and Loan  
Holding Company Status During a Multi-  
Step Acquisition

Dear [ ]:

In your letter of February 6, 2004, as supplemented by a letter dated March 25, 2004, you request that OTS confirm that [ ] (Holding Company), a savings and loan holding company, will not become subject to holding company activities limitations under section 10(c)(9) of the Home Owners' Loan Act (HOLA), by virtue of acquiring another savings association in a multi-step transaction, and, in order to minimize state tax liabilities, holding the other savings association as a separate subsidiary for up to 45 days before merging it into the Holding Company's existing savings association subsidiary.

Based on the facts presented, for reasons discussed more fully below, we confirm that the Holding Company will continue to be excepted from the holding company activities restrictions set forth at section 10(c)(9)(A) and (B) of the HOLA, by virtue of section 10(c)(9)(C), if the Holding Company engages in the proposed acquisition, and holds the target savings association as a separate subsidiary for up to 45 days before merging it into the Holding Company's existing savings association subsidiary.

## **Background**

### **The Parties**

The Holding Company, a Delaware corporation headquartered in [ ], acquired [ ] (Savings Bank) in 1998, in connection with the Savings Bank's mutual to stock conversion and holding company reorganization. The Savings Bank, a Savings Association Insurance Fund (SAIF) insured federal savings association, is a wholly owned subsidiary of the Holding Company. The Holding

Company has had only one savings association subsidiary, the Savings Bank, since it became a savings and loan holding company in 1998.

As of December 31, 2003, the Holding Company had total consolidated assets of \$[ ] billion, and total consolidated equity capital of \$[ ] million. As of March 31, 2004, the Savings Bank had total assets of \$[ ] billion, and total equity capital of \$[ ] million. As of the same date, the Savings Bank was well-capitalized, with tangible and tier one leverage capital ratios of [ ]% and a total risk based capital ratio of [ ]%.

[ ] (Target Company) is incorporated in [ ], and headquartered in [ ]. The Target Company is currently a bank holding company, as a result of its ownership of all of the stock of [ ] (Institution), a national bank headquartered in [ ]. The Target Company is registered with the Board of Governors of the Federal Reserve System as a bank holding company.

As of March 31, 2004, the Target Company and the Institution each had total assets of approximately \$[ ] million. As of the same date, the Institution had total equity capital of \$[ ] million, and was well-capitalized, with tangible and tier one leverage capital ratios of [ ]% and a total risk based capital ratio of [ ]%.

### **The Proposed Transaction**

In the proposed transaction, the Target Company will merge with and into the Holding Company, with the Holding Company as the surviving corporation (the Holding Company Merger). At the effective time of the Holding Company Merger, the Institution will convert from a national bank to a federal savings association, pursuant to OTS regulations.<sup>1</sup> The Holding Company expects to complete the Holding Company Merger before the end of [ ] 2004.<sup>2</sup> Following the Holding Company Merger, the Holding Company intends to hold the Savings Bank and the Institution as separate subsidiaries until on or about [ ], 2004. On or about [ ], 2004, the Holding Company will cause the Savings Bank to merge into the Institution, with the Institution as the survivor (Subsidiary Merger). After the Subsidiary Merger, the Institution will change its name to the name of the Savings Bank, and amend its charter to provide that its home office will be located in [ ].

The parties have structured the proposed transaction in this manner in order to reduce state tax liabilities, and to provide adequate time to combine business processes between the Savings Bank and the Institution.

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<sup>1</sup> You have stated that the Federal Reserve Bank of [ ] has advised you that it will not require a bank holding company application in connection with the transaction, in light of the Institution's proposed conversion to a savings association.

<sup>2</sup> The OTS [ ] Regional Office approved the Institution's conversion to a federal savings association, and the related holding company and merger application on [ ], 2004.

## Analysis

Prior to the enactment of the Gramm-Leach-Bliley Act (GLB Act),<sup>3</sup> savings and loan holding companies that acquired all or all but one of their subsidiary savings associations in certain types of supervisory transactions, and whose subsidiary savings associations each met the qualified thrift lender (QTL) test,<sup>4</sup> were generally exempt from the activities restrictions set forth at section 10(c) of the HOLA.<sup>5</sup>

The GLB Act added section 10(c)(9) of the HOLA,<sup>6</sup> which provides, in essence, that savings and loan holding companies generally may not engage in commercial activities.<sup>7</sup> The statutory limitations, however, do not apply to “grandfathered” savings and loan holding companies. Specifically, section 10(c)(9)(C) provides that the restrictions do not apply to any company that was a savings and loan holding company on May 4, 1999 (or that became a savings and loan holding company pursuant to an application pending before the OTS on or before that date) and that: (i) meets and continues to meet the requirements of section 10(c)(3); and (ii) continues to control not fewer than one savings association that it controlled on May 4, 1999, or the successor to such savings association.<sup>8</sup>

To date, the Holding Company has met the criteria for an exception from the section 10(c) activities restrictions. Before the enactment of the GLB Act, the Holding Company held one savings association subsidiary, which met the QTL test. After the enactment of the GLB Act, the Holding Company has met the requirements for grandfathered status, because it was a savings and loan holding company on May 4, 1999, continues to meet the section 10(c)(3) requirements, and continues to control the Savings Bank.

After consummation of all the steps of the proposed transaction (including the Holding Company merger and the Subsidiary Merger), the Holding Company will clearly meet most of the criteria for grandfathering under section 10(c)(9)(C) of the HOLA. The Holding Company was a savings and loan holding company as of May 4, 1999, and, after the mergers, it will meet the requirements of section 10(c)(3), because it will hold only one savings association subsidiary, which will meet the QTL test. Also, it is clear that at

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<sup>3</sup> Pub. L. 106-102 (Nov. 12, 1999).

<sup>4</sup> See 12 U.S.C. § 1467a(m).

<sup>5</sup> See 12 U.S.C. § 1467a(c)(3).

<sup>6</sup> See Section 401 of the GLB Act, 113 Stat. 1434.

<sup>7</sup> See 12 U.S.C. § 1467a(c)(9)(A) and (B).

<sup>8</sup> Section 10(e)(3) of the HOLA, 12 U.S.C. § 1467a(e)(3), generally prohibits the formation of a savings and loan holding company that controls savings associations in more than one state. You have represented that even if the Holding Company were considered a multiple savings and loan holding company during the 45 day period in question, the Holding Company’s control of the Savings Bank and the Institution would be permissible under section 10(e)(3), because the acquisition would be permissible under the exception set forth at section 10(e)(3)(C). Accordingly, we have not addressed section 10(e)(3) in additional detail in this opinion.

all times during the transaction, the Holding Company will continue to control a savings association it held on May 4, 1999, or the successor to such a savings association. Although the Institution will be the survivor of the Subsidiary Merger, 12 C.F.R. § 552.13(l) provides that where two federal associations merge, the resulting institution is a continuation of both merging entities.

The only issue is whether, in consummating the proposed transaction, the Holding Company “continues to meet” the requirements of section 10(c)(3), as required under section 10(c)(9)(C)(i), given that during the period between the Holding Company Merger and the Subsidiary Merger, the Holding Company will control two savings associations, neither of which it acquired in a supervisory transaction.<sup>9</sup>

The Chief Counsel’s Office has opined that a unitary savings and loan holding company does not become a multiple savings and loan holding company under section 10(c) where the acquiring savings and loan holding company holds two savings associations as a step in a transaction in which the two savings associations are almost immediately merged.<sup>10</sup> In addition, on several occasions, OTS has informally taken the position that a multiple holding company structure is not created where an acquiring savings and loan holding company temporarily holds two savings associations for a longer period than a “moment in time.” OTS, however, has not addressed a period as long as the 45 days proposed by the Holding Company.

The purpose of the activities restrictions on multiple holding companies set forth at section 10(c)(3) of the HOLA was to restrict the expansion of savings and loan holding companies. An early version of the bill that ultimately became the Savings and Loan Holding Company Act, supported by the Federal Home Loan Bank Board (FHLBB), would have limited the activities of all savings and loan holding companies, regardless of the number of savings associations they controlled.<sup>11</sup> Later versions of the legislation, including the version that was ultimately enacted, eliminated the restriction on the activities of savings and loan holding companies that controlled only one savings association (*i.e.*, unitary savings and loan holding companies) so as not to impede the transferability of ownership of savings associations.<sup>12</sup>

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<sup>9</sup> The Chief Counsel has stated that if a holding company: fails to meet the section 10(c)(3) requirements after first meeting them, it could not ‘requalify’ under this section, because the statute requires that the holding company continue to meet the section 10(c)(3) requirements.” (Emphasis in original.)

Op. C.C. (Aug. 30, 2001).

<sup>10</sup> See, Op. Dep. C.C. (May 29, 1992).

<sup>11</sup> See S. 1542, as printed in *Hearings Before the Committee on Banking and Currency, United States Senate, Ninetieth Congress, First Session, on S. 1542*, at 5 – 7.

<sup>12</sup> S. Rep. No. 354, 90<sup>th</sup> Cong. 6, 7 (1967). The legislative history states, in relevant part, that: In order to provide the [FHLBB] with adequate authority while at the same time alleviating the marketability problem for existing stock associations, the committee recommended that holding companies which control only one association be exempt only from the unrelated activities and divestment provisions of section 408(c). This will permit the sale of a stock association to a corporation (provided the corporation

The purpose of the activities restrictions that section 401 of the GLB Act added to section 10(c)(9) of the HOLA was to prevent new affiliations between savings associations and entities engaged in non-financial (*i.e.*, commercial) activities.<sup>13</sup> Accordingly, it was logical to incorporate the restriction regarding multiple savings and loan holding companies into the section 10(c)(9)(C) grandfathering provision, because such companies could not engage in non-financial activities before the GLB Act was enacted, and there was no reason to except such companies from the commercial activities limitations of the GLB Act.

The previous positions, discussed above,<sup>14</sup> taken regarding the creation of multiple savings and loan holding companies in step transactions reflect the fact that there are valid business reasons for structuring a transaction in steps, and that the temporary control of two institutions is not contrary to the purposes of the restriction regarding multiple holding companies. That is, where the acquiror's clearly stated goal is to merge the two savings associations, and the statute clearly allows the preservation of unitary holding company status where a direct merger occurs,<sup>15</sup> there is no persuasive reason to place the form of the transaction (that is, the temporary control of two associations) over the substance (that is, the intention to merge the two institutions as soon as possible under the circumstances). The Chief Counsel has stated that OTS has a responsibility to look beyond the form of transactions to their true substance.<sup>16</sup>

The period in this case is longer than in previous step transactions. However, it serves a purpose similar to the periods in other transactions: structuring the transaction so as to provide for regulatory benefits, and to minimize tax liabilities. The Holding Company has provided a commitment to merge the two entities within 45 days of its acquisition of the Target Company. The Holding Company does not propose to engage in the transaction with the intent of operating two separate institutions, and expects to realize significant efficiencies, including cost savings, from the merger of the two institutions.

Based on the foregoing, we do not believe that treating the Holding Company as a unitary holding company during the relatively short interim period raises the concerns that the GLB Act provision was intended to address, that is, allowing multiple holding companies to engage in commercial activities. The Holding Company has been a unitary holding company for a significant period of time, and currently has grandfathered

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controlled no other associations) but at the same time will provide the [FHLBB] with the examination, registration, and reporting authority it needs . . . .

<sup>13</sup> See, e.g., H.R. Rep. No. 106-434, at 170 – 171 (1999).

<sup>14</sup> See, fn. 8, and accompanying text.

<sup>15</sup> It is clear that no multiple savings and loan holding company is created where an acquiring savings and loan holding company acquires an additional association through the direct merger of the target institution into its existing savings association. In addition, section 10(c)(9)(C) clearly contemplates situations in which a grandfathered savings and loan holding company acquires another association through a merger, in light of the “successor” language in section 10(c)(9)(C)(ii) of HOLA.

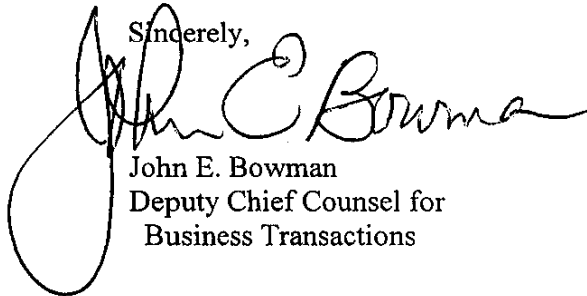
<sup>16</sup> See Op. C.C. (Nov. 7, 1990).

powers. It could have structured the transaction to avoid the temporary existence of two savings association subsidiaries, but that would have caused substantial, avoidable, expenses to the surviving association. The Holding Company has committed to merge the two entities within 45 days of the initial acquisition.

Accordingly, we conclude, based on the foregoing facts and representations, that the Holding Company will "continue to meet" the section 10(c)(3) requirements, as the term is used in section 10(c)(9)(C)(i).

In reaching the foregoing conclusions, we have relied on the factual representations contained in the materials you have submitted to us on behalf of the Holding Company. Our positions depend on the accuracy and completeness of those representations. Any material change in facts or circumstances could result in different conclusions from those expressed herein.

Sincerely,

A handwritten signature in black ink, appearing to read "John E. Bowman". The signature is written in a cursive style with a large loop at the end.

John E. Bowman  
Deputy Chief Counsel for  
Business Transactions

cc: Regional Directors  
Regional Counsel