Office of Thrift Supervision **March 9, 1998**

Department of the Treasury

Transmittal

TR–192

Federal Register, Vol. 63, No. 45, pp. 11361-11367 **Number: TR–192**

The Office of Thrift Supervision (OTS) has adopted the attached final rule allowing mutual holding companies to set up a modified corporate structure with an intermediate subsidiary that has greater flexibility to repurchase its own stock in the open market.

The subsidiary is a stock holding company, sandwiched between the mutual holding company and its savings association in a three-level corporate structure, that holds all of the stock of the savings association. The subsidiary can sell up to 49.9 percent of its stock to the public, but the controlling interest in the subsidiary holding company resides with the parent mutual holding company, which, in turn, is owned by depositors at the savings association.

OTS believes the new rule provides mutual holding companies with increased flexibility to establish corporate structures that can take advantage of market opportunities while protecting the rights of mutual depositors.

The final rule is substantially similar to the rule proposed on June 5, 1997. The final rule provides that the new subsidiary holding company must be federally chartered by OTS, and its proposed charter and bylaw requirements modeled after those for federal stock savings associations. In addition, the subsidiary holding company must follow the same rules on issuing stock that apply to a savings association, including the requirement that, in general, depositors have the first opportunity to buy a new issue of stock before the general public. All stock issues must receive prior approval from OTS, and OTS states in the rule's preamble that there may be circumstances under which share issuances would be permitted without a right of first refusal.

As in the original two-level mutual holding company, depositors of the savings association own the parent mutual holding company and have full voting rights. The permissible activities of the subsidiary holding company also are limited to those of the parent mutual holding company.

OTS received only 11 comments on the rule, most of which were favorable. OTS did not adopt most of the changes suggested by commenters because the changes would have reduced the rights of mutual depositors and reduced OTS' ability to protect those rights.

OTS made one change from the proposed to the final rule to require that during the three-year period following the issuance of stock the holding company must obtain prior approval from OTS before engaging in open-market stock repurchases to fund employee stock benefit plans. OTS made the change in order to more closely monitor such stock repurchases on a case-by-case basis.

The final rule was published in the March 9, 1998, edition of the Federal Register, Vol. 63, No. 45, pp. 11361-11367.

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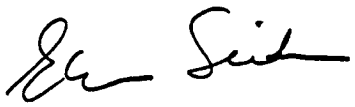
Attachment



— Ellen Seidman
Director
Office of Thrift Supervision

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 575

[98–23]

RIN 1550–AB04

Mutual Holding Companies

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is amending its mutual holding company regulations to permit a mutual holding company (MHC) to establish a subsidiary stock holding company that would hold all of the stock of a savings association subsidiary. The final rule permits the establishment of intermediate stock holding companies (SHCs) that will be subject to restrictions that are substantially similar to those currently applicable to MHCs.

EFFECTIVE DATE: April 1, 1998.

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I. Background of the Proposal

Responding to inquiries from MHCs and mutual savings associations concerning the formation of second-tier stock holding companies, OTS issued an Advance Notice of Proposed Rulemaking (ANPR) soliciting comment on issues raised by the existence of SHCs.[1] On June 5, 1997, OTS published a notice of proposed rulemaking (NPR) proposing to amend its regulations to permit the establishment and operation of federally chartered mid-tier holding companies.[2] The purpose of the proposed amendment was to enhance the organizational flexibility of the MHC structure and to enable MHCs to compete more effectively in the marketplace. Additionally, permitting the formation of SHCs will allow MHCs, through the SHCs, greater flexibility in structuring stock repurchase programs.

Under current 12 CFR part 575, a mutual savings association may reorganize into a MHC structure where the MHC owns at least a majority of the stock of a subsidiary savings association. Depositors of the mutual savings association continue to maintain a depositor-creditor relationship with the stock savings association subsidiary, while retaining their other indicia of ownership, *e.g.*, voting and liquidation rights, with the MHC. This structure permits the balance of the shares (up to 49.9%) of the stock savings association subsidiary to be sold to the public in one or more offerings when the MHC is formed, or later.

The final rule will permit the MHC to form an SHC to hold all of the shares of the stock savings association subsidiary. The SHC, like the stock savings association subsidiary under the current rule, will be required to issue at least a majority of its shares to the MHC and may issue up to 49.9% of its shares to the public. Under the final rule, the SHC will be required to hold 100% of the shares of the savings association subsidiary. The final rule, like the NPR, provides that the SHC structure may not be used to evade or frustrate the purposes of 12 CFR part 575 or related provisions of 12 CFR part 563b that govern mutual-to-stock conversions by savings associations. OTS' guiding principle with respect to MHC conversion rules is that the substantive and procedural limitations applicable to such transactions should mirror those for a mutual-to-stock conversion of a savings association. This is so insiders or minority shareholders do not get a windfall by achieving something (*e.g.*, a greater ownership interest) through an MHC reorganization and subsequent conversion to stock form that they cannot accomplish through a direct mutual-to-stock conversion of the savings association.

II. General Discussion of the Comments

Eleven commenters responded to the NPR proposal: one savings bank; one mutual holding company; two individuals; three trade groups; and four law firms. All but one of the commenters generally supported the concept of SHCs. The one commenter who did not support the formation of SHCs was opposed to any changes to OTS' rules governing mutual holding companies. Most of the commenters argued for greater flexibility and fewer restrictions on SHCs than set forth in the proposed rule. Two of the trade groups that commented, however, were generally supportive of the rule as proposed.

The final rule is substantially similar to the proposed rule. Specific comments addressing various sections are discussed in the description of the revisions to 12 CFR part 575 set forth below.

III. Analysis of Final Rule

A. Federal Charter and Bylaws for SHCs

OTS proposed that SHCs must be federally chartered. The final rule continues this requirement and defines a SHC as a mutual holding company for purposes of section 10(o) of the Home Owners' Loan Act (HOLA). As a MHC, the SHC is subject to the exclusive jurisdiction of OTS. OTS consistently has interpreted section 10(o) and its legislative history as demonstrating Congress' intent that section 10(o) expressly preempts state law with regard to the creation and regulation of MHCs.[3]

Two commenters questioned whether OTS has the statutory authority to charter SHCs. OTS believes that it has authority under section 10(o) to charter SHCs. Section 10(o)(10)(A) of HOLA defines a mutual holding company as "a corporation organized as a holding company under [section 10(o) of HOLA]." Given this broad definition, coupled with the explicit statutory revisions and legislative history expressing Congress' intent that OTS have exclusive authority to charter and regulate MHCs, OTS believes there is a clear statutory basis for OTS to charter a SHC as a mutual holding company.

As indicated in the preamble to the final rule adopting 12 CFR Part 575 in 1993, the mutual holding company provisions were amended by the Financial Institutions Reform, Recovery, And Enforcement Act of 1989, Public L. 101–73, 103 Stat. 183 (1989), to expressly provide that mutual holding companies would be chartered and subject to regulations prescribed by the

[1] 61 FR 58144 (November 13, 1996).

[2] 62 FR 30778 (June 5, 1997).

[3] *See* 58 FR 44105, 44106–44107 (August 13, 1993) (discussion of OTS' exclusive authority to charter and regulate MHCs).

Director of OTS.[4] The explanatory statement offered at the mark-up of the legislation stated that the amendments "would provide a clear regulatory framework for MHCs, and unquestionable regulatory authority to the [OTS] by providing that MHCs will be chartered by the [Director of OTS] and subject to OTS regulation."[5] OTS believes that Congress has set forth a detailed statutory scheme that addresses virtually all of the material aspects of the establishment and corporate governance of a mutual holding company. Thus, it follows that Congress intended for OTS to occupy the field of mutual holding company regulation for savings associations and that requiring SHCs to be federally chartered is consistent with both the statute and Congressional intent.

Moreover, MHC structures are fundamentally different from traditional savings and loan and bank holding companies. Because of their unique hybrid structure—part mutual, part stock—OTS has attempted to ensure that the interests of the mutual members are not diminished or exploited in connection with the formation and operation of the MHC. OTS has been mindful that many MHCs do eventually convert to full stock form under OTS' mutual to stock conversion regulations. Thus, unlike a traditional state-chartered savings and loan holding company, a MHC is the corporate repository of the mutual members' economic and legal interests. OTS' policy has always been that a MHC and its subsidiaries may not take any action that would violate the substantive provisions and policies of the mutual to stock conversion regulations. Treating a SHC as a traditional state-chartered savings and loan holding company would substantially reduce OTS' ability to effectively protect the rights of the mutual members and ensure consistent treatment under the mutual to stock conversion regulations for members of MHCs and members of mutual savings associations that do not form MHCs.

The MHC statute clearly contemplates that the reorganizing savings association will be a directly owned subsidiary of a federally chartered mutual holding company. To permit a state-chartered corporation to control the reorganizing savings association is inconsistent with OTS' occupation of the field of MHC regulation, would diminish OTS' ability to regulate the corporate governance provisions of the intermediate holding company, and create potential conflicts between federal and state regulation. One commenter suggested that OTS could deal with any issues concerning corporate governance provisions by imposing conditions in connection with the approval of the application. OTS questions whether this proposed solution is viable. OTS believes that requiring a federal charter for a SHC is the best means of ensuring consistent and non-conflicting corporate governance provisions for the MHC, the SHC and their savings association subsidiary. This, in turn, would ensure that OTS has adequate authority to protect and balance the interests of all the parties involved in a MHC reorganization.

Requiring SHCs to be federally chartered is also consistent with the statutory requirement under section 10(o)(9) that authorizes the appointment of a trustee as receiver for a MHC that is in default or that has a savings association subsidiary that is in default. Under section 10(o)(9), a trustee has the authority to liquidate the assets of the MHC (and satisfy any liabilities) and distribute the net proceeds to the owners of the MHC or the Federal Deposit Insurance Corporation ("FDIC") to the extent that the FDIC has suffered any loss as insurer of the savings association subsidiary. By requiring that the SHC be treated as a MHC and be federally chartered, OTS will have clear authority to seek the appointment of a trustee as receiver of a SHC whenever the parent MHC or its SHC or savings association subsidiary is in default. This will ensure that the receiver of the MHC has the maximum flexibility to liquidate the assets of the SHC to ensure that any losses to the FDIC as insurer are minimized.

One commenter argued that section 10(o)(4)(A) of HOLA is inconsistent with the idea that the SHC could be defined as a MHC under the statute. Section 10(o)(4)(A) provides that "[p]ersons having ownership rights in the mutual association * * * shall have the same ownership rights with respect to the mutual holding company." OTS does not agree that this section is inconsistent with the proposal to authorize a federal charter for SHCs. Under the final rule, a SHC must always be controlled by a parent MHC. The members' interest referenced by section 10(o)(4)(A) will reside directly with the parent MHC. As the parent MHC is required to maintain a majority ownership interest in the SHC, the members will also indirectly maintain the same ownership rights in the SHC that they had in the mutual association. OTS believes that having the SHC directly controlled by the parent MHC is consistent with the language and intent of section 10(o)(4)(A) when viewed in the context of the entire statute. OTS also believes the addition of another holding company in the structure does not diminish the interest of the mutual associations' members.

One commenter stated that requiring SHCs to be federally chartered would create problems because of the lack of any developed body of corporate law for SHCs. As indicated in the proposal, OTS will follow the charter, bylaw, and corporate governance provisions that are currently applicable to federal stock savings associations. The corporate governance structure for federal savings associations has been in place over twenty years and the industry and industry counsel are familiar with this system. OTS believes that utilizing the existing corporate governance structure for federal savings associations as a model for SHCs will minimize the burden on SHCs because the existing structure is familiar.

B. Stock Holding Company Powers

Several commenters were in favor of granting unitary savings and loan holding company status to SHCs. They stated that they did not perceive any policy reasons, such as safety and soundness concerns, that support a different treatment for SHCs simply because they are controlled by a MHC. As indicated in the NPR, OTS believes that it is not appropriate to treat SHCs as unitary savings and loan holding companies under the mutual holding company statute. Congress chose to limit the activities of MHCs to those permitted for multiple savings and loan holding companies and bank holding companies when it authorized MHCs as part of the Competitive Equality Banking Act of 1987 (CEBA). Although the legislative history of CEBA does not indicate why, it is reasonable to assume that Congress was aware of the unique nature of mutual institutions and their relationship with these newly authorized holding companies and wished to limit the activities of MHCs to those more closely related to banking.

OTS believes that limiting the activities of a SHC to those permitted to the parent MHC is consistent with the statute. Therefore, the final rule does not authorize SHCs to engage in activities beyond those specified in section 10(o)(5) of the statute. OTS notes, however, that a SHC may utilize its authority under section 10(o)(5) and 12 CFR 575.10(a)(6) to acquire subsidiaries engaged in (i) any activity authorized under 12 CFR Part 559 or (ii)

[4] *Id.* Under the original MHC provisions adopted as part of the Competitive Equality Banking Act of 1987, it was unclear whether MHCs would be federally chartered or state-chartered entities.

[5] *Id.* at 44106.

activities approved for service corporations of state-chartered savings associations in the state where the SHC's savings association subsidiary has its home office.

C. Regulatory Restrictions on Stock Pledges, Dividend Waivers, Indemnification and Employment Contracts

The final rule adopts the provisions set forth in the NPR governing stock pledges, dividend waivers, indemnification, and employment contracts without any changes. Similar to the response to the ANPR, several commenters argued that it was unnecessary and inappropriate to impose the same restrictions on SHCs that currently apply to MHCs and their savings association subsidiaries. Several commenters, however, supported the rule as proposed. OTS, for the reasons stated in the NPR and discussed below, does not find the arguments of the commenters opposed to the proposed rule persuasive. As noted in the preamble to the NPR, OTS' intent is to increase the flexibility of the MHC structure without diminishing the safeguards Congress imposed in adopting the statute.

With respect to stock pledges, section 10(o)(8) requires that the pledging of a savings association's stock by its parent MHC increase the capital of the savings association. OTS believes this restriction should apply equally to both an MHC and an SHC. Applying this restriction to the SHC is consistent with the statute and will ensure that any borrowing using the savings association subsidiary's stock or the SHC's stock as collateral will directly benefit the FDIC-insured savings association.

Regarding dividend waivers, one commenter stated that no restrictions should apply to the SHC since it has no mutual members, and its board of directors has no fiduciary duties to such mutual members. OTS does not agree with this assertion. The same concerns that are present when dividends are paid by a savings association subsidiary to its minority stockholders but waived by the MHC are present when dividends are paid to minority stockholders of an SHC and waived by the parent MHC. In both cases, the board of directors of the MHC must approve a waiver of the dividend payments, and their fiduciary obligation is the same in each instance. It is important in either instance that the value of the waived dividends be retained for the benefit of the members of the MHC to prevent potential windfalls to the minority shareholders in a subsequent conversion of the MHC.

One commenter suggested that the SHC be permitted to issue two classes of voting stock with identical features except that one class would not have the right to receive any dividend payments. Under this scheme, the MHC would receive the class of shares without dividend rights while minority shareholders would receive the dividend-paying class. This proposal would have precisely the same impact as removing the dividend waiver restrictions that protect the interests of the MHC mutual members, a result that OTS rejects. If dividends could be paid only to the minority shareholders this would divert the earnings of the savings association to the minority shareholders at the expense of the MHC. For example, if a savings association subsidiary had 40% of its voting shares held by minority shareholders and earned a million dollars, it would be able to pay out $1,000,000 to its minority shareholders instead of the $400,000 permitted under the existing rules. In effect, the $600,000 that would normally be attributable to the parent MHC would be diverted to the minority stockholders.

The use of dual classes of stock is problematic for several additional reasons. First, it would purport to relieve the MHC's board of directors from its fiduciary obligation to determine that the proposed dual stock structure of the SHC is consistent with the interests of the mutual members of the MHC. Under current rules, the board of directors of the MHC must make an express determination that a waiver of dividends from the savings association subsidiary is consistent with the board's fiduciary duties to the members of the MHC. Use of the dual stock structure, in which the MHC would receive no dividends, would allow the MHC board effectively to approve a blanket dividend waiver without knowing the amounts that would be relinquished by the MHC or what consequences might flow from the MHC's inability to receive dividends in the future.

Dual classes of stock would also create an obvious conflict for the MHC board members who were also minority shareholders of the SHC. These board members would have substantial, personal economic incentives to maximize the payment of dividends, notwithstanding the loss in value to the majority stockholder, the MHC and the mutual members—to whom these directors owe a fiduciary duty. The dual stock structure would also permit the minority shareholders to argue that there should be no dilution of their ownership interests in the event of a conversion of the MHC since no dividend waivers would have occurred. OTS believes that this would completely elevate form over economic substance and grant an inappropriate windfall to the SHC's minority shareholders. For these reasons, no change was made to final rule regarding the treatment of waived dividends.

Another commenter argued that it was particularly inappropriate to impose any restrictions relating to indemnification or employment contracts on SHCs that are more stringent than those imposed on other savings and loan holding companies. Since OTS believes SHCs should be treated as MHCs for the reasons stated above, OTS has determined to impose the same indemnification and employment contract restrictions on SHCs that are currently imposed on MHCs. Thus, the final rule is adopted without any changes to the indemnification or employment contract provisions.

D. SHC Stock Issuances, Stock Repurchases, and Conversion of the MHC

Commenters generally supported the proposed rule on the issue of stock repurchases. Several commenters objected to OTS' interpretation that restricts SHCs (or savings association subsidiaries under the current rule) from issuing stock to complete a merger transaction without first offering the stock to mutual members on a priority basis. A commenter argued that it was inappropriate to continue to grant mutual members priority subscription rights where the shares were being issued in a stock-for-stock merger transaction. Commenters suggested that OTS should consider other factors, including management obtaining a fairness opinion, the value of the company being acquired, and whether the shares of the SHC are actively traded on NASDAQ or a stock exchange in determining whether to permit stock-for-stock mergers without priority subscription rights.

While OTS recognizes that there are reasonable arguments in favor of changing the current policy, OTS still believes that, on balance, mutual members should be granted a first priority subscription right for stock issued by a savings association subsidiary or an SHC. As stated in the NPR, OTS is aware that this may result in MHCs having less flexibility than a traditional savings and loan holding company. This is consistent with the fact that the MHC structure is a unique hybrid corporate structure, part mutual and part stock, that has both advantages and disadvantages. OTS also notes that this issue is not unique to SHCs. OTS'

interpretation of 12 CFR 575.7 on stock issuances also applies to issuances of stock by savings association subsidiaries that are not owned by an SHC.

For this reason and the other reasons cited above, OTS generally will continue to require that mutual members be granted a first priority subscription interest for stock issued by savings associations and SHCs. OTS notes, however, that Section 575.7(d)(6) currently provides that OTS may permit a non-conforming stock issuance where the applicant demonstrates that it would be more beneficial to the issuing savings association. Under this provision, the OTS believes that properly structured merger transactions that do not grant priority subscription rights may qualify for approval and OTS is willing to consider and approve such transactions on a case-by-case basis.

Most commenters generally supported permitting SHCs to engage in stock repurchases on the same basis as a savings association subsidiary of a MHC. The final rule provides that SHCs may not engage in stock repurchases during the three year period following issuance of the stock without the prior approval of OTS. This will permit OTS to evaluate the purpose and reasons for the stock repurchases on a case-by-case basis. OTS does not anticipate that it will permit repurchases in amounts greater than those that have generally been permitted under the mutual to stock conversion regulations.[6]

One commenter requested that OTS clarify that it would not impose stricter standards in reviewing stock repurchases by SHCs and savings association subsidiaries of MHCs than those imposed on savings associations converted under 12 CFR Part 563b. Another commenter requested that OTS revise 12 CFR 575.11(c) to add the additional safe-harbor purchases allowed under the mutual to stock conversion regulations.[7] OTS does not believe that it is necessary or appropriate to include these safe-harbor provisions for SHCs for the reasons discussed below. OTS also does not believe that it should impose a rigid or inflexible standard on stock repurchases by subsidiaries of MHCs.

MHCs, unlike a savings association undertaking a traditional mutual to stock conversion, have control over the amount of capital raised in a stock offering. Thus, MHCs should not be subject to the same pressures of finding appropriate investments for the new capital as fully converted savings associations. Since management has more control over the amount of capital raised by a MHC, OTS will consider this fact when reviewing requests for stock repurchases that occur during the three years following the issuance of the stock. Each request, however, will be reviewed on a case-by-case basis and a decision to grant or deny the request will be based upon all of the relevant facts presented in the request. OTS also notes that after the initial three-year period following issuance of the stock by a SHC, a SHC may engage in stock repurchases subject only to the restrictions that are applicable to savings associations generally.[8]

Upon further consideration of stock repurchase issues, OTS is revising 12 CFR 575.11(c) as proposed to restrict the ability of SHCs to engage in open-market repurchases during the three-year period following the issuance of the stock to fund employee stock benefit plans without obtaining the prior approval of OTS. Because of the potential amounts that may be involved in funding employee stock benefit plans (10% for stock option plans, 4% for management recognition plans, 8% for employee stock option plans, plus any amounts for other tax-qualified or non-tax-qualified plans), and OTS' desire to more closely monitor repurchases by a SHC that occur shortly after a stock issuance, the final rule eliminates this safe-harbor provision. This will also ensure that the stock repurchase provisions affecting employee stock benefit plans for SHCs are consistent with the provisions for converted savings associations under 12 CFR part 563b.

In the NPR, OTS stated its intention to permit SHCs that are formed subsequent to the initial MHC reorganization and stock issuance to "tack on" or include the period that the shares issued by the savings association were outstanding in calculating the three-year period that stock repurchases are restricted. All of the comments on this issue were favorable. One commenter requested that OTS make the "tacking" period an explicit part of section 575.11(c). OTS reiterates its intention to permit SHCs that are formed after an initial MHC reorganization to include the period that any minority shares of the savings association were outstanding in determining the applicability of the three-year repurchase restriction under 12 CFR 575.11(c) and the final rule has been revised to reflect this policy.

[6] *See* 12 CFR 563b.3(g) (1997).

[7] *See* 12 CFR 563b.3(g) (1997).

[8] *See* 12 CFR 563.134 (1997).

IV. Paperwork Reduction Act of 1995

The reporting and recordkeeping requirements contained in this final rule have been submitted to and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under OMB Control No. 1550–0072. Comments on all aspects of this information collection should be sent to the Office of Management and Budget, Paperwork Reduction Project (1550), Washington, D.C. 20503 with copies to OTS, 1700 G Street, NW., Washington, DC 20552.

The reporting/recordkeeping requirements contained in this final rule are found at 12 CFR part 575. The information is needed by OTS in order to supervise savings associations and mutual holding companies and develop regulatory policy. The likely respondents/recordkeepers are OTS-regulated savings associations and mutual holding companies.

Records are to be maintained in accordance with normal and customary business practices as recommended by private counsel, accountants, etc., but no less than three years.

Respondents/recordkeepers are not required to respond to this collection of information unless the collection displays a currently valid OMB control number. The valid control number assigned to the collection of information in this final rule is displayed at 12 CFR 506.1(b).

V. Executive Order 12866

The Director of OTS has determined that this final rule does not constitute a "significant regulatory action" for the purposes of Executive Order 12866.

VI. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that this final rule will not have a significant impact on a substantial number of small entities. The final rule will create additional organizational flexibility for all savings associations that create mutual holding company structures.

VII. Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the

Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. OTS has determined that the final rule will not result in expenditures by state, local, or tribal governments or by the private sector of $100 million or more. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

VIII. Effective Date

Section 553(d) of the Administrative Procedure Act generally requires an agency to publish a substantive rule at least 30 days before its effective date. Section 553(d) of the APA permits waiver of the 30-day delayed effective date requirement for, *inter alia*, good cause or where a rule relieves a restriction. Under the current rule, MHCs are not permitted to form SHCs. Waiver of the 30-day delayed effective date would relieve this restriction and permit MHCs to utilize this structure immediately upon the effective date. For this reason, OTS finds that the 30-day delayed effective date may be waived.

List of Subjects in 12 CFR Part 575

Administrative practice and procedure, Capital, Holding companies, Reporting and recordkeeping requirements, Savings associations, Securities.

Accordingly, the Office of Thrift Supervision hereby amends chapter V, title 12, Code of Federal Regulations, as follows:

PART 575—MUTUAL HOLDING COMPANIES

1. The authority citation for part 575 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1828, 2901.

2. Section 575.2 is amended by revising paragraphs (h) and (o) and adding paragraph (q) to read as follows:

§ 575.2 Definitions.

* * * * *

(h) The term *mutual holding company* means a mutual holding company organized under this part, and unless otherwise indicated, a subsidiary holding company controlled by a mutual holding company, organized under this part.

* * * * *

(o) The term *Stock Issuance Plan* means a plan, submitted pursuant to § 575.7 and containing the information required by § 575.8, providing for the issuance of stock by:

(1) A savings association subsidiary of a mutual holding company; or

(2) A subsidiary holding company.

* * * * *

(q) The term *subsidiary holding company* means a federally chartered stock holding company, controlled by a mutual holding company, that owns the stock of a savings association whose depositors have membership rights in the parent mutual holding company.

3. Section 575.6 is amended by redesignating paragraphs (c) through (i) as paragraphs (d) through (j) and adding a new paragraph (c) to read as follows:

§ 575.6 Contents of Reorganization Plans.

* * * * *

(c) If the reorganizing association proposes to form a subsidiary holding company, provide for the organization of a subsidiary holding company and attach and incorporate the proposed charter and bylaws of such subsidiary holding company.

* * * * *

4. Section 575.10 is amended by:

a. Removing, in the introductory text of paragraph (a)(2), the phrase "the holding company", and by adding in lieu thereof the phrase "the parent mutual holding company';

b. Revising the first sentence of paragraph (a)(3);

c. Revising the first sentence of paragraph (a)(4);

d. Revising paragraph (a)(6)(i)(B); and

e. Revising the first sentence of paragraph (b)(1).

The revisions read as follows:

§ 575.10 Acquisition and disposition of savings associations, savings and loan holding companies, and other corporations by mutual holding companies.

(a) * * *

(3) *Mutual holding companies.* A mutual holding company that is not a subsidiary holding company may acquire control of another mutual holding company, including a subsidiary holding company, by merging with or into such company, provided the necessary approvals are obtained from the OTS, including (without limitation) approval pursuant to part 574 of this chapter. * * *

(4) *Stock holding companies.* A mutual holding company may acquire control of a savings and loan holding company in the stock form that is not a subsidiary holding company, provided the necessary approvals are obtained from the OTS, including (without limitation) approval pursuant to part 574 of this chapter. * * *

* * * * *

(6) * * *

(i) * * *

(B) It is lawful for the stock of such corporation to be purchased by a federal savings association under part 559 of this chapter or by a state savings association under the law of any state where any subsidiary savings association of the mutual holding company has its home office; and

* * * * *

(b) *Dispositions*—(1) A mutual holding company shall provide written notice to the OTS at least 30 days prior to the effective date of any direct or indirect transfer of any of the stock that it holds in a subsidiary holding company, a resulting association, an acquiree association, or any subsidiary savings association that was in the mutual form when acquired by the mutual holding company, including stock transferred in connection with a pledge pursuant to § 575.11(b) or any transfer of all or a substantial portion of the assets or liabilities of any such subsidiary holding company or association. * * *

* * * * *

5. Section 575.11 is amended by:

a. Revising paragraph (b)(1) introductory text, redesignating existing paragraph (b)(1)(ii) as paragraph (b)(1)(iii), and adding a new paragraph (b)(1)(ii);

b. Revising paragraph (b)(2);

c. Revising the introductory text of paragraph (c) and paragraphs (c)(1) and (c)(3); and

d. Revising paragraph (e).

The revisions and addition read as follows:

§ 575.11 Operating restrictions.

* * * * *

(b) *Pledging stock*—(1) No mutual holding company may pledge the stock of its resulting association, an acquiree association, or any subsidiary savings association that was in the mutual form when acquired by the mutual holding company (or its parent mutual holding company), unless the proceeds of the loan secured by the pledge are infused into the association whose stock is pledged. No mutual holding company may pledge the stock of its subsidiary holding company unless the proceeds of the loan secured by the pledge are infused into any savings association subsidiary of the subsidiary holding company that is a resulting association, an acquiree association, or a subsidiary savings association that was in the mutual form when acquired by the subsidiary holding company (or its parent mutual holding company). In the event the subsidiary holding company has more than one savings association subsidiary, the loan proceeds shall, unless otherwise approved by the OTS, be infused in equal amounts to each

savings association subsidiary. Any amount of the stock of such association or subsidiary holding company may be pledged for these purposes. Nothing in this paragraph (b)(1) shall be deemed to prohibit:

* * * * *

(ii) The payment of dividends from a subsidiary holding company to its mutual holding company parent to the extent otherwise permissible; or

* * * * *

(2) Within ten days after its pledge of stock pursuant to paragraph (b)(1) of this section, a mutual holding company shall provide written notice to the OTS regarding the terms of the transaction (including the amount of principal and interest, repayment terms, maturity date, the nature and amount of collateral, and the terms governing seizure of the collateral) and shall include in such notice a certification that the proceeds of the loan have been transferred to the subsidiary savings association whose stock (or the stock of its parent subsidiary holding company) has been pledged.

* * * * *

(c) *Restrictions on stock repurchases.* No subsidiary savings association of a mutual holding company that has any stockholders other than the association's mutual holding company and no subsidiary holding company that has any stockholders other than its parent mutual holding company shall repurchase any share of stock within three years of its date of issuance (which may include the time period the shares issued by the savings association were outstanding if the subsidiary holding company was formed after the initial issuance by the savings association), unless the repurchase:

(1) Is part of a general repurchase made on a pro rata basis pursuant to an offer approved by the OTS and made to all stockholders of the association or subsidiary holding company (except that the parent mutual holding company may be excluded from the repurchase with the OTS' approval);

* * * * *

(3) Is purchased in the open market by a tax-qualified or non-tax-qualified employee stock benefit plan of the savings association (but not of a subsidiary holding company) in an amount reasonable and appropriate to fund such plan.

* * * * *

(e) *Restrictions on issuance of stock to insiders.* A subsidiary of a mutual holding company that is not a savings association or subsidiary holding company may issue stock to any insider, associate of an insider or tax-qualified or non-tax-qualified employee stock benefit plan of the mutual holding company or any subsidiary of the mutual holding company, provided that such persons or plans provide written notice to the OTS at least 30 days prior to the stock issuance. Subsidiary savings associations and subsidiary holding companies may issue stock to such persons only in accordance with § 575.7.

* * * * *

6. Section 575.12 is amended by:

a. Revising paragraph (a)(2);

b. Revising paragraphs (b)(1)(ii) and (b)(1)(iii); and

c. Revising paragraph (b)(2).

The revisions read as follows:

§ 575.12 Conversion or liquidation of mutual holding companies.

(a) * * *

(2) Exchange of savings association stock. Any stock issued pursuant to § 575.7 by a subsidiary savings association or subsidiary holding company of a mutual holding company to persons other than the parent mutual holding company may be exchanged for the stock issued by the parent mutual holding company in connection with the conversion of the parent mutual holding company to stock form. The parent mutual holding company and the subsidiary holding company or savings association must demonstrate to the satisfaction of the OTS that the basis for the exchange is fair and reasonable.

(b) * * * (1) * * *

(ii) The default of the parent mutual holding company or its subsidiary holding company; or

(iii) Foreclosure on any pledge by the mutual holding company of subsidiary savings association stock or subsidiary holding company stock pursuant to § 575.11(b).

(2) Except as provided in paragraph (b)(3) of this section, the net proceeds of any liquidation of any mutual holding company shall be transferred to the members of the mutual holding company or the stock holders of the subsidiary holding company in accordance with the charter of the mutual holding company or subsidiary holding company.

* * * * *

7. Section 575.14 is added to read as follows:

§ 575.14 Subsidiary holding companies.

(a) *Subsidiary holding companies.* A mutual holding company may establish a subsidiary holding company as a direct subsidiary to hold 100% of the stock of its savings association subsidiary. The formation and operation of the subsidiary holding company may not be utilized as a means to evade or frustrate the purposes of this part 575 or part 563b of this chapter. The subsidiary holding company may be established either at the time of the initial mutual holding company reorganization or at a subsequent date, subject to the approval of the OTS.

(b) *Stock issuances.* For purposes of §§ 575.7 and 575.8, the subsidiary holding company shall be treated as a savings association issuing stock and shall be subject to the requirements of those sections. In the case of a stock issuance by a subsidiary holding company, the aggregate amount of outstanding common stock of the association owned or controlled by persons other than the subsidiary holding company's mutual holding company parent at the close of the proposed issuance shall be less than 50% of the subsidiary holding company's total outstanding common stock.

(c) *Charters and bylaws for subsidiary holding companies*—(1) *Charters.* The charter of a subsidiary holding company shall be in the form set forth in this paragraph (c)(1) and may include any of the additional provisions permitted pursuant to paragraph (c)(2) of this section. The form of the charter is as follows:

Federal MHC Subsidiary Holding Company Charter

Section 1. Corporate title. The full corporate title of the MHC subsidiary holding company is XXX.

Section 2. Domicile. The domicile of the MHC subsidiary holding company shall be in the city of _____, in the state of _____.

Section 3. Duration. The duration of the MHC subsidiary holding company is perpetual.

Section 4. Purpose and powers. The purpose of the MHC subsidiary holding company is to pursue any or all of the lawful objectives of a federal mutual holding company chartered under section 10(o) of the Home Owners' Loan Act, 12 U.S.C. 1467a(o), and to exercise all of the express, implied, and incidental powers conferred thereby and by all acts amendatory thereof and supplemental thereto, subject to the Constitution and laws of the United States as they are now in effect, or as they may hereafter be amended, and subject to all lawful and applicable rules, regulations, and orders of the Office of Thrift Supervision ("Office").

Section 5. Capital stock. The total number of shares of all classes of the capital stock that the MHC subsidiary holding company has the authority to issue is _____, all of which shall be common stock of par [or if no par is specified then shares shall have a stated] value of _____ per share. The shares may be issued from time to time as authorized by the board of directors without the approval of its shareholders, except as

otherwise provided in this section 5 or to the extent that such approval is required by governing law, rule, or regulation. The consideration for the issuance of the shares shall be paid in full before their issuance and shall not be less than the par [or stated] value. Neither promissory notes nor future services shall constitute payment or part payment for the issuance of shares of the MHC subsidiary holding company. The consideration for the shares shall be cash, tangible or intangible property (to the extent direct investment in such property would be permitted to the MHC subsidiary holding company), labor, or services actually performed for the MHC subsidiary holding company, or any combination of the foregoing. In the absence of actual fraud in the transaction, the value of such property, labor, or services, as determined by the board of directors of the MHC subsidiary holding company, shall be conclusive. Upon payment of such consideration, such shares shall be deemed to be fully paid and nonassessable. In the case of a stock dividend, that part of the retained earnings of the MHC subsidiary holding company that is transferred to common stock or paid-in capital accounts upon the issuance of shares as a stock dividend shall be deemed to be the consideration for their issuance.

Except for shares issued in the initial organization of the MHC subsidiary holding company, no shares of capital stock (including shares issuable upon conversion, exchange, or exercise of other securities) shall be issued, directly or indirectly, to officers, directors, or controlling persons (except for shares issued to the parent mutual holding company) of the MHC subsidiary holding company other than as part of a general public offering or as qualifying shares to a director, unless the issuance or the plan under which they would be issued has been approved by a majority of the total votes eligible to be cast at a legal meeting.

The holders of the common stock shall exclusively possess all voting power. Each holder of shares of common stock shall be entitled to one vote for each share held by such holder, except as to the cumulation of votes for the election of directors, unless the charter provides that there shall be no such cumulative voting. Subject to any provision for a liquidation account, in the event of any liquidation, dissolution, or winding up of the MHC subsidiary holding company, the holders of the common stock shall be entitled, after payment or provision for payment of all debts and liabilities of the MHC subsidiary holding company, to receive the remaining assets of the MHC subsidiary holding company available for distribution, in cash or in kind. Each share of common stock shall have the same relative rights as and be identical in all respects with all the other shares of common stock.

Section 6. Preemptive rights. Holders of the capital stock of the MHC subsidiary holding company shall not be entitled to preemptive rights with respect to any shares of the MHC subsidiary holding company which may be issued.

Section 7. Directors. The MHC subsidiary holding company shall be under the direction of a board of directors. The authorized number of directors, as stated in the MHC subsidiary holding company's bylaws, shall not be fewer than five nor more than fifteen except when a greater or lesser number is approved by the Director of the Office, or his or her delegate.

Section 8. Amendment of charter. Except as provided in Section 5, no amendment, addition, alteration, change or repeal of this charter shall be made, unless such is proposed by the board of directors of the MHC subsidiary holding company, approved by the shareholders by a majority of the votes eligible to be cast at a legal meeting, unless a higher vote is otherwise required, and approved or preapproved by the Office.

Attest: _____
Secretary of the Subsidiary Holding Company

By: _____
President or Chief Executive Officer of the Subsidiary Holding Company

Attest: _____
Secretary of the Office of Thrift Supervision

By: _____
Director of the Office of Thrift Supervision

Effective Date: _____

(2) *Charter amendments.* The rules and regulations set forth in § 552.4 of this chapter regarding charter amendments and reissuances of charters (including delegations and filing instructions) shall be applicable to subsidiary holding companies to the same extent as if the subsidiary holding companies were Federal stock savings associations, except that, with respect to the pre-approved charter amendments set forth in § 552.4 of this chapter, the reference to home office in § 552.4(b)(2) of this chapter shall be deemed to refer to the domicile of the subsidiary holding company and the requirements of § 545.95 of this chapter shall not apply to subsidiary holding companies.

(3) *Bylaws.* The rules and regulations set forth in § 552.5 of this chapter regarding bylaws (including their content, any amendments thereto, delegations, and filing instructions) shall be applicable to subsidiary holding companies to the same extent as if subsidiary holding companies were federal stock savings associations. The model bylaws for Federal stock savings associations set forth in the OTS Applications Processing Handbook shall also serve as the model bylaws for subsidiary holding companies, except that the term "association" each time it appears therein shall be replaced with the term "Subsidiary Holding Company."

(4) *Annual reports and books and records.* The rules and regulations set forth in §§ 552.10 and 552.11 of this chapter regarding annual reports to stockholders and maintaining books and records shall be applicable to subsidiary holding companies to the same extent as if subsidiary holding companies were federal stock savings associations.

Dated: March 3, 1998.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

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