



The Commonwealth of Massachusetts

Office of the Commissioner of Banks

One South Station

Boston, Massachusetts 02110

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JANE SWIFT
GOVERNOR

THOMAS J. CURRY
COMMISSIONER

May 9, 2002

By E-mail and U. S. Mail

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW.
Washington, DC 20552
Attention Docket No. 2002-11

RE: Proposed Rule Relative to Mutual Savings Associations, Mutual Holding Company Reorganizations, and Conversions From Mutual to Stock Form;
[No. 2002-11]

To Whom It May Concern:

This letter is in response to the re-proposal by the Office of Thrift Supervision (OTS) relative to proposed amendments of its regulations on the mutual-to-stock conversion process and portions of its regulations on mutual holding company reorganizations (re-proposal). The Massachusetts Division of Banks (Division) welcomes the opportunity to comment on the mutual holding company provisions of the re-proposal and express concerns over those aspects which appear to represent significant policy shifts by the OTS.

The Division is the primary regulator of the Commonwealth's state-chartered banking system. Its regulatory responsibilities involve the supervision and examination of 300 state-chartered financial institutions with total combined assets of over \$185 billion. The Division's interest in the re-proposal is reflected by the fact that there are 118 mutual banks and 21 mutual holding companies within the Massachusetts state-chartered system. In addition, the Division licenses and supervises over 3,000 financial services licensees, including mortgage lenders and brokers, foreign transmittal agencies, and finance companies, among others. The Division is also a member of the Conference of State Bank Supervisors (CSBS), which has filed or will file comments pertaining to the above-referenced re-proposal issued by the OTS. The Division endorses the views previously



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expressed by CSBS, but also wants to comment on matters that are important to Massachusetts state-chartered banks¹.

Generally speaking, depositors have a very limited role in a mutual thrift institution's governance. The only real protection afforded depositor interests under the mutual holding company corporate structure is the fiduciary duty directors and officers owe to depositors. The Massachusetts mutual holding company statute and regulations, as well as earlier versions of the OTS regulations recognized these inherent limitations of the mutual holding company structure. As a consequence, state and federal bank regulatory agencies generally have a longstanding mission of protecting depositors' interests over management and minority shareholder interests. Simply put, a minority shareholder knows or should know what they are buying in the context of a minority stock issuance. Regulatory or public policy is not advanced by shifting the OTS regulations' focus from depositor protection to the protection of insiders (boards of directors and operating management) and minority shareholders. This apparent underlying shift in policy needs to be reconsidered.

The Division has continuing concerns regarding OTS's position relative to dividend waivers and the elimination of the requirement that minority shares be diluted by the amount of waived dividends at the time of a subsequent full conversion to stock form of ownership. This policy change, which first occurred under the earlier OTS interim final rule, is disturbing. Removal of the dilution requirement allows management the opportunity to enrich minority shareholders, most often including themselves, at the expense of the majority shareholders, comprised of depositors. Furthermore, given the elevated degree of scrutiny being paid to alleged insider and other corporate governance abuses in the current larger business environment, the non-dilution of minority shares during a second stage full conversion is inappropriate and may increase an institution's risk of litigation by depositors on breach of fiduciary grounds.

The Division also is concerned that the re-proposal represents a significant policy shift relative to management stock benefit plans. The re-proposal states that the OTS will not approve management benefit plans that in the aggregate award more than 25% of the number of shares ultimately issued in the public offering to minority shareholders.² However, the OTS re-proposal appears to increase the rewards that accrue to management stakeholders without additional public policy or regulatory justification.

The re-proposal's Preamble also states that mid-tier holding companies are mutual holding companies, and that mutual holding companies, by statute, must be federally chartered. (See 12 U.S.C. 1467a(o)(7)). The Division supports the legal arguments made in a letter to be submitted by CSBS on these proposed regulations that mid-tier entities are not required by law to be federally chartered. The Division is unclear as to the OTS re-

¹ July 26, 2001 letter to OTS Director Ellen Seidman from Neil Milner, CSBS President and CEO.

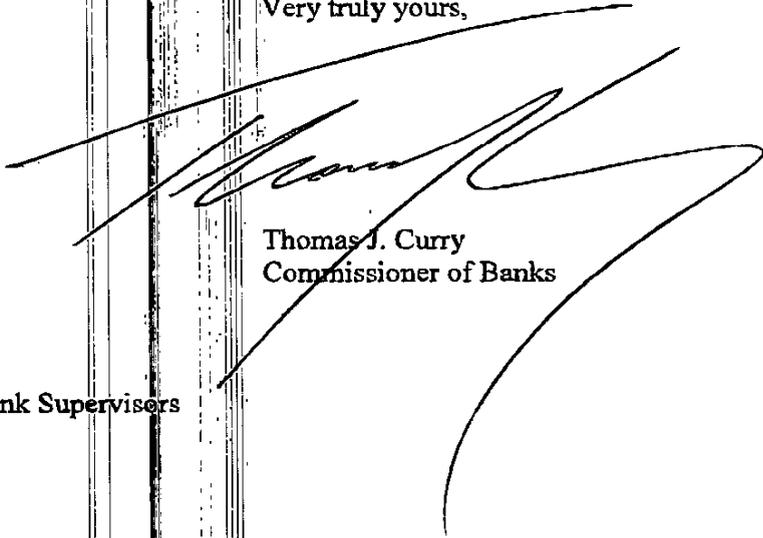
² This restriction does not include ESOP shares allocated to managers.

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proposals' underlying rationale for arriving at this position. This requirement may eliminate ambiguity as to whether a mid-tier entity would be a holding company under the Bank Holding Company Act. However, at the same time this requirement would negate the opportunity for dual supervision of that entity, which occurs in many other corporate structures. An example is the dual regulation of entities operating within a savings and loan holding company structure. This requirement for a federally chartered mid-tier entity also appears to be designed as a means for an institution to evade the more stringent treatment of dividend waivers by the Federal Reserve Board. For these reasons, the OTS should reconsider its position on this matter.

If you should have any questions relative to the contents of this letter, please contact Deputy Commissioner David J. Cotney at (617) 956-1500 extension 542. Again, thank you for the opportunity to comment on the re-proposal.

Very truly yours,



Thomas J. Curry
Commissioner of Banks

cc: Conference of State Bank Supervisors