

**MULDOON
MURPHY &
AGUGLIA** LLP

ATTORNEYS AT LAW
5101 WISCONSIN AVENUE, NW
WASHINGTON, DC 20016
202.362.0840 FAX 202.966.9409
WWW.MULDOONMURPHY.COM

April 13, 2006

VIA FACSIMILE (202.906.6518)
AND REGULAR MAIL

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

Re: Notice of Proposed Rule Making
Federal Savings Association Bylaws; Integrity of Directors
OTS Docket No.: 2006-05
RIN: 1550-AC00

Dear Sir or Madam:

We appreciate the opportunity to comment on the above referenced Notice of Proposed Rule Making (the "Proposal") regarding the optional pre-approved director integrity bylaw that federal savings associations and their holding companies (collectively, "federal savings associations") may adopt. We serve as legal counsel to numerous federal savings associations and other financial institutions and their holding companies before the Office of Thrift Supervision (the "OTS"), the other federal banking agencies and state banking agencies.

We support the Proposal and the OTS's rationale for it. Federal savings associations, like other depository institutions and their holding companies, are entrusted with the public's monies and anything that would undermine that trust is antithetical to the best interests of the institutions, their depositors and the public. The integrity of the individuals charged with the fiduciary responsibility to lead and direct the operations of federal savings associations in a safe and sound manner is of utmost importance in engendering and maintaining the public's trust.

Expansion of the Provision Barring Disqualified Persons From Nominating Directors

We support the added provision barring disqualified persons from either directly or indirectly nominating individuals to serve on boards of directors of federal savings associations. We concur with the OTS's view that without the provision, a disqualified person could easily evade the purpose of the bylaw. However, to further protect against potential evasion, we believe the bylaw should be expanded in two respects. First, to include an "acting in concert" provision

Regulation Comments
Chief Counsel's Office
April 13, 2006
Page 2

(as that term is defined in 12 C.F.R. 574.2(c)) so that a disqualified person could not act in concert with a qualified person to advance a nomination. Second, to include a reference to "persons" so as to cover situations where an informal group rather than a recognizable distinct legal entity advances a nomination. Consequently, we propose that the nomination provision be revised as follows:

"A person who under this provision is not qualified to serve as a director, and any person or entity owned or controlled by or acting in concert with such person, is not permitted to nominate anyone to serve as a director." (proposed additional language underlined)

In reading the Proposal, we are concerned that, without an acting in concert provision, there would be a loophole that we assume the OTS does not intend. Our concern stems from the only example of the application of the nomination provisions contained in the Proposal, which concludes that a nomination advanced by a trust where a disqualified is the trustee or principal beneficiary would be impermissible.^{1/} Presumably, the same conclusion would be reached where a corporation or other distinct legal entity, such as a partnership, advances a nomination and a disqualified person is a director, executive officer or controlling shareholder of the corporation or a partner in the partnership. However, director nominations are frequently advance by informal groups where no similar formal indicia of ownership or control are present. It is common for dissident shareholders seeking to wage a proxy contest to form a "committee of concerned shareholders" or other informal group, which may contain one or more disqualified persons, to nominate and support a slate of directors opposed to management's slate. These circumstances differ vastly from the permitted situation where two or more persons, at least one of whom is disqualified, act *independently* to nominate a qualified individual. Absent an acting in concert provision, we believe it is unclear whether a nomination made by a group that contains one or more disqualified persons would be permissible. We believe it should not be permissible because it would evade the purpose of the bylaw's nomination provision.

As in other areas of law regarding actions by shareholders in the context of a group, we believe that the addition of an acting in concert provision to the bylaw's nomination provision is appropriate and warranted. There is an "acting in concert" provision in both the OTS Mutual to Stock Conversion Regulations^{2/} and in the OTS Acquisition of Control Regulations^{3/}. Similarly, the regulations of the Securities and Exchange Commission (the "SEC") recognize the actions by

¹ See 71 Federal Register 7695, at 7697 (February 14, 2006).

² See 12 C.F.R. 563b.25.

³ See 12 C.F.R. 574.2(c).

**MULDOON
MURPHY &
AGUGGIA**

Regulation Comments
Chief Counsel's Office
April 13, 2006
Page 3

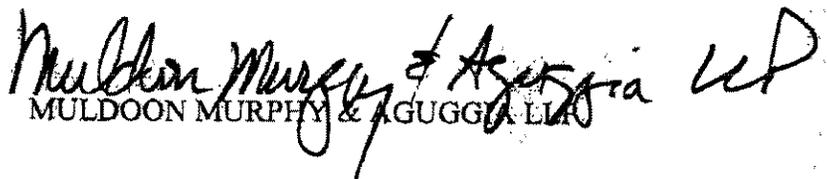
groups of shareholders and impose on these groups certain reporting obligations when they act in concert to acquire an issuer's securities.^{4/} In each instance, the OTS and the SEC recognize that without the inclusion of an acting in concert component to the applicable regulation, the purpose of the regulation would be undermined.

Expansion of the Cease and Desist Provision and the Violation of Laws and Regulations Provision

We believe the proposed provision of the optional pre-approved bylaw governing cease and desist orders should not be limited to orders issued by a banking agency, but should be expanded to cover cease and desist orders issued by regulatory agencies with jurisdiction over other financial businesses and by regulatory agencies with jurisdiction over non-financial businesses. The relevant issue is the seriousness of the misconduct giving rise to the issuance of a cease and desist order, not the line of business in which the person subject to the order conducts business. In addition, we believe that the list of violations of laws and regulations set forth in sub-section 3 of the proposed pre-approved bylaw should be expanded to include violations of housing authority laws or regulations and violations of the rules, regulations, codes of conduct or ethics of a self-regulatory trade or professional organization. The OTS views these violations as bearing on an individual's integrity^{5/}.

Thank you for your consideration of these comments.

Sincerely,


MULDOON MURPHY & AGUGGIA LLP

00272691.WPD

⁴ See SEC Schedules 13D and 13G (Instruction 2 for Cover Page).

⁵ See 12 C.F.R. 574.7(g)(1).