AMERICA'S MUTUAL BANKS
7018 th STREET NW SUITE 700. WASHINGTON, D.C. 20001

Mutual Alert

The OCC's Proposal for Broadened Investment Powers for Savings Associations: Part Deux

Last November we reported on the OCC's proposal for broadening the investment powers of savings associations and noted a number of issues that were raised by that proposal. As you may recall the proposal is to give federal savings associations an election to exercise the same "rights and privileges" of a national bank upon 60 days' notice without objection of the OCC. In effect this would give a stock federal savings association an alternative to converting to a national bank. An association exercising this right is deemed to be a "covered savings association". Federal mutual associations would not have an alternative of converting to a mutual national bank but instead would have to make the election to be a "covered savings association" to exercise national bank "rights and privileges". What are "rights and privileges" is not defined but the term is generally defined broadly by the courts. Nonetheless, the language does attempt to say what "rights and privileges" are not. For example, the governance provisions in the federal association stock and mutual charters and bylaws are not changed and shall still apply. Also, the "Corporate Lifecycle" statutory provisions governing mergers, stock conversion , charter conversion and receivership among others are not "rights and privileges" and the exiting provisions applicable to federal associations continue to apply.. Perhaps most significantly a covered bank has no right to membership in a Federal Reserve Bank. Moreover, a covered savings association would lose its service corporation investment authority. The authority to invest in subsidiary operations is limited to that of a national bank which is essentially only those activities which the bank can invest in itself.

A significant question remains as to how the statute, if passed into law, would be interpreted with respect to the QTL test under Section 10(m) and the investment limitations under Section 5(c) of the Home Owners Loan Act of 1933(HOLA). Under the proposed language the OCC would be given blanket authority and mandated to issue regulations exempting covered savings associations from both the OWL and investment limitations. No longer would federal savings associations be required to maintain any residential loans in their portfolio or any other asset class unless required for a national bank. Under the language of 10(m) of the HOLA, as amended by the Dodd-Frank Act, the OCC already exercises limited emergency powers to exempt savings associations from QTL. The proposed language would eliminate the QTL requirements in Section 10(m) and the investment limitations by asset class in Section 5(c) entirely. The Federal Reserve Board (FRB) has not yet weighed in as to its position on creating a

bank like savings and loan association that for holding company registration is not registered as a bank holding company. It remains to be seen whether the FRB will go against its traditional inclinations and support the OCC approach. Moreover, it has not yet conceded that the appropriate agency for granting 10(m) exceptions would be the OCC under the proposed language. However, the OCC may have already strengthened its position by asserting that power in limited circumstances under the existing 10(m) provisions without opposition by the FRB.

For federal mutuals the proposal offers increased investment powers but probably undermines the urgency for a national mutual commercial bank charter. This in turn will deprive mutual banks from being able to fully enjoy the various powers and exemptions generally extended to banks by the banking laws. Too often because of unintentional omissions (the slip of the draftsman's pen) savings associations are not afforded the same rights as banks. For example savings associations are denied the small bank holding company capital exemption because they are not banks. There have been similar problems with broker dealer, Jobs Act and other securities law exceptions. Of course, a stock savings association can always convert to a commercial bank as a solution. A mutual would be better served with the right to do the same thing that a stock bank can do –convert to a national bank.

In sum, the OCC's proposal is a positive step for federal mutual savings associations seeking bank like investment powers. However, for traditional mutual associations dedicated to residential housing finance, it will expose them to supervisory pressure to become less concentrated in home loans and more diverse in asset composition inevitably increasing the need for merger with more diversified institutions or new managerial skills. It will probably forever shut the door to national bank status without a stock conversion for a federal mutual. While the proposal is not what we have asked for it is encouraging that mutual banks seeking more investment authority may see some progress. For those seeking to phase out of housing lending it will be a significant liberalization.