



**AMERICAN
ASSOCIATION
OF BANK DIRECTORS**

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February 9, 2009

The Honorable John Reich
Director
Office of Thrift Supervision
1700 G St., NW
Washington, DC 20552

Dear Director Reich:

AABD, a non-profit trade association representing the interests of bank and savings institution directors, has been advised that the OTS is requiring savings and loan holding companies of federal savings banks to execute an agreement with OTS that obligates the savings and loan holding company to provide as much capital to the federal savings association subsidiary as OTS may require.

AABD is opposed to this OTS initiative for the reasons stated below and urges OTS to halt immediately the initiative and rescind all such agreements that have been entered into.

The agreement states that so long as the savings and loan holding company controls the savings association, the company will provide the savings association with such capital as OTS may determine is necessary. The agreement states that it is legally binding and OTS may enforce it against the Company, its successors and assigns pursuant to Section 8 of the FDI Act. Finally, the agreement states that in the event of an appointment of a conservator or receiver for the savings association, the obligations of the Company under the agreement shall survive and the FDIC may enforce the agreement in the FDIC's capacity as conservator or receiver.

OTS has apparently taken this initiative without proposing a rule under the Administrative Procedures Act. There is a question whether OTS is violating the APA in requesting savings and loan holding companies to execute these capital guarantee agreements without the benefit of a duly adopted rule.

By rendering the agreement as enforceable under Section 8 of the FDI Act, the OTS may fine any institution-affiliated party for up to \$1 million a day (plus an inflation adjustor) for each violation of the agreement in which the institution-affiliated party participated. Authorizing the FDIC as receiver or conservator to enforce the agreement may permit the FDIC to require the company to pay for all of the FDIC's liquidation costs.

AABD is opposed to the use of these agreements for the following reasons:

- They undermine Treasury's capital purchase program ("CPP"). Treasury has repeatedly stated that all healthy or viable banks are encouraged to participate in CPP so that banks will lend more. But the OTS agreement is a burdensome and unreasonable pre-condition to healthy federal savings associations participating in the program.
- The open-ended obligation to capitalize the federal savings association subsidiary is contrary to the statutory framework under which holding companies may be required to provide limited capital guarantees. See Sections 38(e)(2)(C) and (E) of the FDI Act, which state that the applicable federal banking agency cannot accept a capital restoration plan from an undercapitalized bank unless the company controlling the bank has guaranteed that the institution will comply with the plan until the institution has been adequately capitalized, but that liability

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will be the lesser of 5% of the institution's total assets or the amount necessary to bring the institution into compliance with all capital standards. There is no explicit statutory authority for the OTS to impose arbitrarily an open-ended enforceable agreement on a healthy savings and loan holding company applying for CPP funds.

- The agreement misuses the regulatory relief legislation provision (section 702) that permits OTS and other federal banking agencies to enforce capital guarantee agreements regardless of whether the party did anything wrong, and is contrary to the representations of the agencies to AABD and the U.S. Congress at the time of passage that they would not use this authority routinely, at least with respect to directors and officers of the institution. This authority apparently is being used routinely for savings and loan holding companies applying for TARP CPP money. AABD was opposed to Section 702 in part because it was concerned that federal banking agencies would withhold approval on applications in order to compel institution-related parties to sign binding agreements guaranteeing the capital of the institution

AABD has formed a Task Force headed by Raymond Gustini, a partner with Nixon Peabody, who specializes in representing savings institutions. In order for the Task Force to review the OTS's actions, we request the following:

- Is OTS requiring that all savings and loan holding companies that have applied for CPP investments execute the agreement, including those whose CPP funds have already been received, and including those whose subsidiary is a state savings association subject to OTS jurisdiction?
- Is OTS requiring savings and loan holding companies that have not applied for CPP funds to execute similar agreements in which the company agrees to maintain capital at the savings association subsidiary as determined by the OTS? If so, under what circumstances are such agreements being used and how frequent are they being used?
- What happens if a savings and loan holding company refuses to sign?
- How many savings and loan holding companies have signed these agreements?
- How many OTS requests to savings and loan holding companies to sign these agreements are pending?

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'D Baris', with a long horizontal flourish extending to the right.

David Baris