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Covered Savings Associations

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MidFirst Bank

Submitter Information

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General Comment

See attached file(s)

Attachments

MidFirst Bank

MIDFIRST BANK

November 19, 2018

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street SW
Suite 3E-218
Washington, DC 20219

RE: Docket ID OCC-2018-0020
Covered Savings Associations

Dear Madam or Sir,

MidFirst Bank ("MidFirst") appreciates the opportunity to comment on the proposed rule to provide a streamlined method by which eligible savings associations may elect to operate as a national bank as set forth in Section 206 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (the "statute" or "legislation")[1]. MidFirst Bank is a federally chartered savings association with $16 billion in assets, headquartered in Oklahoma City and is wholly owned by Midland Financial Co. Overall, MidFirst is supportive of the proposal, which eliminates several outdated requirements that constrain the ability of small to mid-sized savings associations to evolve and serve the changing needs of their communities.

While the proposed rule stays true to the intended outcome of the statute by providing savings associations with a streamlined approach for making the election and thereby diversifying their lending activities (among other changes), MidFirst requests clarification from the OCC regarding certain aspects as discussed below. Importantly, MidFirst notes that the proposed rule would also be improved by input from the Federal Reserve on its approach to the legislation and the OCC's proposed rule as it relates to its jurisdiction over savings associations' holding companies.

1. **The definition of "Covered Savings Association" should be clear that it permits the savings association to grow beyond $20B, while still maintaining its ability to make the election at any time.**

MidFirst supports the concept of Covered Savings Association (a "CSA") which is defined to be a federal savings association with total assets of $20 billion or less as of December 31, 2017. One proposed improvement to the plain reading of the proposed rule is text that makes it clear that any CSA that was under $20 billion at the end of 2017 retains its ability to make an election under this rule into perpetuity. It is also important that the option to terminate the election does not foreclose future opportunities to re-elect. This means that a federal savings association would retain its ability to operate as a national bank, even if the institution grows beyond $20 billion at some point in the future. A federal savings association

[1] *Economic Growth, Regulatory Relief, and Consumer Protection Act*, Pub. L. No. 115-174 § 206, 132 Stat. 1,296, 1,310-11 (2018).

can select CSA status at any time, and in the event the CSA terminates the CSA election, the federal savings association can re-designate as a CSA at any subsequent time following a five-year period.

To that end, MidFirst proposes this revision to the proposed rule:

§ 101.3 Procedures and standard of review.
(a) Notice—(1) Submission. A Federal savings association that had total consolidated assets of $20 billion or less as of December 31, 2017, as reported on the Federal savings association's Consolidated Reports of Condition and Income for December 31, 2017, may make an election to operate as a covered savings association by submitting a notice to the appropriate OCC supervisory office. **(2) Grandfathering. A Federal savings association that made an election of the type described in clause (a)(1) above and then terminated such election does not surrender its ability to make a re-election after termination even if its consolidated assets exceed $20 billion at the time of re-election so long as its total consolidated assets conformed with Section (a)(1) as of December 31, 2017.**

2. **The proposed rule implies limitations on the savings association not contemplated by the statute as it relates to divestment of nonconforming subsidiaries, assets, or activities.**

The proposed rule definitively limits the ability of a savings association to continue to hold permissible subsidiaries of a savings association post-election. The legislation was less definitive on this point than the rule. Relying on the plain meaning of the statutory text that reads, "... allowing the Federal savings association to submit to the Comptroller an application to continue to hold assets and subsidiaries described in paragraph (2) after electing to operate as a covered savings association," MidFirst contends that divestiture is not absolutely required.[2] Rather, MidFirst asserts that the statute requires the OCC to promulgate a rule that details the conditions by which a savings association may retain reasonable nonconforming subsidiaries (as defined by the current proposed rule) post-election.

It appears clear from the statutory language that by not forcing a savings association to complete a full conversion to a national bank, there is recognition of the continued value of the savings association charter to operate in a manner that differs from national banks. Furthermore, applying the statutory interpretation canon of "expressio unius" or that "expression of one thing suggests the exclusion of others," Congress had the ability to categorically exclude nonconforming subsidiaries, assets or activities but chose not to.[3] This choice by Congress should be given regulatory effect. Taken together, MidFirst asserts: (1) that the unique aspects of a savings association that are described as "nonconforming subsidiaries, assets or activities" deserve the opportunity to be retained and; (2) the standard of review to determine whether their continued retention post-election should tilt in favor of retention *unless* it threatens the safety or soundness of the institution. Generally, MidFirst is of the opinion that, regardless of the increase in commercial lending and non-mortgage consumer lending activities that this election permits, reasonable business lines and assets will not threaten the safety and soundness of the savings association any differently than they would if no election was made. Put differently, the election to operate as a national bank for certain purposes does not significantly alter the incremental risk associated with the subsidiaries, assets or activities of a savings association. As such, those activities deserve the opportunity to be retained in perpetuity, subject to review on a regular basis by the OCC.

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[2] See Section 206 of the *Economic Growth, Regulatory Relief, and Consumer Protection Act*, Pub. L. No. 115-174 § 206 altering section 5A(f)(3)(B) of HOLA.

[3] See Reves v. Ernst & Young, 494 U.S. 56, 60-61 (1990) and "THE REHNQUIST COURT'S CANONS OF STATUTORY CONSTRUCTION", Appendix to "Foreword: Law As Equilibrium," William N. Eskridge, Jr., Philip P. Frickey, 108 Harv. L. Rev. 26, November, 1994. Format modified by Judge Russell E. Carparelli, Colorado Court of Appeals, Sep. 2005.

MidFirst urges the OCC to offer CSAs the option to apply to retain subsidiaries, assets and activities consistent with a savings association, subject to OCC review at election and periodically thereafter.

To that end, MidFirst proposes this improvement to the proposed rule:

§ 101.5 Nonconforming subsidiaries, assets, and activities.

(a) Divestiture, conformance, or discontinuation. A covered savings association shall divest, conform, or discontinue a nonconforming subsidiary, asset, or activity unless **retention or continuation of the nonconforming subsidiary, asset, or activity is or has been consistent with the safe and sound operation of the covered savings association**.

(b) **Application for continuation. A covered federal savings association may from time to time submit to the Comptroller an application to continue to hold or to establish assets and subsidiaries that do not conform to the requirements for assets and subsidiaries of a national bank. The covered savings association may submit the application at election, or anytime following election. Such subsidiaries, assets or activities that are consistent with the safe and sound operation of a covered savings association are presumptively permitted to be retained, subject to the Comptroller's review at application and periodically thereafter.**

3. **The proposed rule should not impose new burdens on savings associations' subsidiaries, assets, or activities that are considered national bank-permissible activities.**

The proposed rule does not distinguish between national bank-permissible activities and those that are exclusive to savings associations, but should the revision suggested above be incorporated, MidFirst suggests that the OCC create a clear, concise statement of policy that governs national bank-permissible subsidiaries, assets and activities. Specifically, MidFirst recommends that no changes in the legal form of national bank-permissible subsidiaries, assets or activities be required. In so doing, the OCC would be honoring the intent of the legislation to make the conversion/election process as seamless as possible. Absent the OCC determining that a change in corporate form is necessary for safety and soundness, these costly technical changes to status should be avoided. The test for conversion of the corporate form should be one in which the OCC must prove a material adverse financial effect on the savings association post-election would be imminent.

As explained above, the historical differences between savings association permissions should be given weight here. The legislation does not require savings associations to convert entirely to a national bank in order to take advantage of the benefits of increased lending opportunities. Rather, the historical differences between savings associations and national banks should be fundamentally preserved, unless it is expressly stated in the legislation. The proposed rule should not force full alignment of a savings association with a national bank where the legislation is otherwise silent.

4. **The OCC's proposed rule would be significantly improved if the input of the Federal Reserve was included on the issue of how it will approach its regulation of savings associations' holding companies.**

MidFirst is aware that the OCC does not have jurisdiction over the regulation of savings association holding companies, and thus this rule does not address the impact of the legislation or rule on those entities. However, the Federal Reserve's input is of great necessity for those savings associations, such as

MidFirst, that operate with a holding company. Specifically, the proposed rule eliminates the Qualified Thrift Lender ("QTL") restrictions on the subsidiary savings association making the CSA election, but it does not discuss QTL in relation to savings and loan holding companies ("SLHCs"). Whether this was a legislative oversight can be debated, but the canons of statutory interpretation can be useful in this context. Namely, courts will interpret ambiguous statutes so as to best carry out their statutory purpose.[4] In this instance, the statutory power to create a streamlined process to elect to be treated as a national bank for certain purposes, should not be interpreted so narrowly to cover only the savings association, but also its attendant holding company. Furthermore, the legislation is explicit that the corporate governance of the CSA need not be altered in order to make the election.[5] MidFirst interprets this portion of the statute to mean that changes to the holding company structure of MidFirst is not necessary to effectuate the election. Put another way, the statute's provisions on maintaining the corporate governance structure of a savings association provide evidence that Congress would want the Federal Reserve to recognize that a compliant CSA can be held by a traditional savings and loan holding company. The proposed rule should, in consultation with the Federal Reserve, make clear that a savings and loan holding company may maintain a CSA, so long as the CSA complies with the terms of the rule.

In fact, when asked directly by Representative Rothfus (R-PA) in a recent House Financial Services hearing, Randal Quarles, Vice Chairman for Supervision, Board of Governors of the Federal Reserve System, said that he did not intend to frustrate the purpose of the legislation, stating "Well, we are working closely with the OCC on that question. Having come to -- we haven't come to detailed views as to how we will implement that provision, but we certainly intend to hew to the Congressional intent."[6]

The Congressional intent of the charter flexibility provisions would not be fulfilled if the parent SLHC is forced to seek regulatory approval for conversion to a Bank Holding Company in situations in which the savings association is granted national bank status for certain purposes. As QTL is a key element of relief afforded federal savings associations in electing CSA status, QTL should not be a factor triggering redesignation of a SLHC to a Bank Holding Company. The OCC is aware of the cost, time and burden in applying for conversion from a federal savings association to a national bank, and similarly from a SLHC to a Bank Holding Company.

5. **The proposed rule provision regarding branch documentation requirements are burdensome and not necessary in order to effectuate the legislation.**

The proposed rule requires a savings association making the election to compile a detailed list of branches existing as of the date of election and provide supporting regulatory approval documentation. Particularly for branches that have been operational for a number of years, this documentation may be difficult or impossible to obtain. Considering the legislation's silence on the issue, the OCC does not document how this information relates to safety and soundness and it is unclear why this support is needed for branches that have been in operation for years under OCC supervision. The OCC and the Federal Deposit Insurance Corporation already possess listings of branches that are approved and open for operations; no additional documentation from the institutions should be required. All branches have been open and operational, as well as locations receiving regulatory non-objection or approvals as of the CSA election date, and should be presumed to be compliant with no additional documentation required. As such, MidFirst suggests that any documentation requirements be limited to branches formed after the election is made.

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[4] Id.

[5] See Section 206 of the *Economic Growth, Regulatory Relief, and Consumer Protection Act*, Pub. L. No. 115-174 § 206 altering section 5A(d)(1) of HOLA.

[6] House Financial Services hearing entitled "Semi-Annual Testimony on the Federal Reserve's Supervision and Regulation of the Financial System." Wednesday, November 14, 2018 10:00 AM in Rayburn 2128

6. **Framework for National Bank Rule Applicability to CSAs**

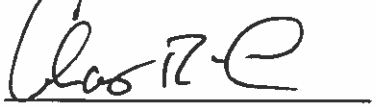
The rule offers two possible processes to extend national bank rules to CSAs. The first proposal identified as Option A affords greater certainty by specifying at the outset those rules that apply and those that do not, whereas Option B provides more flexibility by permitting consultation with the OCC regarding permissibility in certain cases. MidFirst believes Option B is optimal so as to allow CSAs and the OCC the opportunity to jointly determine if an activity is consistent with regulatory expectations and requirements. This is particularly true given the evolving nature of the banking industry into areas perhaps not currently contemplated and given that structural governance variances between national banks and federal savings associations, and hence CSAs, will remain.

Conclusion

The proposed rule provides many benefits that would ultimately allow institutions who elect to become a CSA to better serve the communities in which they are situated. Congress was clear in their intent to eliminate costly and burdensome charter conversions by passing this rule and directed OCC to issue implementing regulations that accomplish that goal. MidFirst believes the changes suggested in this comment letter are consistent with legislative intent and should be incorporated into the final rule. Should you require further information, please contact the undersigned.

Sincerely,

MidFirst Bank



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