

OFFICE OF THRIFT SUPERVISION

Approval of a Minority Stock Issuance by a Subsidiary of a Mutual Holding Company

Order No.: 2002-16

Date: April 19, 2002

**Docket Nos.: H-3051, H-3059,
08163**

BCSB Bankcorp, Inc., Baltimore, Maryland (Applicant) has applied to the Office of Thrift Supervision (OTS), pursuant to 12 U.S.C. § 1467a(o) and 12 C.F.R. § 575.7, to issue up to 170,000 shares of common stock to the Corporation's deferred compensation plan (Plan). The Applicant owns all of the stock of Baltimore County Savings Bank, F.S.B., Baltimore, Maryland (Association). In connection with the proposed transaction, the Applicant has requested that OTS waive 12 C.F.R. §§ 575.7(d)(2), 575.7(d)(6), 575.8(a)(1), 575.8(a)(3)-(6), 575.8(a)(10), 575.8(a)(13) and 575.8(a)(20).

The Association completed its reorganization into a mutual holding company subsidiary on July 7, 1998, and in connection with the reorganization, conducted a minority stock offering. The Applicant's mutual holding company, Baltimore County Savings Bank, M.H.C., Baltimore, Maryland (MHC), currently holds 63.99% of the Applicant's stock, and minority shareholders hold the remaining 36.01%.

The Association established the Plan in 1995 as a means of compensating directors. To date, the Applicant's directors have been able to receive only cash under the Plan. The Applicant proposes to amend the Plan to permit participants to elect to acquire stock of the Applicant with the compensation that has been deferred. In essence, rather than issuing stock directly to the director for services rendered, the Applicant would issue the shares to the Plan, which will transfer the shares to the director at a later date.

The proposed amendments to the Plan are subject to shareholder approval. The Applicant has filed the Application in order to enable the Applicant to issue either authorized but unissued stock or treasury stock to the Plan. Alternatively, the Plan may acquire shares through open market purchases.

OTS regulations, at 12 C.F.R. § 575.7(a), provide that no savings association subsidiary of a mutual holding company may issue stock to persons other than its mutual holding company parent unless the association obtains advance approval of each such issuance from OTS and the issuance complies with the criteria for approval set forth in 12 C.F.R. §§ 575.7 and 575.8. In addition, OTS regulations at 12 C.F.R. § 575.14(b) provide that for purposes of 12 C.F.R. §§ 575.7 and 575.8, a subsidiary holding company that proposes to issue stock, such as the Applicant, is treated as a savings association and

is subject to the requirements of §§ 575.7 and 575.8.

Specifically, (i) the proposed issuance must be made pursuant to a Stock Issuance Plan (SIP) that meets the requirements of section 575.8, (ii) the SIP must be consistent with the charter of the association and the subsidiary holding company, (iii) the SIP must provide the association with fully sufficient capital and not be inequitable or detrimental to the association or the mutual holding company, or to the members of the mutual holding company, (iv) the price range of the stock must be reasonable, (v) the mutual holding company must hold more than 50 percent of the association's outstanding common stock after the transaction, (vi) the association must furnish all information required by the OTS, (vii) the proposed stock issuance must meet the convenience and needs standards set forth in the mutual to stock conversion regulations at 12 C.F.R. § 563b.11, and (viii) the proposed issuance must comply with all other applicable laws and regulations. In addition, the proposed purchase priorities must be consistent with the OTS regulations on mutual to stock conversions, and comply with applicable securities requirements.

The Applicant's SIP meets the requirements of § 575.8, except for the provisions for which the Applicant has requested a waiver. The SIP provides that the MHC will hold more than 50% of the Applicant's stock after the offering. The issuance complies with the quantitative limitations of 12 C.F.R. §§ 575.8(a)(7) and 575.8(a)(8). Counsel for the Applicant has represented that before the Applicant issues stock, the Applicant will file the appropriate materials with the Securities and Exchange Commission, pursuant to the Securities Act of 1933. The Applicant's shareholders are expected to approve the Plan at the next annual meeting.

The SIP is consistent with the Association's charter, and also with the Applicant's charter, which has authorized the number of shares that would be outstanding after the issuance, and requires a shareholder vote for issuances to directors of the Applicant other than in a general public offering.

As for provision of sufficient capital to the Association, the Association is well-capitalized, as defined under the OTS's Prompt Corrective Action regulations. The proposed stock issuance, if completed in the manner described in the application, will not be inequitable to the Association, the Company, or the Company's members. With respect to provision of information required by OTS, the Applicant has furnished all information OTS has requested.

In light of the Association's Composite Rating, and its Community Reinvestment Act rating of "Satisfactory", the proposed transaction meets the convenience and needs standard set forth at 12 C.F.R. § 563b.11. Finally, we are aware of no information indicating that the proposed transaction is inconsistent with any statute or regulation (other than provisions for which a waiver has been requested).

The Applicant has requested that OTS waive those regulatory provisions set forth

above. The OTS MHC regulations provide that OTS may waive a provision of the regulations for good cause.¹ In addition, OTS regulations provide generally that the "Director may, for good cause and to the extent permitted by statute, waive the applicability of any provision of [Chapter V of 12 C.F.R.]."²

None of the provisions for which the Applicant has requested a waiver is mandated by statute. Therefore, the only issue regarding the waiver is whether "good cause" exists.

The term "good cause," as used in the OTS waiver regulations, is essentially a shorthand form of articulating the requirement that the action be "rational [and] based on consideration of the relevant factors."

The restrictions applicable to minority stock issuances are imposed for the same reasons that similar restrictions are imposed in the mutual to stock conversion process, that is, to ensure that the stock issuance process is fair to all concerned, and not detrimental to the interests of the federal deposit insurance funds.

Both the MHC Regulations and the mutual-to-stock conversion regulations contemplate the issuance of conversion stock to employee and director plans. Deferred compensation plans are common methods of compensating directors. The Plan, providing for deferred compensation to directors, is somewhat comparable to director benefit plans that OTS has allowed in connection with conversion and MHC minority stock issuance applications, in that the Plan, like management benefit plans, provides directors with common stock as compensation for service. In addition, like other management benefit plans, the Plan would have to be approved by shareholders before directors could receive stock as deferred compensation.

The pertinent issue here is whether any of the requested waivers would, under the circumstances, be contrary to the purposes of the relevant regulation.

With respect to the § 575.8(a)(1) requirement that the Applicant issue stock at an aggregate price equal to the total *pro forma* market value of the stock, based upon an independent appraisal, the shares to be issued to the Plan compensate directors for services previously performed. The shares will be issued based on their market price at the relevant time. An appraisal is not necessary, because the stock is currently traded and the offering is much smaller than the MHC offering typically contemplated under the regulations. As stated above, compensation plans awarding stock to management are typically proposed in connection with MHC-2 applications.

With respect to the purchase limitations of §§ 575.8(a)(3)-(a)(6), the amount of stock to be issued will be less than 2.9 percent of the outstanding common stock of the

¹ 12 C.F.R. § 575.1(b) (2001).

² 12 C.F.R. § 500.30(a) (2001).

Applicant. When added to all other non-tax-qualified stock benefit plans, the amount of stock will be less than ten percent of the outstanding common stock of the Applicant, but more than ten percent of the outstanding common stock held by minority shareholders. Therefore, the Applicant has requested a waiver from these provisions. There is an adequate basis to grant the waiver because the application pertains to a relatively small percentage of shares, and because the stock feature of the Plan merely functions as a convenience for the directors. The Plan participants, even under the current version of the Plan, could use the Plan proceeds to purchase stock in the aftermarket, or could elect not to avail themselves of the Plan, and simply purchase stock of the Applicant.

With respect to the § 575.8(a)(10) requirement that the Applicant issue the stock at a uniform per share price, employee and director plans, by their nature, do not issue shares at a uniform price, primarily because the shares are issued over an extended period of time. The plans contemplated in MHC-2 offerings that OTS has approved have not met this requirement, and it is not appropriate to subject the Plan to more stringent requirements than other plans.

With respect to the § 575.8(a)(13) requirement that insiders of the Applicant not purchase stock of the Applicant during the three years following the offering, except with OTS approval (except in certain circumstances), the requirement is intended to be triggered by public offerings of stock. Issuances in plans approved in connections with such offerings have not been subject to a separate limitation.

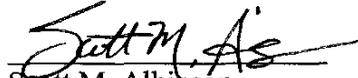
With respect to the §§ 575.7(d)(2) and 575.8(a)(20) limits on the duration of a stock offering, the regulatory limits are directed at public offerings, and plan offerings, by their nature, commonly continue over an extended period of time.

Finally, with respect to the § 575.7(d)(6) requirement that MHC-2 offerings issue stock in accordance with the purchase priorities and underwriting provisions applicable to mutual to stock conversions under 12 C.F.R. § 563b.3, plans by their nature are designed to reward management. In addition, the Plan involves a relatively small amount of stock.

Accordingly, there is an adequate basis to grant the waivers requested by the Applicant, and the requested waivers are hereby granted.

Therefore, for the reasons stated above, OTS finds that the application satisfies the applicable approval standards and that there is an adequate basis to grant the waiver requests. Accordingly, the application is hereby approved and the requested waivers are granted.

By order of the Director of the Office of Thrift Supervision, or his designee,
effective April 19, 2002.


Scott M. Albinson
Managing Director
Office of Supervision