



Mutual Savings Association Advisory Committee

Office of the Comptroller of the Currency

400 7th Street, S.W.

Washington, DC 20219

**Re: Notice of Meeting of the MSAAC and Invitation to Submit Written Comments:
NR 2020-77, June, 8, 2020**

Dear Members of the Committee,

America's Mutual Banks (AMB) hereby submits our written comments to the Mutual Savings Association Advisory Committee (MSAAC) in response to the invitation contained in the above notice. America's Mutual Banks (AMB) is an unincorporated association whose membership consists of mutually chartered federal and state chartered FDIC insured institutions and mutual holding companies. AMB's membership consists entirely of community based institutions dedicated to serving their communities and fostering the economic growth of those communities. Community based, mutual form institutions or holding companies are a historically vital part of the fabric of many communities and their future viability must be protected and enhanced. We are dedicated to promoting the interests of mutual financial institutions and their holding companies.

The Office of the Comptroller of the Currency ("the OCC") has issued a Notice of Proposed Rule Making (NPR) to codify certain guidance, revise and reorganize its regulations relating to the activities and operations of national banks and Federal savings associations. (Docket ID OCC 2020-0003, RIN 1557-AE74). Although most all of the discussion in the preamble to the NPR is focused on national banks, it covers a wide range of digital activities and permissible national bank and federal association activities. Significantly, it also constitutes comprehensive guidance for the permissible incorporation of state law pertaining to corporate governance of a national bank particularly what is generally referred to as antitakeover provisions in corporate governance documents. Currently the OCC regulations authorize a national bank and to a lesser extent federal associations to use the corporate governance provisions of the state in which the main office of the bank is located, the state in which the bank's holding company is located, the



Delaware General Corporation Law, or the Model Business Corporation Act. The NPR, however, would expand the scope of a national bank's choice of law. It would revise paragraph (b) of § 7.2000, 12 CFR 7.200, to authorize a national bank to elect the corporate governance provisions of the law of any state in which any branch of the bank is located, in addition to the law of the state in which the bank's main office is located, to the extent not inconsistent with applicable Federal banking statutes or regulations or safety and soundness. In addition, the NPR requests comment on whether a national bank should be able to adopt a combination of provisions, a governance buffet, from the various jurisdictions in which it or its holding company are located in addition to the Model Act and Delaware. Finally, a national bank whose corporate governance law was selected as the law governing the holding company may continue to apply that law even if the holding company ceases to control that bank. The NPR, while liberalizing, requires that the implementation be made by an amendment to the bank's bylaws.

Of direct interest to our members, the NPR also seeks comment as to whether the provisions applicable to national banks should be applied to federal stock and mutual associations. However, the word "mutual" is mentioned only once in the NPR, in a reference to section 5.21, the regulation which applies to mutual corporate governance. As Federal associations have an entirely different enabling Act, it is not clear that an application of the same governance rules applicable to national banks to federal associations is a good fit. For example, the regulations applicable to federal stock banks allow limits on voting and various other antitakeover provisions that the OCC deems unlawful for national banks. Moreover, mutual associations are a distinct and very different entity from a governance perspective. There is no discussion in the NPR that would inform a reader as to the OCC's inclinations in this regard while there is ample discussion regarding national banks. We suggest that the MSAAC devote some time to this proposal and give its input to the OCC as to issues affecting mutuals raised by the proposal. We believe mutual associations should have the same leeway in making a choice of law as national banks but should not be denied the benefit of state law simply because national banks are denied those provisions by their enabling act.

Stock federal associations subsidiaries of MHC's are an altogether different creature of law. In that case, under Reg MM, the Federal Reserve Board charters and dictates the corporate governance of the MHC but the OCC prescribes governance for the subsidiary federal stock bank. Clearly, any attempt to revise the governance documents of a subsidiary of a MHC should be harmonized with Reg. MM. That is not to say that the governance provisions for federal mutual and stock associations do not need updating. Indeed, they do, and should not be treated as the same as those applying to stock national banks. Arguably, there is a more compelling case to bring the governance of mutuals into the 21st century and plug any loopholes that have been



exploited by professional investors seeking to terminate their mutuality. One of the principal problems in the governance of federal mutuals is that it is founded on the assumption that depositor members have an active interest in participating in the association's corporate affairs. This assumption may have been valid before deposit powers and FDIC deposit insurance, but it is faulty today and demonstrated by the lack of attendance at annual meetings and the necessity of a quorum requirement of "any number of members present." Most depositors are principally concerned about their stated return and the safety of their funds. They seldom, if ever, attend annual meetings or cast votes in person. Indeed, if there were a quorum requirement of any significant number it would be burdensome to fulfill. It is no accident that a significant number of federal mutuals have elected to convert to mutual savings banks in states with favorable mutual savings bank statutes. Notably these states eliminate the fiction of member participation by eliminating voting. Indeed, a number of states have abolished their state savings associations in favor of savings banks.

As with so many other regulations, one size does not fit all. While the NPR is lacking any indication that the application of its terms to federal mutuals was particularly considered, out of necessity we call the Committee's attention to a number of issues that the proposal raises if the OCC were to reflexively apply the NPR's national bank provisions to federal mutuals.

Under the NPR, there are a number of qualifications that may make the adoption of a particular state law provision highly problematic in a contentious shareholder or member environment. That is, an election of choice of law is subject to a OCC self-initiated or bank requested review on a case by case basis with vague or no guidance as to the standards for approval. Indeed, the proposed regulation provides that "based on the substance of the provision or the individual circumstances of a national bank," the OCC may determine an individual provision to be ineffective. What the OCC might do with respect to an antitakeover provision in a hotly contested controversial situation should not be a question that needs to be answered. This is a similar problem for federal mutuals as the OCC's predecessor the OTS has a history of varying attitudes to protective bylaws and charter provisions oftentimes influenced by litigious "professional depositors". If the OCC is inclined to allow matters of governance to be decided by state law, then it should do so and rely on its supervisory enforcement powers as a backup in the case state laws are exploited to the detriment of the bank. The proposal contains too many qualifications to be reliable.



The NPR also provides that a national bank may not elect any state law anti-takeover provision that may impede a capital infusion, with prescribed examples of impediment circumstances as including a merger, acquisition, proxy contest or director removal, among other things. While this exception swallows the rule, the NPR provides that such provisions can be adopted if at the time of adoption by the national bank it includes in the impediment (antitakeover) provision in its bylaws or articles a clause that makes ineffective such provisions in the future in the event that certain conditions exist. The conditions are: the national bank is less than adequately capitalized, is in troubled condition, is otherwise in less than satisfactory condition or grounds exist for the appointment of a receiver for the bank. In addition to the absence of the listed conditions existing at the time of adoption, its articles or bylaws must also contain a provision making the antitakeover provision ineffective in the event the "OCC otherwise directs the bank not to follow the provision for supervisory reasons." We do not believe these provisions (e.g. interested shareholder and poison pill charter provisions) are compatible with mutual associations and would need to be tailored in a suitable way. We are particularly concerned that required stock conversion and elimination of protections against forced stock conversions not creep their way into these provisions.

While the initial thrust of the NPR is quite liberalizing and would give a bank an unprecedented range of choice of laws, even to the point of selecting a patchwork of jurisdictions for individual antitakeover and other governance provisions, the many qualifications that are attached to that choice limit it to such an extent as to make any choice unreliable in a challenge. There is a threshold question whether the state or federal courts will respect combined elections of law if the bank makes a choice of the law of a state where the bank may have minimal contacts. In the highly litigious environment of a contest for control of a bank-stock or mutual, adversaries will not hesitate to challenge unorthodox applications of choices of law. This is even more likely given the current trend line involving court decisions on the validity of choice of law as part of contractual agreements where the parties have reached an agreement. There has been a trend of court decisions where courts are increasing their requirements for an actual nexus to the jurisdiction chosen. Ironically, states will be deciding federal law to the extent they interpret the validity of a state antitakeover provision applied pursuant to a federal OCC regulation.

As if the various qualifications were not enough of a burden, the preamble states: "[w]hile the OCC has concluded that the types of provisions set out in paragraph (b) are not inconsistent with Federal banking statutes and regulations in general, the specific provision a particular bank adopts may contain features that could change the result of the OCC's review." Paragraph (b) does provide a helpful list of generally permissible antitakeover provisions.(most of which are inapplicable to mutuals) However, while the OCC has concluded that the types of provisions set



out in paragraph (b) are not inconsistent with Federal banking statutes and regulations in general, the specific provision a particular bank adopts may contain features that could change the result of the OCC's review at least as to those provisions not prohibited as inconsistent with the law pertaining to national banks. We recommend that the OCC should eliminate an approval process for mutual governance amendments and allow an institution to rely on state law as opined by its counsel for the validity of an individual antitakeover provision. Otherwise, the helpful guidance in proposed Section 7.2001 concerning common antitakeover provisions permissible under state law is academic in that it provides little certainty and no legal validity to their enforceability.

Further, restrictions on the right to vote shares above a certain percentage, and supermajority voting provisions are prescribed as prohibited for national banks but are provisions normally permitted for federal associations. We are concerned that the failure to expressly address federal mutuals will suggest a question as to the validity of these provisions in their case.

As many, if not most, national banks are controlled by state incorporated holding companies, it is doubtful that this proposal will have much of an effect on the practical use of protective charter and bylaw provisions. Since the holding company typically holds the controlling interest in the bank, any contests occur at the holding company level. It is at this level that most governing documents include protective provisions. This is not the case for mutuals which (with the exception of mutual holding companies whose corporate documents are prescribed by Reg MM) do not have the choice to include antitakeover provisions in the holding company governance documents. It may be possible to deter certain predatory tactics by a bylaw or charter amendment at the bank level bypassing a shareholder vote at the holding company level, but it would still require a determination by the OCC that such a provision was valid.

Suffice to say, the NPR contains a wide range of subjects but the OCC needs to clarify how it would affect mutual associations. We urge the MSAAC to use its expertise to inform the OCC as to the peculiar effect of the NPR on mutual banks. OCC regulations pertaining to mutual governance are long overdue for an overhaul. However, simply applying the same governance rules applicable to national banks to mutual is not appropriate.



Thank you for the opportunity to submit our comments.

Very truly yours,

/s

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DC Director

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