

May 12, 2021

By Email

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Re: Docket ID OCC-2021-0002; Federal Reserve R-1741 & RIN No. 7100-AG11; FDIC RIN 3064-AF73

AMENDMENT TO THE CAPITAL RULE TO FACILITATE THE EMERGENCY CAPITAL INVESTMENT PROGRAM

Ladies and Gentlemen:

The Subchapter S Bank Association ("Association") welcomes the opportunity to comment on the above referenced interim final rules ("Rules") published in the Federal Register on March 22, 2021 by the Comptroller of the Currency, The Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Company (collectively, the "Agencies") and issued pursuant to the Consolidated Appropriations Act, 2021 ("Act"). The Association was founded in 1998 after Congress amended the Internal Revenue Code ("IRC") to permit banks and bank holding companies to elect subchapter S tax treatment. The Association serves as an educational resource to Subchapter S banks, bank holding companies, and their shareholders, officers and directors. The Association's membership consists of banking institutions throughout the country which have either elected, or are interested in, Subchapter S tax status. Approximately one third of all insured depository institutions in the United States maintain an election under Subchapter S of the IRC since inception of the legislation 23 years ago. As of December

31, 2020, the total number of subchapter S banks/bank holding companies was 2,036 out of a total number of 5,001 banks in the US. The Association's members are closely held community banks, a number of which are also Minority Depository Institutions ("MDI") or Community Development Financial Institutions ("CDFI"). Rules to:

1. Permit the Subordinated Debt instruments that Subchapter S Banks and bank holding companies will be required to issue to participate in the Emergency Capital Investment Program ("ECIP") to count as Tier 1 capital rather than just Tier 2 capital; and
2. Permit the Subordinated Debt instruments to be treated as equity rather than debt for purposes of the Small Bank Holding Company Policy Statement ("SMBHC Policy") issued by the Federal Reserve at 12 C.F.R. 225, Appendix C.

Affording the Subordinated Debt instruments authorized by the Act the above treatment would put them on equal footing with other MDIs and CDFIs that are not subject to prohibitions under Subchapter S of the IRC which permit the issuance of only one class of stock. The Agencies permitted Subordinated Debt to be counted as Tier 1 capital and to be deducted from the calculation of debt-to-equity ratio requirements in the SBHC Policy for purposes of the Troubled Asset Relief Program ("TARP") and as such there is ample precedent for this treatment. *See* 74 Fed. Reg. 26077 (June 1, 2009).

The Agencies asked for specific comment with regard to the following:

1. Regulatory capital treatment of Senior Preferred Stock and Subordinated Debt issued under the ECIP;
2. For banking organizations subject to the Board's Small Bank Holding Company and Savings and Loan Holding Company Policy Statement, what are the advantages and disadvantages of including Senior Preferred Stock as equity and Subordinated Debt as debt for purposes of meeting the debt-to-equity ratio? What are the advantages and disadvantages of including Senior Preferred Stock subject to the limits described in the Policy Statement as redeemable preferred stock? What are the advantages and disadvantages of excluding Subordinated Debt from debt for purposes of the debt-to-equity ratio?

Since Subchapter S bank holding companies can only issue one class of stock, we are responding to the above questions only with respect to Subordinated Debt. Including Subordinated Debt as debt for purposes of meeting the debt-to-equity ratio in the SBHC Policy will severely limit the amount of capital such organizations can obtain under the ECIP. Excluding Subordinated Debt from the debt-to-equity ratio is extremely advantageous for Subchapter S entities because such organizations will be able to maximize the amount of capital they can obtain under the ECIP to support their extensions of credit to low to moderate income persons and communities they serve. There is no downside to permitting this treatment.

The rules as currently written will severely restrict the ability of the Association's members, particularly community-based institutions, to utilize the ECIP and to spread the program's funds throughout their communities. Many of the Association's members operate in rural communities or in low- to moderate-income areas, both of which have been devastated by COVID-19. The ECIP has the potential to, and arguably was intended to, help restore economic stability in those areas most severely impacted by the COVID-19 pandemic. The Rules as currently written would prevent or severely limit many Subchapter S

banks from participating in the ECIP. Because a large number of MDI and CDFI banks are also Subchapter S Banks, the Rules as currently written would significantly reduce the effectiveness of the ECIP as a whole. Therefore, we respectfully request the Agencies revise the Rules to permit the Subordinated Debt issued under the program to receive Tier 1 Capital equity capital treatment under the SMBHC Policy and to permit Subordinated Debt instruments to be treated as equity rather than debt for purposes of the SMBHC Policy.

Very truly yours,



Patrick J. Kennedy, Jr.
President, Subchapter S Bank Association