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VIA FEDERAL EXPRESS

Ms. Jennifer J. Johnson, Secretary
Office of the Secretary
Board of Governors of the Federal Reserve System
20th Street & Constitution Ave, N.W.
Washington, D.C. 20551
reg.comments@federalreserve.gov

Re: Docket No. R-1442
RIN 7100-AD87

Dear Ms. Johnson:

This law firm represents banks, savings associations and bank and savings and loan holding companies in various capacities, including regulatory matters. It is in this capacity that we submit this comment letter on the joint agency proposed rulemaking: "Regulatory Capital Rules, Regulatory Capital Implementation of BASEL III, Minimum Capital Ratios, Capital Adequacy, Transition Provisions and Prompt Corrective Action," 77 Federal Register 52792 (August 30, 2012) (the "Proposed Rule").

Generally, our comments suggest, that in adopting any final rule, the Federal Reserve Board ("FRB"): (i) ensure that any final rule accounts for the structural and practical differences between a depository institution and its parent holding company and that such rule clearly delineate how it will apply to each of the institution and its holding company; (ii) defer to the statutory grandfather and transitional provisions contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"); and (iii) adopt a "Small Savings and Loan Holding Company Exception" similar to the Small Bank Holding Company exception that currently exists. Each of these recommendations is discussed in more detail below.

I. General Comment

The Proposed Rule contemplates adopting a uniform capital regulation and applying it to Federal Reserve member banks, bank holding companies and savings and loan holding companies. In doing this, we urge the FRB to avoid confusion and unintended results by

recognizing the structural differences between insured depository institutions and their parent holding companies. While Section 171 of the Dodd-Frank Act requires that the ratios and components of regulatory capital be the same for depository institutions and depository institution holding companies the structural and practical differences between an institution and its holding company, should not be ignored. Any final rule needs to delineate and specify how it will apply to each of the respective entities where structural or practical considerations require different approaches.

II. Transition Period/Grandfather Clause

A. Transition Period for Savings and Loan Holding Companies

Section 171 of the Dodd-Frank Act generally requires the adoption of consolidated holding company capital requirements that are no less stringent than those applicable to the subsidiary insured institutions. However, pursuant to Section 171(b)(4)(D) of the Act, with respect to any depository institution holding company that was not supervised by the FRB as of May 19, 2010, such capital requirements, "shall be effective 5 years after the date of enactment of this Act." All savings and loan holding companies in existence as of May 19, 2010 are covered by this language, since they were not regulated by the FRB on May 19, 2010 but by the former Office of Thrift Supervision. Since the Dodd-Frank Act was effective on July 21, 2010, the statutory transition period requires that the consolidated capital regulations apply to savings and loan holding companies no earlier than July 21, 2015.

Although the Proposed Rule and its preamble contain detailed discussion of transition rules, we are unaware of any acknowledgement that the capital requirements as adopted will apply to savings and loan holding companies until July 21, 2015, at the earliest. Such a result is necessary to comply with the Dodd-Frank Act. The language of Section 171 makes the transition period mandatory, not precatory. The FRB cannot ignore the clear and specific five year transition period required by Section 171(b)(4).[1]

The failure of the Proposed Rule to mention the Dodd-Frank Act's five-year transition period for savings and loan holding companies is even more incomprehensible given that the Proposed Rule *does* refer to the very same statutory transition period as it applies to the effectiveness of the new capital requirements to certain U.S.-regulated bank holding company subsidiaries of foreign banking corporations. The Proposed Rule acknowledges that the application of the five-year transition period for such bank holding companies is consistent with the Dodd-Frank Act. The FRB's recognition and application of the statutory language for that class of companies means that it cannot reasonably assert that the identical statutory five-year

[1] Section 616 of the Dodd-Frank Act also provides the FRB with certain general authority to issue regulations and orders concerning capital requirements for savings and loan holding companies. However, basic principles of statutory construction require the broad language of Section 616 to be read consistently with the specific requirements of Section 171, including the mandated transition period. The FRB has no authority, by virtue of Section 616 or anything else, to disregard the Section 171 transition period.

transition period should not be applied to savings and loan holding companies. Given the unambiguous statutory language, the FRB may not "pick and choose" which class of regulated entities receives the benefit of the transition period.

Additionally, as a matter of policy, it would be unwise to eliminate the necessary transition period for savings and loan holding companies.[2] The period is important to allow such companies to plan for the applicability of the consolidated capital requirements. Until the Proposed Rule was issued, the FRB gave no indication that the five-year transition period required by Dodd-Frank might not be implemented. Given the unambiguous statutory language, no savings and loan holding company would have reasonably believed that it would not have the benefit of the transition period. Savings and loan holding companies have, therefore, relied upon the specific statutory time frame in developing capital plans. Such companies cannot realistically be expected to adjust their business and capital planning to incorporate such a material regulatory development without an adequate lead time.[3]

B. Grandfather Provision for Trust Preferred Securities

Equally troubling is the Proposed Rule's apparent disregard for the specific grandfather provision for trust preferred securities set forth in Section 171(b)(4)(C) of the Dodd-Frank Act. The grandfather provision states that the statutory deduction for trust preferred securities otherwise required is not applicable to debt or equity instruments issued before May 19, 2010 by bank and savings and loan holding companies of less than $15 billion in assets (as of December 31, 2009) or to organizations that were mutual holding companies on May 19, 2010. The Proposed Rule ignores the Dodd-Frank grandfather language and instead proposes a complete phase out of all trust preferred securities, including those grandfathered by Dodd-Frank, within ten years. Again, the Proposed Rule appears to be suggesting that the FRB has authority to deviate from the unambiguous intent of Congress as clearly set forth in a statute.

We recognize that the FRB is seeking to implement principles of Basel III, including agreed upon timeframes. However, the Basel III agreements are aimed at much larger banking organizations than those contemplated by the referenced Dodd-Frank Act grandfather provision. Consequently, the Dodd-Frank grandfather provision is not, in fact, inconsistent with the intent and purposes of Basel III. Moreover, the Basel III agreements do not supercede federal legislation, to which the FRB is bound. If the FRB disagrees with the policy determination of

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[2] The Proposed Rule contemplates an effective date of January 1, 2013, which would provide savings and loan holding companies with essentially no transition period. This contrasts with the three year transition period given bank holding companies when the risk-based capital guidelines were first adopted. See 54 Federal Register 4186 (January 27, 1989).

[3] The FRB has authority to impose capital-related requirements on individual savings and loan holding companies where needed, just as the Office of Thrift Supervision did for many years. See, e.g., 12 U.S.C. §1467a(g); 1818(b)(3). Consequently, we do not view safety and soundness considerations as justification for disregarding the statutory transition period required by the Dodd-Frank Act.

Congress with respect to trust preferred securities, as expressed in Dodd-Frank, it may seek a change in the law.

III. Small Savings and Loan Holding Company Exception

The FRB should adopt a "Small Savings and Loan Holding Company" exception to the consolidated holding company capital requirements similar to the "Small Bank Holding Company" exemption that has existed for some time. The Small Bank Holding Company exception was specifically mentioned in Section 171(b)(5)(C) of the Dodd-Frank Act and there is no similar express language adopting an exception for small savings and loan holding companies. The preamble to the Proposed Rule suggests that the lack of recognition of a Small Savings and Loan Holding Company exception in the Dodd-Frank Act means that the FRB may not choose to adopt one. However, we note that the Dodd-Frank Act does *not prohibit* such an exception for savings and loan holding companies. There is no similar exception in the Dodd-Frank Act for savings and loan companies because they were regulated by the Office of Thrift Supervision at the time and were not subject to FRB capital guidelines, or any capital requirements at all. The Dodd-Frank Act language merely recognized the Small Bank Holding Company exception that already existed and, if anything, suggests that appropriate exceptions to the regulatory capital requirements are acceptable. The FRB has discretion to correct this drafting oversight in the Dodd-Frank by adopting a Small Savings and Loan Holding exception comparable to that existing for small bank holding companies.

We are unaware of any policy or safety and soundness basis to distinguish between a small bank and a small savings and loan holding company for this purpose, at least so long as the savings and loan holding company is only engaged in activities in which a bank holding company can engage.[4] A failure by the FRB to create a similar exception for saving and loan holding companies would be disparate treatment for which there is no reasonable underlying policy. It would also impose needless regulatory costs and burdens and place small savings and loan holding companies at a competitive disadvantage, again without any discernible policy reason. Congress specifically determined to maintain the federal thrift charter in its consideration of the Dodd-Frank Act, and the FRB should facilitate that goal by avoiding policies that needlessly discriminate against the charter.

We cannot help but notice the contrast between the FRB's apparent view that it has discretion to disregard the language of the Dodd-Frank Act when it comes to the previously discussed five-year transition period for savings and loan holding companies and its claimed lack of authority under the Dodd-Frank Act's language to exercise its discretion to adopt a Small Savings and Loan Holding Company exception. The principle of statutory construction upon

[4] The Small Bank and Holding Company Exception was adopted by the FRB in order to facilitate the transfer of ownership of small banks. 54 Federal Register 4186 (January 27, 1989). The purpose behind the exception applies equally to small savings and loan holding companies. Similarly, as with small bank holding companies, savings and loan holding companies of comparable size typically do not conduct material business activities other than holding the stock of the depository institution subsidiaries.

which the FRB appears to be operating is that the appropriate interpretation in a particular case is that which is most disadvantageous to savings and loan holding companies. Such a posture is inappropriate given Congress' considered policy in the Dodd-Frank Act of retaining the federal thrift charter.

We urge the FRB to amend the Proposed Rule consistently with these comments in any final rule.

Thank you for your consideration of our comments.

Very truly yours,

LUSE GORMAN POMERENK & SCHICK, P.C.

cc: Federal Deposit Insurance Corporation (comments@fdic.gov)
Office of the Comptroller of the Currency (comments@occ.treas.gov)