



America's Mutual Holding Companies



October 22, 2012

The Honorable Ben S. Bernanke
Chairman
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

The Honorable Thomas J. Curry
Comptroller
Office of the Comptroller of the Currency
Administrator of National Banks
Washington, DC 20219

The Honorable Martin J. Gruenberg
Acting Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Dear Chairman Bernanke, Comptroller Curry and Acting Chairman Gruenberg:

America's Mutual Holding Companies ("AMHC") welcomes the opportunity to comment on the joint proposed rules released on June 7, 2012 by the Federal Reserve Board (the "Board"), the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation intended to implement the Basel III regulatory capital reforms from the Basel Committee on Banking Supervision (the "Basel III Proposals"). AMHC is an unincorporated association of mutual holding companies ("MHCs") with minority public stockholders, located

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throughout the United States. AMHC was formed for the purpose of advocating for treatment that recognizes the inherent characteristics unique to MHCs with public shareholders. Currently, there are over 56 MHCs with over \$50 billion in assets located in 20 states from Maine to Washington State and New Mexico to Georgia.

Summary

AMHC believes that the impact of the Basel III Proposals on MHCs will be detrimental, and possibly systemically threatening. Among other things, the Basel III Proposals fail to adequately address two significant issues facing MHCs. As a result of the proposed increased level, complexity and volatility of capital requirements to be applied to all MHCs, the provisions in Regulation MM (12 C.F.R. Section 239.8(d)) that require an MHC to seek and obtain an annual approval of members before the MHC may waive its right to dividends paid by a stock subsidiary will make it even more difficult for MHCs to access the capital markets and augment capital, exactly the unintended result. Additionally, the obvious drafting oversight and resulting disconnect enacted in the Dodd-Frank Wall Street Reform and Consumer Protection Act (“DFA”) and perpetuated in the Basel III Proposals whereby small bank holding companies are exempt from the Basel III Proposal’s new and complex capital requirements and similarly situated small MHCs are not, begs to be addressed and remedied and the Basel III Proposals provide the opportunity to do so.

Discussion

Regulation MM. The Board adopted Regulation MM pursuant to an interim final rule with a request for comments and that comment period ended on October 27, 2011. It is now one year from the end of the comment period and the Board has yet to issue a final rule based upon a comprehensive review and public discussion regarding the comments received. There is ample case law that the courts will hold agencies to a high standard of deliberative fairness when they choose to adopt a rule effective immediately as was done in this case. AMHC believes that the Basel III Proposals present an opportunity for the Board to belatedly address the comments received and to take a hard look at the impact of Regulation MM on MHCs and mutual institutions generally.

AMHC is particularly concerned with the provision in Regulation MM that requires a MHC to seek and obtain an annual approval of members before the MHC may waive its right to dividends paid by a stock subsidiary. The Board adopted this requirement pursuant to Section 625 of the DFA. That section of the DFA amended Section 10(o) of the Home Owners’ Loan Act (“HOLA”) (12 U.S.C. Section 1467a(o)), to set forth the conditions under which an MHC may waive its rights to a dividend. Specifically, under that statute, dividend waivers are permitted if: (1) no insider of the MHC, associate of an insider, or tax-qualified or non-tax-qualified employee stock benefit plan of the MHC holds any share of the stock in the class of stock to which the waiver would apply, or (2) the MHC gives written notice to the Board of its intent to waive its right to receive dividends (“Dividend Waiver Notice”) not later than 30 days before the date of the proposed date of payment of the dividend, and the Board does not object to

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the waiver. The DFA provides that the Board may not object to a waiver of dividends if: (1) the waiver would not be detrimental to the safe and sound operation of the savings association; and (2) the MHC's board of directors expressly determines that a waiver of dividends by the MHC is consistent with the fiduciary duties of the board of directors to the MHC's mutual members; and (3) the MHC was organized as an MHC, issued minority stock and waived its right to dividends, in each case, prior to December 1, 2009 (a "grandfathered MHC").

In Regulation MM, the Board has established requirements to implement Section 625 of the DFA with respect to both grandfathered MHCs and nongrandfathered MHCs which seek Board approval. In both cases, Regulation MM requires that prior to an MHC waiving a dividend, a majority of the members must have approved the dividend waiver within 12 months prior to the declaration date of the dividend. This requirement goes well beyond anything contained in Section 625 of the DFA. That section only requires that the board of directors demonstrate that the waiver of the dividend is consistent with its fiduciary duty to the MHC's members.

Neither Section 625, nor any of its legislative history, discuss the need for a member vote. If Congress had wanted to impose a member vote requirement (or any requirement for that matter that would demonstrate how a board should meet its fiduciary duty) Congress could have easily included such language in Section 625. The absence of member vote language in Section 625 creates a strong implication that Congress did not intend to impose such a burdensome standard on an MHC. Instead, Congress left it to principles of general corporate law to determine whether a board has met its fiduciary duty requirements. This is supported by the express language of Section 625 which requires a board of directors to provide the Board with a copy of the resolution and any supporting materials relied upon by the board of the MHC that were used to enable the board to conclude that the waiver is consistent with its fiduciary duties to the members of the MHC.

AMHC believes that Congress was well aware of the past position of the Board with respect to dividend waivers. Nonetheless, the language used by Congress in Section 625 is virtually identical to the former regulation of the Office of Thrift Supervision ("OTS"), found at 12 C.F.R. Section 575.11(d), with respect to the standards by which a dividend waiver may be approved. This shows the clear intent of Congress to maintain those same standards established by the OTS, which are now enforced by the Board due to the elimination of the OTS. If Congress had desired to adopt a different standard from that used by the OTS, it would not have copied the language from the former OTS regulation.

Additionally, AMHC does not believe that the Board adequately assessed the costs and burdens that would be imposed as a result of the member vote requirement. The Board failed to consider the economic consequences of the regulation by failing to assess the many direct costs to MHCs resulting from requiring a member vote. The adoption of the regulation failed to assess the tax costs that would be imposed if an MHC determined not to waive a dividend. There was no evidence that the Board considered the indirect costs of the regulation, including the impact to

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the stock price from the inability to pay a dividend if a waiver would not be obtained, or the reduction in the viability of the MHC form, which would reduce the ability of an existing MHC to augment its capital or by mutual institutions that cannot otherwise undertake a full stock conversion.

In light of the delay in issuing a final regulation and the lack of a review of the costs and burdens precipitated by the interim final rule, the Board should take this opportunity during the drafting of the Basel III Proposals to revisit Regulation MM especially now with the knowledge of the significant changes to the level, complexity and volatility of the capital requirements which the Basel III Proposals propose to implement. Regulation MM was already impeding the ability of MHCs to access the capital markets and the Basel III Proposals will only make it that much more difficult. Further, the application of this dividend restriction coupled with the Basel III Proposals will in all likelihood dissuade mutual banks from availing themselves of the MHC form and possibly force existing MHCs to contemplate the second step of conversion to full stock form. These unintended consequences may lead incrementally to the loss of the MHC form of organization as well as mutual form banks as a result of eliminating the intermediate step of converting to a MHC to comply with heightened capital requirements. Preserving the mutual nature of the organization while permitting access to capital is exactly what the Board should be attempting to achieve. The Basel III Proposals only exacerbate an already tenuous position in which MHCs find themselves.

Small MHCs. AMHC is troubled by the basic unfairness of having small bank holding companies, as defined in the Board's Small Bank Holding Company Policy Statement (12 C.F.R. Part 225, Appendix C) (the "SBHCPS") exempt from the provisions of the Basel III Proposals while similarly sized small MHCs are not. The Board noted in footnote 8 to the notice of proposed rulemaking titled "Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Minimum Regulatory Capital Ratios, Capital Adequacy, Transition Provisions, and Prompt Corrective Action" ("Proposal 1"), that "Application of the proposals to all savings and loan holding companies (including small savings and loan holding companies) is consistent with the transfer of supervisory responsibilities to the Board and the requirements of section 171 of the Dodd-Frank Act. Section 171 of the Dodd-Frank Act by its terms does not apply to small bank holding companies, but there is no exemption from the requirements of section 171 for small savings and loan holding companies." While AMHC does not disagree with the Board's literal reading of the provisions of the DFA, AMHC believes this completely illogical and unfair result is a consequence of an arbitrary timing issue and a misunderstanding by the drafters of the DFA.

When the drafters of the DFA included the wording to exempt small bank holding companies in all likelihood they did not appreciate that they were leaving out small MHCs. More importantly, the Board must honestly ask itself if it were considering the provisions of the SBHCPS today, rather than at a time before the transfer of supervisory responsibilities relative to MHCs, would it seriously consider differentiating between small bank holding companies and small MHCs. AMHC feels strongly that the honest answer is no. The fact that the SBHCPS was

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adopted prior to the DFA mandated transfer of supervision of MHCs to the Board is nothing more than an accident of the calendar and should not be used as some arbitrary basis to favor one form of institution and discriminate against another. Further, when the SBHCPS was adopted, the Board did so using its own discretionary authority and not relying on a particular statutory section. AMHC strongly suggests that the Board has similar authority to amend the SBHCPS to include small MHCs. The Basel III Proposals only exacerbate this unjust differentiation. To burden small MHCs with the increased level, complexity and volatility of the new capital requirements and exempt small bank holding companies and credit unions is to create an inherently unlevelled playing field. As discussed above, small MHCs ability to access the capital markets will be severely hampered by this disparity.

Without Board action, small MHCs may need to seriously consider converting their subsidiary savings and loan charters to alternative federal and state bank or savings bank charters to avail themselves of the exemption provided by the SBHCPS. When it comes to converting to a national bank charter, this concept in and of itself is problematic because the OCC has given no indication that it will entertain such an application for charter conversion. However, the Bank Holding Company Act of 1956, as amended (the "BHCA") provides a method by which a MHC could convert its subsidiary savings and loan to a state savings bank and the resulting holding company would qualify under the exemption provision of the SBHCPS. Section 3(g) of the BHCA (12 U.S.C. Section 1842(g)) provides as follows:

(g) Mutual bank holding company.

- (1) Establishment. Notwithstanding any provision of Federal law other than this chapter, a savings bank or cooperative bank operating in mutual form may reorganize so as to form a holding company.
- (2) Regulations. A bank holding company organized as a mutual holding company shall be regulated on terms, and shall be subject to limitations, comparable to those applicable to any other bank holding company.

The wording of subsection (2) is especially noteworthy. The Board would necessarily be required to deem the newly converted entity a bank holding company and treat it like any other bank holding company; in most instances as a small bank holding company. In addition, it would appear that the controlling authority for the chartering of the MHC would derive from this section rather than Section 10(l) of the HOLA. While it is regrettable that federally chartered MHCs may have to abandon the federal system in order to comply with the Basel III Proposals, the Board should confirm that this avenue is available¹

The apparent lack of understanding by the Board of the nature and history of MHCs is a concern. The disregard of small MHCs when compared to small bank holding companies is an

¹ Congressman Michael Grimm (R-NY), has introduced H.R. 4217, the Mutual Community Bank Competitive Equality Act, which provides for, among other things, (i) that the Board shall apply its SBHCPS to any MHC that would otherwise qualify as a small bank holding company, if it were a bank holding company and (ii) authorizing the OCC to charter mutual national banks. Clearly, Representative Grimm is trying to address the inadvertent error that occurred in drafting the DFA.

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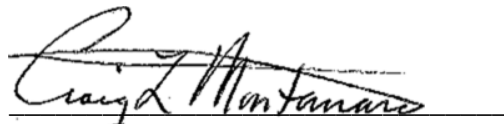
example of the one size fits all approach to regulation and intellectually unsupportable. The Board's failure to acknowledge this problem may very well result in unintended consequences exactly the opposite from what the proposals are trying to accomplish.

Conclusion

The members of AMHC agree with the position that a strong capital base is vital to banking institutions and the maintenance of a safe and sound banking system. AMHC however does not think that the inequitable application of law and regulation is the way to achieve this objective. MHCs provide critical banking services to their communities and foster economic growth in those communities. Unnecessarily restricting a MHCs ability to raise additional capital as well as impeding a mutual institution's ability to augment capital (as a consequence of effectively eliminating the intermediate step of converting to a MHC) because not enough attention was paid to the unique nature of the MHC and mutual bank forms of organization would be a mistake. AMHC strongly believes that by working closely with the Board, an acceptable solution can be fashioned. The continuing viability of MHCs should be a common goal which together can achieved.

AMHC appreciates the opportunity to comment on the Basel III Proposals and would welcome the chance to discuss its position and thoughts on this matter at your convenience. Please feel free to contact the undersigned at your earliest opportunity.

Very truly yours,



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